Moore South Africa

DIRECTORS GUIDE

2023 - 2024

www.moore-southafrica.com

INDEX

INTRODUCTION AND DISCLAIMER

The information contained in this guide is a summary of some of the key issues affecting directors and officers of companies, and provides an overview of relevant legislation pertaining to their office.

Directors and officers are required to be cognisant of corporate legislation pertaining to their office, and to remain up to date with any amendments to legislation that may impact on their duties and responsibilities.

As legislation, regulations and tax law are continuously changing and evolving, it is of the utmost importance for companies to continue to meet their obligations and to be aware of the latest publications by Regulators, the legislature, and the Companies and Intellectual Property Commission [hereinafter referred to as 'CIPC' or 'the Commission'].

Directors are required to ensure that managers and employees are also aware of the legislation (and amendments thereto), and that all within the company are committed to act honestly, with integrity, and a high level of competence and knowledge.

While legislation is required to be complied with, the King IV™ Report and Code of Governance is a guideline for best practices which are expected of directors in South Africa. Although, as far at the JSE Securities Exchange South Africa (JSE) is concerned, listed companies must adhere to the King Report recommendations, or indicate the extent to which they have deviated from them. Where appropriate, the guide indicates where King IV™ could provide amplification for directors and officers on the governance of a company in South Africa – the main thrust being to provide an overview thereof. The reader is advised to consult a professional adviser for further assistance and information, and for guidance on new, proposed and existing legislation which may affect directors and officers of companies.

Due to the limitations in length of this guide, the information contained herein is a summary of some of the key aspects impacting directors, officers, shareholders, and other stakeholders who have an interest in the corporate governance of companies in South Africa.

SOUTH AFRICAN LAW AND DIRECTORS

The duties of company directors are governed by South African common law, in terms of which directors are required to act in the utmost good faith and in the best interests of their companies and to exercise care, skill and diligence.

The Companies Act (no.71 of 2008) [hereinafter referred to as 'the Act' or 'the Companies Act'], read together with the Regulations, codified a large portion of the common law position relating to directors' duties, and made a few notable additions (which did not have the effect of altering the common law position significantly). Section 76 sets out the standard of directors' conduct, which has been expanded upon further in the chapter titled 'Duties and Responsibilities of Directors'. Another main purpose of the Companies Act is to promote compliance with the Bill of Rights as provided for in the Constitution in the application of company law in South Africa. An entity (company or close corporation) has a duty to comply with the common law, Companies Act and Regulations (as amended from time to time) – and directors have to fulfill their duties accordingly, otherwise they could be held liable.

In addition, a director is required to ensure that the company complies with appropriate industry or sector specific legislation, as well as all other applicable laws affecting business in South Africa (some of which are listed in the chapter titled 'Important Laws Affecting Businesses in South Africa').

CLOSE CORPORATIONS (CC'S)

A CC is a type of South African legal entity which was, in the past, usually chosen for smaller businesses. It is governed by both the Close Corporations Act (no.60 of 1984), and the Companies Act. The owners and managers of a CC are the members, holding a membership interest in the CC. The same requirements for maintaining accurate and complete accounting records, satisfying the financial reporting standards and preparing annual financial statements (AFS) apply to CC's as for companies. Since the implementation of the Companies Act, no new CC's may be registered, however the Companies Act permitted existing CC's (those incorporated before 2011) to continue trading for an indefinite period. At some point in the future, however, the Act may be amended to compel all CC's to convert to one of the company forms provided for in the Act.

CATEGORIES OF COMPANIES

The Act provides for two categories of companies, namely profit companies and non-profit companies as follows:

PROFIT COMPANIES	■ State-owned company (SOC Ltd)
	■ A private company (Pty) Ltd if: ◆ it is not a state-owned company ◆ its MOI prohibits it offering any of its securities to the public and restricts the transferability of its securities ◆ Must have at least one director*
	◆ A personal liability company (Incorporated or Inc.) if: ◆ it meets the criteria for a private company ◆ its MOI states that it is a personal liability company ◆ Must have at least one director*
	■ A public company, (Ltd) in any other case ■ Must have at least 3 directors* **The minimum number of incorporators is reduced from 7 to 1**
One or more persons, or an organ of state, may incorporate a profit company.	
NON-PROFIT COMPANIES	Name to be followed by suffix "NPC" Incorporated for a public benefit or an object relating to one or more cultural or social activities, or communal or group interests Can be incorporated with or without members. If there are no members, the MOI must set out the basis on which directors are to be appointed by its board, or other persons Must have at least three directors
An organ of state, a juristic person, or 3 or more persons acting in concert may incorporate a non-profit company.	

* The MOI may provide for a higher number in substitution for the minimum number of directors than those required by the Act.

- An external company means a foreign company (for profit or not for profit) that is conducting business or non-profit activities within South Africa, as is set out in Section 23 of the Act. It is required to be registered as an external company at CIPC in terms of Regulation 20.
- A domesticated company means a foreign company whose registration has been transferred to South Africa in terms of Sections 13(5) to (11).

COMPANIES FIRST AMENDMENT BILL, 2023 AND SECOND AMENDMENT BILL, 2023

The Companies First Amendment and Second Amendment Bill were tabled in Parliament on the 28 August 2023, and have been published. [The initial draft of the Companies Amendment Bill was published in 2018, followed by a revised draft Bill in 2021, both of which have undergone extensive public consultation and engagement].

The First Amendment Bill seeks to, inter alia:

- Remove certain obstacles to legitimate business activity
- Facilitate greater equity between directors and senior management on the one hand, and shareholders and workers on the other hand – among other things by ensuring greater transparency regarding the disclosure of senior executive remuneration and its 'reasonableness'. The Bill proposes that shareholders be advised at annual general meetings of remuneration policies, the remuneration of specified top executives and the gap between the earnings of the top and bottom 5% of earners in a company
- Address various policy matters affecting social and ethics committees
- Provide for greater disclosure of the ultimate owner of shares in a business, as part of the broader efforts to combat corruption and money-laundering.

The 2023 Bills differ to the first and second draft Company Amendment BIlls (published in 2018 and 2021). Certain provisions contained in the October 2021 draft have been withdrawn, as these issues have since been addressed in the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Act (no.22 of 2022), [hereinafter referred to as 'the GLAAA']. More specifically, these amendments relate to beneficial interests in shares and the concept of "beneficial ownership".

In addition, on the 24th May 2023 the Minister of Trade, Industry and Competition published Regulations pursuant to the amendments that were made to the Companies Act in terms of the GLAAA – and these Regulations largely reinforce the new provisions in the Companies Act relating to beneficial interests in shares. Regulation 30(9) provides for access to the public to view copies of a company's annual returns filed with CIPC, and Regulation 30(10) allows CIPC to provide electronic access to view copies of the documents filed together with the annual return (such as the securities register of a company) to such persons and on such conditions as may be determined by CIPC, after consultation with the Minister and the Financial Intelligence Centre.

The Second Amendment Bill seeks to:

- Expand upon action that can be taken to declare directors delinquent. Section 162(2) of the Companies Act makes provision for an application to court for an order declaring a person delinquent or under probation (see chapter titled 'Probation and Delinquency' for more detail). The Bill proposes to extend the time bar set out in Section 162(2). Currently, a company, a shareholder, a director, company secretary, a prescribed officer of a company, or a registered trade union (that represents employees of a company), may apply to a court for an order declaring a person delinquent or under probation if that person is a director of the company, or has been a director of the company within the previous 2 years. The Bill proposes to extend this time period to where the person was a director within the previous 5 years. The proposed amendment is based on a recommendation made by the Zondo Commission of Enquiry into State Capture, and on the basis of it being the general public interest to extend the time period. In addition, the proposed legislation should be expressed to be retrospective. Thus, the proposal is that the legislation should state that the court, on good cause shown, may extend the time bar even though the conduct in question was committed during the period before the extension.
- Provide for courts to increase the time bar in relation to claims for damages applicable to directors for breaching their fiduciary duties and duties of care, skill and diligence as well as certain statutory duties in terms of Section 77. Currently Section 77(7) of the Act provides that proceedings to recover loss, damages or costs in these circumstances are to be instituted within 3 years after the act or omission that gave rise to the liability. The Bill proposes to allow the Court to extend this time frame, on good cause shown.

Where the proposed amendments contained in each of these Bills are relevant to the content of this guide, we have included the proposals in red text, for easy reference, referred to as "the Amendment Bill". We have also included a "Summary of Proposed Companies Act Amendments" on pages 63 to 64. Please note that these are proposed amendments. The final documents signed into law may not include all the legislative adjustments that could be made in the interim. In addition, and due to the limitations in length of the guide, we have not included all the proposed amendments, but only those deemed most relevant to directors and officers of companies in South Africa.

KING IV™

Since 1994, there have been several versions of the King Report. Each version has been built on the underlying principles of the previous report, and recognises that good corporate governance and ethical leadership are essential in society today, irrespective of the size or nature of the entity. King IV™ takes the form of a report which includes the Code, and separate sector supplements for SME's, NPO's, State-Owned Entities, Municipalities and Retirement Funds. It is recommended that all organisations and governing bodies should follow the principles and practices laid down in this document.

Unlike the previous King reports, which were rules-based and followed a 'tick-box' approach, King IV™ is principles- and outcomes-based. King IV™ encourages organisations to have a more 'hands-on' approach to principles, so that practices can be clearly linked to outcomes in an "apply and explain" approach. This gives governing bodies more flexibility when implementing the recommended practices, but requires them to be transparent when disclosing how they achieved their goals. King IV™ sets out 17 principles, some of which have been legislated (and if a conflict occurs, the law prevails). It also includes a large number of recommended practices, to help governing bodies and organisations achieve 'good corporate citizen' status and governance outcomes. It is voluntary (unless prescribed by law or by a Stock Exchange listings requirement). The Companies Act has many features which result in an alignment with international best practices and the governance principles of the King Code and Reports.

Key Concepts of King IV™

Because of the interdependence of organisations and wider society, board decisions should not be made in isolation. Integrated thinking, where the board of directors considers all issues affecting the organisation when making decisions (and not just the economic bottom line), is fundamental to the long-term sustainability of the organisation through the sustained creation of value for stakeholders. Integrated thinking reinforces the way the company operates as an integral part of society, underpins sustainable development, integrated reporting and the stake-holder inclusive approach.

Sustainable Development – an approach to development which balances the different, and often competing needs of the company against an awareness of the environmental, social and economic limitations of society. The board should develop a strategy which includes accounting for sustainability issues and reporting these to stakeholders.

Source:
The King IV Report on Corporate Governance for South Africa 2016, Institute of Directors S.A.
For more information, see http://www.iodsa.co.za/?page=AboutKingIV"

Corporate Citizenship – the company should be a responsible “citizen”, involved with social, environmental and economic issues, respect for human rights, effective management of stakeholder relationships, resource management with an eye on future needs, and ensuring a positive impact on the community within which it operates.

Stakeholder-Inclusive Approach – the board should consider and balance the legitimate needs, interests and expectations of all stakeholders in making decisions in the best interests of the company. Active stakeholders play a crucial role in the governance process because they are entitled to hold the board and the company accountable for their actions and disclosures.

King IV™ Principles of Good Governance

The board of directors should:

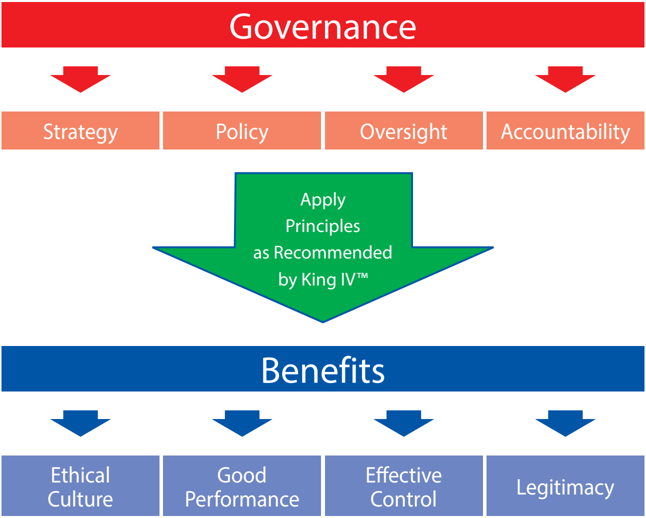
1. Lead ethically and effectively
2. Govern ethics and establish an ethical culture
3. Ensure responsible corporate citizenship
4. Appreciate that the company’s core purpose, its risks and opportunities, strategy, business model, performance and sustainable development are all inseparable components of the value creation process
5. Ensure that reports allow stakeholders to make informed assessments about the organisation’s performance and its short, medium and long-term prospects
6. Serve as the focal point and custodian of corporate governance
7. Have the appropriate balance of knowledge, skills, experience, diversity and independence
8. Delegate within the board to promote independent judgement, and assist with the balance of power and effective discharge of duties
9. Evaluate board’s performance and support continued improvement and effectiveness
10. Appoint and delegate to management in a way that contributes to role clarity and the effective exercise of authority and responsibilities
11. Govern risk in line with strategic objectives
12. Govern information and technology in line with strategic objectives
13. Comply with applicable laws and adopted, non-binding rules, codes and standards
14. Remunerate fairly, responsibly and transparently
15. Use assurance services and functions to enable an effective control environment which supports the integrity of information
16. Adopt a stakeholder-inclusive approach
17. Practise responsible investment which promotes good governance and the creation of value (applies to institutional investor organisations).

Source:

The King IV Report on Corporate Governance for South Africa 2016, Institute of Directors S.A.
For more information, see http://www.iodsa.co.za/?page=AboutKingIV”

King IV™, POPIA AND PAIA

POPIA gives effect to the Constitutional right to privacy in South Africa, and applies to most organisations in South Africa – both public and private, including a private company, non-profit company, close corporation, or personal liability company. Principle 6 of King IV™ states that the board of directors is the "custodian of corporate governance", and Principle 13 requires the board to comply with applicable laws, such as POPIA. In effect,the board is therefore required to identify the elements and principles of governance that are required to prepare for, and maintain, the appropriate level of compliance with POPIA. In so doing, the board would need to also balance POPIA against the provisions of the Promotion of Access to Information Act (no.2 of 2000) or 'PAIA', which provides for the right to access to information and the free flow of information within South Africa. The board needs to consider data protection, legal compliance, information management, governance, risks and possible mitigation strategy models relating to personal information, as well as the positioning of the Information Officer to succeed.



Source:
The King IV Report on Corporate Governance for South Africa 2016, Institute of Directors S.A.
For more information, see http://www.iodsa.co.za/?page=AboutKingIV"

NATURE AND DEFINITION OF A DIRECTOR

Nature of a Director

The directors of a company are the key people entrusted by law with the function of administering the company and are central to ensuring good corporate governance in the company.

The director functions as both a trustee and a consultant:

- A director is required to have the experience, skill, time and ability necessary to carry out his functions effectively, and should place the interests of the company first, similar to that of a "consultant"
- At common law, directors owe fiduciary duties and obligations of care and skill to the company, which are similar to that of a "trustee".

Definition of a Director

The Act extends the definition of "director" to include others, which has particular impact in regard to duties, potential liability and responsibility of directors and officers.

The definition of "director" in the Act includes a member of a board of a company, or an alternate director of a company, and includes any person occupying the position of a director or alternate director, by whatever name designated.

The definition is extended to include a prescribed officer, a person who is a member of a committee of a board of a company, or the audit committee of a company (irrespective of whether or not the person is also a member of the company's board).

For purposes of Section 69 (qualification and eligibility), Section 76 (standards of directors' conduct), Section 77 (directors' liability), Section 78 (indemnification and directors' insurance), the definition of "director" is extended to include an alternate director, prescribed officer, a person who is a member of a committee of a board of a company, or is a member of the audit committee of a company (irrespective of whether or not the person is also a member of the company's board).

With reference to indemnification and directors' insurance, the definition also includes former director(s). Section 75 also extends the definition of director to certain persons, as more clearly defined on page 30.

Those designated officers as described above are subject to the same standards of conduct, duties of care, skill and diligence and fiduciary duties as directors, and will be held jointly and severally liable with directors. The MOI and any additional rules are also specifically binding between the company and such officers.

PRESCRIBED OFFICER

A prescribed officer is anyone who fulfils the role of a director but who is operating (intentionally or otherwise) under a different designation. He is therefore typically an executive who is in a position to influence the management of the company or one of its significant divisions, and who regularly participates to a material degree in the exercise of general effective control over and management of the whole or a significant portion of the business and activities of the company.

A company secretary, may, for example, fall within the definition of a prescribed officer in terms of the Act, even although he may not be a director appointed to the board of the company.

Prescribed officers are bound by the same codified duties and liabilities of directors which are referred to in numerous sections of the Act.

It is very important that the board is able to identify who the prescribed officers are. Equally important is that the prescribed officers know who they are, and that they understand their responsibilities in terms of the Act. Not doing so puts both the board and the prescribed officer at risk of non-compliance with the Act, which in turn could lead to activities that may result in personal liability.

APPOINTMENT AND ELECTION OF DIRECTORS

Section 66(2): The board must comprise:

- In the case of a private or personal liability company: at least one director, or
- In the case of a public company or a non-profit company: at least three directors –

in addition to the minimum number of directors that the company must have to satisfy any requirement, whether in terms of the Act or its MOI, to appoint an audit committee, or a social and ethics committee. The MOI may provide for a higher number in substitution for the minimum number of directors than those required by the Act.

Section 66(4)(a) provides that the MOI may:

- Provide for the direct appointment and removal of one or more directors, by any person named who is named in, or determined in terms of, the MOI, and
- May also provide for a person to be an ex officio director as a consequence of that person holding some other office, title, designation or similar status (subject to him being eligible and qualified to do so in terms of Section 69)
- The appointment or election of alternate director(s) to the company.

- **Section 66(4)(b):** A profit company (other than a SOC Ltd) must provide for the election by shareholders of at least 50% of the directors, and 50% of any alternate directors.
- **Section 66(11):** A failure by a company at any time to have the minimum number of directors does not limit or negate the authority of the board or invalidate anything done by the board or the company.
- **Section 66(12):** Save as otherwise provided elsewhere in the Act, or in the company's MOI, any particular director may be appointed to more than one committee and when calculating the minimum number of directors required for a company, any such director who has been appointed to more than one committee must be counted only once.
- **Section 66(5)(b):** A person who holds office or acts in the capacity of an ex officio director of a company has all the powers and functions of any other director of the company and is subject to all of the liabilities, of any other director of the company (unless otherwise stated in the company's MOI).

Election of Directors of Profit Companies

Section 68(1): Each director of a profit company must be elected by the persons entitled to exercise voting rights in such an election, to serve for an indefinite term, or for a term as set out in the MOI.

Section 68(2): Unless a profit company's MOI provides otherwise, the election is to be conducted as a series of votes each of which is on the candidacy of a single individual to fill a single vacancy with the series of votes continuing until all vacancies on the board at that time have been filled.

Section 68(3): Unless the MOI of a profit company provides otherwise, the board may appoint a person who satisfies the requirements for election as a director to fill any vacancy and serve as a director of the company on a temporary basis.

- **Section 66(7):** A person becomes entitled to serve as a director when he has been appointed or elected in accordance with the provisions of the Act, or holds an office, title, designation or similar status as ex officio director in terms of these provisions, and is not ineligible or disqualified in terms of Section 69, and has delivered to the company a written consent to serve as its director.

> Prior to accepting an appointment, a director should carefully consider whether he has the necessary expertise to act as a director, given the size, nature and complexity of the company.

NON-ELIGIBLE AND DISQUALIFIED DIRECTORS

Section 69 states that a person who is ineligible or disqualified, must not be appointed or elected as a director of a company, or consent thereto, or act as such. The election or appointment is a nullity if, at the time of the election or appointment, that person is ineligible or disqualified. A company may, in its MOI, impose additional grounds of ineligibility or disqualification, and set out minimum qualifications to be met by directors of the company. A company must not knowingly permit an ineligible or disqualified person to serve or act as a director, and the Commission must maintain a public register of persons who are disqualified. A person who becomes ineligible or disqualified while serving as a director of a company ceases to be entitled to continue to act as a director immediately, subject to Section 70(2).

A person is **ineligible** if the person is a juristic person, an unemancipated minor or under similar legal disability, or does not satisfy any qualification set out in the MOI.

The Act Sets Out Disqualifications as Follows:

Section 69(8)(a): a court has prohibited that person to be a director, or declared the person to be delinquent (Section 162). A person under probation cannot serve as a director for the period of probation.

Section 69(8)(b):
(i) An unrehabilitated insolvent (ii) a person prohibited in terms of any public regulation (iii) any person removed from an office of trust due to dishonesty, or (iv) any person convicted of offences in the Republic or elsewhere and imprisoned without the option of a fine, or fined more than the prescribed amount, for fraud, theft, forgery, perjury or a specific offence involving fraud, misrepresentation or dishonesty, or in regard to the forming or managing of a company, or in terms of the Companies Act, Insolvency Act, or Financial Intelligence Centre Act.

Where a director is disqualified in terms of (iii) and (iv) above, he may nevertheless act as a director of a private company if he is the sole shareholder or the shares are held by a person/s related to that disqualified person, and each such person has consented in writing to that disqualified person being a director of the company. In addition, Section 69(9) provides that such a person's disqualification will end after five years under certain circumstances set out in that Section, and that the court may also, in certain circumstances extend the disqualification time frame of disqualification of such a person if it is necessary to protect the public, having regard to the conduct of the disqualified person up to the time of the application.

TERMINATION OF OFFICE

A Director's Term of Office may terminate when:

- It has expired as per the MOI (where applicable)
- The director resigns
- The death of the director
- If he is declared delinquent or becomes disqualified
- If he is removed by a shareholders' resolution or the board or a court order.

Resignation

Directors may resign by tendering a letter of resignation.

Removal by the Shareholders

Section 71(1): A director may be removed by an ordinary resolution adopted at a shareholders meeting by the persons entitled to exercise voting rights in an election of that director. Before the shareholders may consider such a resolution, the director concerned must be given notice of the meeting and the resolution (at least equivalent to that which a shareholder is entitled to receive), and must be afforded a reasonable opportunity to make a presentation in person or through a representative to the meeting, before the resolution is put to vote.

Removal by the Board

Section 71: Under certain specific circumstances, the board (provided the company has more than two directors) may remove a director without shareholder approval. Section 71 cannot be amended in a company's MOI.

The board of directors may remove a director from office if there are two or more directors, and one of the following applies:

- The director has become disqualified or ineligible to act
- The director has become incapacitated to the extent that the director is unable to perform the functions of a director, and is unlikely to regain that capacity within a reasonable time
- The director has neglected or been derelict in performance of his duties.

When one of the above assertions has been made in relation to a director, the board (other than the director concerned) must determine the matter by resolution, and may then begin proceedings to remove the director.

The board must call a meeting of directors to determine the matter. The director must be given notice of the meeting and the proposed removal, including a copy of the proposed resolution and a statement stating reasons for the resolution, with sufficient specificity to reasonably permit the director to prepare and present a response. He must be given a reasonable chance to make presentation personally (or by a representative) at the meeting before the resolution is put to a vote.

Removal by the Companies Tribunal

A director may be removed from the board by the Companies Tribunal. Where there are fewer than three directors, and in any circumstances similar to those set out in Section 71(3), the Companies Tribunal must determine the removal of the director on application by any shareholder or director.

Removal of Director During Business Rescue Proceedings

At any time during business rescue proceedings, the business rescue practitioner may apply to a court for an order removing a director from office on the grounds set out in Section 137(5)(a) and (b). This is in addition to any right of a person to apply to a court for an order contemplated in Section 162 (a declaration of delinquency).

Compensation

A person who is removed from office as director in terms of Section 71 may have a right at common law or other right that a person may have to apply to a court for damages or other compensation for loss of office as a director, or loss of any other office as a consequence of being removed as a director.

Section 70: Vacancies on the Board

Where there is a vacancy on the board in circumstances as described above, such vacancy must be filled by a new appointment or new election, which would either be conducted at the next Annual General Meeting (AGM) of the company (if applicable), or in any other case, within 6 months of the vacancy, at a shareholders meeting called to elect him or her or by a poll of persons entitled to exercise voting rights in an election of a director.

REMUNERATION OF DIRECTORS

Unless the MOI provides otherwise, the company may pay remuneration to its directors for their service as directors, subject to the fact that remuneration contemplated in this section, may be paid in accordance with a special resolution approved by the shareholders within the previous two years.

DUTIES AND RESPONSIBILITIES OF DIRECTORS

Common Law Duties and Partially Codified Duties (Section 76)

- Fiduciary duties:
  - to act bona fide in the interests of the company, to exercise powers for their proper purpose, to exercise independent judgement in decision making and not to use corporate property information or opportunities for personal gain
- Duty to disclose any conflict of interest
- Duty to position and use information for company's benefit, and not for his own private advantage or the advantage of any other person other than the company or a wholly owned subsidiary of the company
- Duty to disclose material information [unless he reasonably believes the information is immaterial to the company or generally available to the public or known to other directors or is bound not to disclose the information by legal or ethical obligation of confidentiality]
- Section 76(3(c) codifies the duty of care of a director by stating that he has a duty to perform his duties in good faith, in the best interests of the company and with due care, skill and diligence that would reasonably be expected of a person carrying out the same functions in relation to the company as those carried out by that director, and having the general knowledge skill and experience of that director

Duties in Terms of Strategy and Conduct

- Duty to comply with the Act in relation to different types of companies (Section 8)
- Duty to comply with the company's MOI (Section 13, 15 and 16)
- Duty to manage the business affairs of the company [Section 66(1)]
- Duty to carry on the business without trading recklessly or under insolvent conditions (Section 22)
- Duty to comply with Solvency and Liquidity Test (Section 4)
- Duty to implement business rescue proceedings if necessary

Duties Relating to Keeping of Records and Audit

- Duty to keep company records (Section 24)
- Duty to keep accounting records (Section 28)
- Duty to provide for the Proper Conduct of Audit or Independent Review where applicable (Sections 90 & 92)

Duties Relating to the Board,Shareholders and Administration

- Duty to appoint board committees & an audit committee if applicable (Sections 72 & 94)
- Duty to appoint a company secretary where applicable (Section 84 & 86)

- Duty to facilitate shareholders' meeting (Section 61)
- Duty to facilitate directors' meetings (Section 73)
- Duty to enable shareholders to exercise their voting powers and rights [Section 2(2) & 58]
- Duty to operate in the best interest of the shareholders [Section 20(6) & (7) & 76(3)]

Duties Relating to Accountability, Transparency and Disclosure

- Duty to prepare financial/ annual financial statements (Section 29 & 30)
- Duty to prepare a directors' report [Section 30(3)]
- Duty to issue a prospectus (Section 100)
- Duty to disclose director's remuneration information (Section 30)
- Duty to disclose director's financial Interests (Section 75)
- Duty to file an annual return (Section 33) together with accompanying documentation, where applicable

Other Duties and Responsibilities

- Duty to operate within the framework of King IV™
- Duty to comply with all other legislation

Directors' duties under POPIA and PAIA

- In terms of the business judgement rule, directors are required to take reasonably diligent steps to become informed about POPIA.
- As the Responsible Party (who processes personal information), a company, or its board of directors, is required to appoint and register an Information Officer with the Information Regulator.
- Usually the role of the Information Officer is, by default, assigned to the Chief Executive Officer, Managing Director or an equivalent officer of a company.
- Notwithstanding the delegation of authority to the Information Officer or IT Manager (in regard to the protection of cyber security), the board retains overall responsibility over POPIA compliance of the Responsible Party.
- The board is required to implement a 'POPI' programme to ensure the protection of personal information for their 'Data Subjects' (employees, clients, customers, suppliers etc).
- The POPI programme should aim, inter alia, to identify risk areas, develop strategies and policies for POPIA, and ensure the implementation thereof within the organisation.
- Cyber security and data protection policies are required to be developed and implemented, not only in compliance with POPIA, but in line with Principle 12 of King IV™.
- Section 22 of POPIA imposes a mandatory reporting obligation on the Responsible Party – to report a data breach, in writing, to the Information Regulator, where one has occurred.

Main Objectives of the Board

The main "best interest" objectives of the board, are:

- To operate in the best interests of the shareholders
- To operate in the best interests of the company.

These objectives may be achieved by implementing a framework of corporate strategy and good corporate governance.

The board is responsible for determining the company's strategic direction, which includes determining the business model, which entity to trade through, the capital structure and strategic planning.

Corporate governance is the implementation and execution of the corporate strategy, as managed by the board of directors in terms of conformance and performance standards.

Directors have a duty to operate in the best interest of the shareholders at all times. Directors have numerous administrative duties within the company, such as facilitating meetings of the shareholders and the board, and a duty to make sure that shareholders are able to exercise their voting rights.

Structure of the Board

The "board" refers to the collective word used to designate directors when they act together as a group. When determining the structure of the board, the company should take cognisance of factors such as the nature of the business, needs of the company, structure of committees, quorum requirements and the skills and knowledge required to make decisions. The Act does not prescribe how the board should be structured, save to state that at least three non-executive directors must be appointed to the audit committee of a public company or State owned company.

However, good governance principles and the King Reports recommend that a balanced board of non–executive, independent non-executive and executive directors be elected, so as to ensure a clear separation of ownership from control and reward structures and that the board operates independently and is not an extension of the day to day management of the company. It is recommended that the board structure be reviewed on an annual basis.

Executive*	■ Salaried, he may enter a fixed term service agreement with the company ■ Involved with the day to day running of the company
Non-Executive*	■ Does not have any day-to-day management role ■ Usually only attends board meetings and are paid directors fees for their service ■ May be a shareholder in the company
Non-Executive Independent*	■ Has limited or no financial interest in the organisation, or any interests that could influence the company ■ Not a representative of a controlling shareholder
Alternate	■ Defined in the Act ■ Acts on behalf of a director when he cannot personally fulfil his duties
Ex Officio	■ Defined in the Act ■ Director as a consequence of that person holding some other office, title, designation or similar status

* Not defined in the Act.

Delegation of Authority

The board may delegate to the committee any of the authority of the board. The creation of a committee, delegation of authority or action taken does not alone satisfy or constitute compliance by a director with the required duty of a director to the company. While many of the directors' duties may be delegated to management, the directors retain overall responsibility over management, and have a duty to monitor management's performance.

Section 73(1): Board Meetings

A director authorised by the board of a company, may call a board meeting at any time. A board meeting is obligatory if called for by:

- At least two of the directors, or
- 25% of the directors where board comprises 12 or more directors. (The MOI may specify a different number or percentage).

The board may determine from time to time the requirement for notice for meetings, as long as this complies with the MOI or rules and no meeting may be convened without notice to all the directors subject to certain exceptions.

Board meetings may be held with certain or all the directors using electronic communication (EC), as long as the EC facility enables all persons participating in that meeting to communicate concurrently with each other without an intermediary and to participate effectively in that meeting (and as long as the MOI allows for it).

A majority of the directors must be present in person or by electronic communication before a vote may be called at the meeting. The definition of "present at a meeting" includes a "virtual presence" or representation by electronic proxy.

Each director has one vote on a matter before the board, and a majority of votes cast on a resolution is sufficient to approve that resolution. In the case of a tied vote, the chair may cast a deciding vote if he has not previously voted. In all other instances the motion is not carried. Properly executed minutes of directors meetings are important to record decisions made and thereby manage the liability of holding the office of director.

A signature or an initial on a document may be made by or on behalf of a person by the use of an electronic signature or an advanced electronic signature. In addition, proxy forms, annual financial statements, prospectuses and annual reports may be lawfully created, signed, retained and sent electronically.

Board Committees

Unless the MOI provides otherwise, the board may appoint any number of committees of directors, or may consult with or receive advice from any person.

The board may appoint non-directors to a committee (as long as they are not disqualified or ineligible). Such persons shall not have a vote on a matter to be decided by the committee, but may nevertheless incur the same liabilities as directors in terms of the Act.

➪ Regulation 43: Social and Ethics Committee

The Minister has prescribed that a listed public company or SOC Ltd or any other company that has in any two of the previous five years achieved a Public Interest Score above 500 points is obliged to have a social and ethics committee, which must be appointed at each AGM, unless exempted in terms of Regulation 43(2).

➪ Section 61: Shareholders' Meetings

Directors have a duty to call and convene shareholders' meetings.

In general, there are two types of shareholders' meetings, the annual general meeting (AGM) and ordinary general meetings. Proper notice of the meeting must be given of the date, place and purpose of the shareholders' meeting. The notice periods for calling of meetings are: fifteen business days for public companies, and ten business days for private companies.

In order to conduct business at a shareholders' meeting, a quorum (minimum number of members) must be present. Where a quorum is not present, the meeting must be adjourned.

In terms of Section 61(3), the board is required to convene a shareholders' meeting on receipt of one or more written and signed demands.

The board can determine the location for the meeting, which can either be within South Africa's borders, or located overseas.

If a company is unable to convene a meeting because it has no directors, or because all of its directors are incapacitated, then any other person authorised by the company's MOI may convene the meeting.

If no person has been authorised, then the Companies Tribunal, on a request by any shareholder, may issue an administrative order for a shareholders' meeting to be convened.

If a company fails to convene a meeting for any reason other than the above, the Act allows the Court to call a shareholders' meeting.

A public company is required to have an AGM which must take place within eighteen months after incorporation, and then every calendar year, within fifteen months of the last meeting.

The Act does not require a private company to have an AGM. However, the board is required to approve the AFS, and these are required to be presented to the first shareholders meeting after they have been so approved (there is no time frame stipulated), unless exempted.

At the AGM (where applicable), the following business is required to be transacted: Presentation of the directors' report, audited financial statements for the immediately preceding financial year, an audit committee report, the election of directors, to the extent required by this Act or the company's MOI, the appointment of

(i) an auditor for the ensuing financial year; and
(ii) an audit committee; and
(d) any matters raised by shareholders, with or without advance notice to the company.

The Amendment Bill proposes amendments to Section 61 by requiring the Social and Ethics Committee Report and Remuneration Report to be presented at the AGM.

RIGHTS AND POWERS OF DIRECTORS

Rights

- To discharge their duties without interference from co-directors
- To receive reasonable notice of meetings
- To claim reimbursement for expenses incurred
- To inspect the company's accounting records, assisted by an accountant
- To take independent professional advice at the expense of the company
- To participate in the strategic management of the company and attend and vote at board meetings.

Powers

Listed below are some of the Sections in the Act which empower directors.

Section 66(1): To exercise unfettered powers: The board has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that the Act or the MOI of the company provides otherwise.

Section 15: Every company must have a MOI, which is binding between the company and each shareholder, as well as between and amongst the shareholders, and also between the company and each director and prescribed officer and any other person who serves on a commitee of the board, regarding their functions in the company. The MOI must be consistent with the Act, and will be void to the extent that it contravenes or is inconsistent with the Act. It may be tailored specifically by the company (per the alterable provisions of the Act), as long as it does not change any of the unalterable provisions of the Act – unless such a change will impose a higher standard/greater restriction or longer period of time than would otherwise apply to the company in the unalterable provision. In addition, and provided the MOI does not provide otherwise, the board of directors can make,amend and/or repeal any rules relating to governance of the company in regard to matters that are not in the MOI or the Act, and must publish (to shareholders) and file these rules with the Commission (if applicable).

These rules must be consistent with the Act and the MOI and will be void to the extent they are inconsistent with them. The shareholders may also enter into a shareholders agreement, and again, this agreement cannot be inconsistent with the Act or the MOI of the company, and to the extent that the shareholders agreement is inconsistent with them, is void to the extent of that inconsistency.

The Amendment Bill proposes to amend Section 16 (which deals with the amendment of the MOI), by providing that any amendments to the MOI of a company will take effect 10 business days after receipt of the notice of amendment by the Commission, unless endorsed or rejected with reasons by the Commission prior to the expiry of the 10 business days period or the date, if any, set out in the Notice of Amendment, provided that such date shall not be a date prior to expiry of the 10 business days – in other words, if the Commission has not endorsed or rejected the Notice of Amendment sooner, then the amendment will take effect on the expiry of the 10 business days.

Section 21: To ratify Pre-Incorporation contracts.

Section 38: To issue shares: (but only within the classes, and to the extent, that the shares have been authorised by or in terms of the company's MOI, in accordance with Section 36). **The Amendment Bill proposes to insert a new Section 38A – which empowers a court, on application by the company, or any party who holds an interest in the company, to validate the irregular creation, allotment or issue of shares after satisfying itself that it is just and equitable to do so in the circumstances.**

Section 129: To resolve to institute business rescue proceedings.

Section 44–45: To authorise the provision of financial assistance for subscription of securities and loans or other financial assistance to directors, provided certain conditions are met. **The Amendment Bill proposes to amend Section 45 to exclude the provisions thereof from applying to the giving of financial assistance by a holding company to its subsidiary.**

Section 46: To authorise distributions provided all requirements of the Act have been complied with.

Section 48: To acquire company or subsidiary shares in terms of the Act. The Section requires that where the board has resolved that the company is to acquire a number of its own shares, the decision must be approved by special resolution of the shareholders of the company if any shares are to be acquired by the company from a director or prescribed officer of the company, or a person related to a director or prescribed officer of the company, and is subject to the requirements of Sections 114 and 115, if, considered alone, or together with other transactions in an integrated series of transactions, it involves the acquisition by the company of more than 5% of the issued shares of any particular class of the company's shares. **The Amendment Bill proposes that no special resolution will be required when the company is implementing a pro-rata share buy-back where the shareholders affected are also a director, prescribed officer or person related to a director or prescribed officer of the company.**

There has, over recent years, been a steady increase in regulatory, compliance and reporting requirements for directors in South Africa.

Section 33: Annual Returns

Annual returns must be submitted by every category of company including external companies in the prescribed form with the prescribed fee and within 30 business days after the anniversary date of its date of incorporation (in the case of a company that was incorporated in the Republic, or the date that its registration was transferred to the Republic, in the case of a domesticated company). A CC is required to file its annual return within the anniversary month of its incorporation up until the month thereafter.

An annual return is a statutory return in terms of the Act and therefore must be complied with. Failure to do so will result in the Commission assuming that the company is not doing business, and may lead to deregistration. Companies which are required in terms of the Act to have their financial statements audited must file a copy of the latest approved audited financial statements together with their annual return, in iXBRL format.

Companies (and CC's) that are required to produce audited AFS's in terms of the Companies Act (in other words, "statutory audits"), are those that fall within the following categories:

- All public companies and State-Owned companies
- Companies that have an explicit stipulation in their MOI that they should audit their AFS's
- Companies whose Public Interest Score is 350 or more
- Companies that in the ordinary course of their primary activities, hold assets in a fiduciary capacity for person who are not related to them, and the aggregate value of such assets held at any time during the financial year exceeds R5 million.

The Act also requires that the following companies are required to be audited: A Non-Profit Company created by the State, or for the State, and a Company whose Public Interest Score is between 100–349, and whose annual financial statements have been internally compiled.

iXBRL involves a digital file format for the reporting of a company's AFS, and replaces the PDF document. It makes it easier for companies to report their financial information in an electronic format, and for the Commission to analyse the data submitted, as the iXBRL format creates uniformity amongst all financial reports. The Commission mandated the digital reporting system for all qualifying entities from 1 July 2018.

A company that is not required to have its annual financial statements audited, may elect to file a copy of its audited or reviewed statements together with its annual return, however this is not compulsary.

A company that is not required to file annual financial statements and does not elect to file a copy of its audited or reviewed annual financial statements must file a financial accountability supplement (FAS) with its annual return. Companies that voluntarily audit their AFS based on a board or shareholder resolution, and those that have theirs independently reviewed are also not obliged to submit their AFS in the iXBRL format, but may do so if they wish.

Each year, in its annual return, every company must designate a director, employee or other person who is responsible for the company's compliance with the transparency and accountability provisions in the Act.

The Amendment Bill proposes that a public company, state-owned company or private company [whose public interest score exceeds the limits set out in Section 30(2) or regulations as contemplated in section 30(7)] will be required to file a copy of its latest AFS with its annual return.

The Beneficial Ownership Register

As from 24 May 2023, anyone with more than 5% beneficial ownership of a company or close corporation must submit to CIPC information relating to the beneficial ownership (BO) of the entity. This applies to profit companies, non-profit companies, external companies and close corporations, regardless of the entity's status – i.e. whether it be trading, dormant or in the deregistration process (for non-submission of annual returns). Directors/members are then required to verify the information every year together with the entity's CIPC annual return. In addition, if any change is made to the ownership of the entity during the course of the year, the BO register must be updated within 10 business days of the change. The purpose of the BO Register is so that CIPC has a register of all natural persons who own or exercise control over legal entities, and to assist law enforcement with the information when it comes to investigations as to the ultimate owners of entities. Unless the legislation changes, the general public will not have access to the BO information of an entity- the information may only be accessed by law enforcement and competent authorities, such as the National Prosecuting Authority, the South African Revenue Service, and the Financial Intelligence Centre.

This requirement has been imposed by the General Laws (Anti-Money Laundering and Combating of Terrorism Financing) Amendment Act (no.22 of 2022), and the Companies Amendment Regulations, 2023 –, as a result of increased measures to combat money laundering and terrorist financing in South Africa (as a consequence of South Africa having been "greylisted"). This Act introduced two new definitions – "affected company" and "beneficial owner" – refer to pages 62 to 63. A company that falls within the ambit of being an "affected company" must establish and maintain a register of all persons who hold a beneficial interest in the company (which is equal to or exceeds 5% if the total securities of the company).

The information required to be uploaded to CIPC includes a certified copy of the extract of the company securities register, a certified copy of its register of disclosure of beneficial interests, a certified copy of each beneficial owner's identity document, and a Special Power of Attorney authorising the filer to submit the information on behalf of the entity.

Failure to comply with this obligation will result in a Compliance Notice being issued by CIPC, and possible administrative penalties being imposed.

The Mandatory Compliance Checklist

CIPC requires that a mandatory Compliance Checklist be completed and submitted by all categories of companies (as listed on page 4), whose annual financial statements are audited or independently reviewed. This requirement does not apply to a close corporation. The checklist is required to be submitted within 30 business days after the anniversary of the company's date of incorporation. The period for which the company declares its compliance is to be known as its "Compliance Year", and is aligned to the anniversary date of its incorporation.

The Checklist requires that the company declare its compliance status to certain Sections, Regulations and Schedule 1 of the Act, as follows: **Section 4**: Solvency and Liquidity, **Section 15**: Memorandum of Incorporation (MOI), shareholder agreements and rules, **Section 26**: Access to company records, **Section 27**: Financial year of company, **Section 28**: Accounting records, **Section 29**: Financial Statements, **Section 30**: Annual Financial Statements, **Section 32**: Use of company name and registration number, **Section 33**: Annual Return, **Section 44**: Financial assistance for subscription of securities, **Section 45**: Loans or other financial assistance to directors, **Section 50**: Securities Register and numbering, **Section 61**: Shareholders meeting, **Section 66**: Board, directors and prescribed officers, **Section 69**: Ineligibility and disqualification of directors/prescribed officers, **Section 70**: Vacancies on board, **Section 72**: Board committees, **Section 86**: Mandatory appointment of company secretary, **Section 90**: Appointment of auditor, **Section 92**: Rotation of auditor, **Section 94**: Audit committees, **Regulation 21**: Registered office of the company, **Regulation 43**: Social and Ethics Committee, **Schedule 1**: Provisions concerning Non-Profit companies.

These Sections, Regulations and Schedule 1 are expanded on throughout this guide, and are indicated with a green arrow ⇨ to indicate that they are applicable to the Checklist. It is ultimately the responsibility of the directors to ensure compliance and completion of the Checklist. Any person who completes it incorrectly or fraudulently can be held responsible, as follows:

- Section 215(2)(e): a person commits an offence who knowingly provides false information to the Commission
- Section 216((b): any person convicted of an offence is liable to a fine or to imprisonment for a period not exceeding 12 months, or to both a fine and imprisonment.

CIPC is tasked with ensuring, monitoring and enforcing compliance with the Act. It is also responsible for, inter alia, the disclosure of information on its business registers. Companies are responsible for submitting information together with their CIPC annual returns with the aim of increased transpareny and disclosure – including beneficial ownership registers, compliance checklists (where applicable) as well as their financial information [whether in the form of a financial accountability supplement or their annual financial statements in XBRL format (where applicable)]. Although no penalites are specifically prescribed for non-compliance with these transparency provisions, a contravention of the Act may result in the issue of a compliance notice by CIPC. Failure to comply with the compliance notice may result in a court-ordered administrative fine or a referral of the matter to the National Prosecuting Authority for prosecution as an offence.

Retention of Records

Any documents, accounts, books, writing, records or other information that a company is required to keep in terms of the Act or any other public regulation must be kept in written form, or in a form or manner that allows the documents and information that comprise the records to be convertible into written form within a reasonable time for a period of at least seven years or any longer period of time specified in any other applicable public regulation. Section 24(3) sets out exactly which records must be maintained – such as a copy of the company's MOI, a record of its directors, copies of reports presented at the AGM of the company, annual financial statements, accounting records, notice and minutes of shareholders and directors meetings etc.

In addition to the above, Section 24(4) states that a company must also maintain:

(a) A securities register or its equivalent as required by Section 50, in the case of a profit company, or a member's register in the case of a non-profit company that has members, and

(b) the records required in terms of Section 85, if that Section applies to the company, namely a maintaining a record of its company secretary and auditor/s.

A company must notify the Commission of the location or of any change in the location of any company records that are not located at its registered office.

Section 26: Access to Information

Section 26 of the Act states that a person who holds or has a beneficial interest in any securities issued by a profit company or who is a member of a non-profit company has a right to inspect and copy without any charge for any such inspection or upon payment of no more than the prescribed maximum charge for any such copy, the information contained in the records of the company, as per Section 24(3)(a), (b), (c)(i) and (ii), (d) and (e) and Section (24)(4)(a) above. **The Amendment Bill proposes that, in addition, to these records, the register of the disclosure of beneficial interest of the company, as mentioned in Section 56(7)(a) should also be included.**

Any other person has a right to inspect or copy the securities register of a profit company, or the members register of a non-profit company that has members, or the register of directors upon payment of an amount not exceeding the prescribed maximum fee for any such inspection, and upon request to do so. **The Amendment Bill proposes that this list be extended so that any person has a right to inspect and copy the information contained in the records referred to in subsections (1)(a), (b), (cA), (e) and (f) of Section 26, upon payment of no more than the prescribed minimum charges for any such inspection and copy – in other words – the reports to annual meetings, the records in respect of company directors, annual financial statements (for seven years after the date on which each such particular statements were issued) the securities register of a profit company or the members register of a non-profit company that has members, and the register of the disclosure of beneficial interest of the company as mentioned in Section 56(7)(a). The Bill further proposes that the right relating to the inspection and copying of reports to annual meetings and the notices and minutes of annual meetings (and communications relating thereto) – shall not apply to a private company, non-profit company or personal liability company – where the annual financial statements are internally prepared in a company with a public interest score of less than 100, or where annual financial statements are independently prepared in a company with a public interest score of less than 350.**

Any such right of access may be exercised only in accordance with The Promotion of Access to Information Act (no.2 of 2000). In addition to the information rights set out above, a company's MOI may establish additional information rights of any person, with respect to any information pertaining to the company, but no such right may negate or diminish any mandatory protection of any record required by or in terms of Part 3 of the Promotion of Access to Information Act.

In addition, with respect to each director, the company must keep a record of addresses for service, and, in the case of a company that is required to have an audit committee, any professional qualifications and experience of the director. If a company receives a request (made in the prescribed manner) for access, it must within 14 business days comply with the request. **The Amendment Bill proposes reducing the time period that a company has to comply with such a request from 14 business days to 10 business days.** It is an offence for a company to fail to accommodate or impede any reasonable request for access, or to unreasonably refuse access to any record that a person has a right to inspect or copy in terms of this Section, or Section 31 (which refers to a right to access to financial statements or related information by a person who holds or has a beneficial interest in any securities issued by the company), or to otherwise impede, interfere with, or attempt to frustrate, the reasonable exercise by any person of the rights set out in this Section or Section 31.

CIPC, POPIA AND PAIA

Section 187(5) of the Companies Act provides that any person may inspect a document, or obtain a certificate of an entity that is registered at the Commission. The Commission issued a Notice on the 30 August 2021 stating that it meets the criteria set out in Section 38 of POPIA, in that the provision of such information to the general public is in line with the proper discharge of its functions as a public body, and is thus exempt from the restrictions relating to the processing of personal information imposed by POPIA.

Regulation 21: Registered Office

Every company and external company must have a registered office at which their documents are maintained. This office must be indicated on the Notice of Incorporation.

Subject to the requirements of the MOI, a Notice of Change of Registered Office must be filed with the Commission where applicable.

Section 32: Use of Registered Name and Number

A company or external company must:

- Provide its full registered name or registration number on demand
- Not misstate its name or registration number in a manner likely to mislead or deceive any person.

The company's registered name and registration number must be clearly displayed in legible characters on all forms, notices and correspondence, electronic or otherwise.

This requirement applies to all bills of exchange, promissory notes, cheques and orders for money or goods and in all letters, delivery notes, invoices, receipts and letters of credit of the company.

It is an offence to mislead the public in this regard. **The Amendment Bill proposes to amend Section 160 relating to disputes around company names. It is proposed that where a company has been ordered to change its name by the Companies Tribunal, and**

it fails to do so, the applicant may approach the Commission, after the expiration of the determined period, to substitute its registration number, followed by 'Inc', '(Pty) Ltd', 'Limited', or 'SOC Ltd' – as the name of the company in question.

Section 75: Disclosure of Personal Financial Interests

Based on a director's fiduciary relationship with the company, directors have a duty to disclose their personal financial interests in the business of the company.

Section 75 applies to an extended definition of 'director' and includes:

- An alternative director, prescribed officer and board committee member (irrespective of whether the person is also a member of the company's board)
- Related persons when used in reference to a director, as defined in Section 1 (including a second company or CC of which a director or related person is a director or member).

In terms of the Act, "personal financial interest" comprises a direct material interest of a financial, monetary or economic nature, or to which a monetary value may be attributed, but does not include any interest held by a person in a unit trust or collective investment scheme unless that person has direct control over the investment decisions of that fund or investment.

A director is not only obliged to disclose his own personal financial interests but also those of parties related to him (including natural and juristic persons).

A director must disclose his interest in advance, before it is considered by a meeting of the board and must recuse himself by leaving the meeting, without taking part in the discussion.

A director is required to deliver a written notice to the board (or shareholders where there is only one director, but a number of holders of beneficial interest in issued securities) setting out the nature and extent of that interest, to be used generally for the purposes of this section until changed or withdrawn by further written notice from that director.

Consequences of non-disclosure

- The resolution and the transaction is void
- Director could be personally liable for losses, damages or costs sustained by the company, shareholders or third parties.

Section 75 will not apply where:

- The sole director is also the sole holder of all the company's securities (including shares)
- Where decisions generally affect all of the directors in their capacity as such
- Where the decision relates to a class of persons even if that director belongs to that class (exceptions apply)
- Where there is a proposal to remove a fellow director from office.

Environmental, social and governance (ESG)

This is an approach to evaluating and operating businesses that goes beyond the sole focus of shareholder return. ESG has three main focus points:

An environmental aspect: the focus is on preserving the natural world, such as climate change, greenhouse gas emissions, biodiversity loss, deforestation, pollution, energy efficiency and water management. Section 76(3) of the Companies Act places an obligation on directors to exercise their functions in the best interests of the company and with the requisite degree of care, skill and diligence. Although these are general director duties, if a director fails to ensure that a company complies with the specific environmental law obligations, the director may be held liable for a breach of these general director duties.

A social aspect: the focus is on people and relationships including working to support gender and diversity, equity, and inclusion, enhancing customer satisfaction and employee engagement. Section 72 of the Companies Act requires state-owned companies, listed companies and every other company that has had a public interest score of at least 500 points in the past 2 years to appoint a social and ethics committee. The social and ethics committee is required to monitor a company's activities with regard to: Social and economic development, Good corporate citizenship, The environment, health and public safety, Consumer relations and Labour and employment matters.

A governance aspect: the focus is on moving beyond how organisations have been typically governed in the past. Examples of specific topics include board composition, cybersecurity practices, management structure, executive compensation, and the prevention of bribery and corruption. The corporate governance practices which are expected of directors are set out in the Companies Act and King IV™. Duties and responsibilities of directors are derived from both the Companies Act and common law. Good corporate governance dictates that directors act in the utmost good faith and in the best interests of their companies, including the need to exercise care, skill and diligence in the performance of their duties. ESG has become a necessary component in many proposed deals with enhanced ESG due diligence and disclosure requirements. Numerous regulations and taxonomies have been released globally in this space, including the South African Green Finance Taxonomy, 1st EDITION, which was released in March 2022. When compiling an integrated report, listed entities usually report on their compliance with ESG matters as required by King IV™.

LENDING AND FINANCIAL ASSISTANCE TO DIRECTORS

"Financial assistance" in Sections 44 and 45 excludes lending money in the ordinary course of business by a company whose primary business is the lending of money, and additionally in re Section 45, includes the lending money, guaranteeing a loan or other obligation and securing any debt or obligation, but excludes an accountable advance to meet company-related legal expenses or anticipated expenses to be incurred by the person on behalf of the company or an amount to defray the person's expenses from removal at the company's request.

Section 44: Financial Assistance for Subscription of Securities

Unless a company's MOI provides otherwise, the board may authorise the company to provide financial assistance by way of a loan, guarantee, the provision of security or otherwise to any person for the purpose of or in connection with the subscription of any option, or any securities, issued or to be issued by the company or a related or inter-related company or for the purchase of any securities of the company or a related or inter-related company (subject to certain conditions), which are outlined below*.

Section 45: Loans or Other Financial Assistance to Directors

Unless a company's MOI provides otherwise, the board may authorise the company to provide direct or or indirect financial assistance to a director or prescribed officer of the company or of a related or inter-related company, or to a related or inter-related company or CC, or to a member of a related or inter-related CC, or to a person related to any such company, CC, director, prescribed officer or member, subject to specific conditions as per below*.

If the board adopts a resolution to provide financial assistance, written notice must be given to all shareholders (unless every shareholder is also a director of the company), and to any trade union representing its employees:

- Within ten business days after the board adopts the resolution, if the total value of all loans, debts, obligations or assistance together with any previous such resolution during the financial year, exceeds one-tenth of 1% of the company's net worth at the time of the resolution, or
- Within 30 business days after the end of the financial year, in any other case.

The Amendment Bill proposes that Section 45 be amended in that the heading be changed to "Financial assistance". The Section presently provides that any financial assistance granted by a company to its subsidiary must be authorised by the board and the shareholders by way of a special resolution. The Bill proposes that the special

resolution requirement should not apply where a company gives financial assistance to its own subsidiary, which eases the burden of companies providing financial assistance to their own subsidiaries and having to apply all the requirements of this Section.

*** Conditions to be met (Sections 44 and 45):**
The provision of financial assistance is only possible where the board has authorised it by way of resolution, but the board may not pass such a resolution unless it is pursuant to an employee share scheme that satisfies the requirements of S97, OR – in any other case – the financial assistance (e.g a loan) has been approved first by the shareholders by way of a special resolution (which either names a specific recipient or a specific class of recipients in general, and which was adopted or adopted within the previous 2 years by the shareholders), and the specific recipient falls within that category, and that immediately after providing the finanical assistance, the board is satisfied that the solvency and liquidity test will be met, as well as a confirmation that the terms are fair and reasonable to the company, and that any specific conditions or restrictions respecting the granting of financial assistance set out in the company's MOI have been satisfied.

FINANCIAL YEAR, ACCOUNTING RECORDS, FINANCIAL STATEMENTS AND AUDITS

Section 27: Financial Year

A company's financial year end is set in its incorporation documents, and the first financial year begins on the date of registration of the company. A company can change its year end only once per annum. It is also not allowed to backdate a year end change (the newly established year end must be later than the date on which the notice to change is filed). After the change, the following year end should not be more than 15 months after year end of the preceding financial year.

Section 28: Maintaining and Keeping of Accounting Records

It is the duty of directors to ensure that the company keeps accurate and complete accounting records in one of the official languages of RSA at its registered office.

The accounting records must be kept in the prescribed manner and form and must provide adequate information to enable the company to satisfy all reporting requirements applicable to it and to provide for:

- The compilation of financial statements
- The proper conduct of an audit or independent review of its annual financial statements (where applicable).

Electronic records must comply with the requirements of the Act.
Non-profit companies must maintain adequate records of all revenue received from donations, grants and member's fees, or in terms of funding, contracts or arrangements with any party.

Regulation 25(3) sets out what is required to be included in the accounting records of a company.

Records which must be kept include:

- A record of the company's assets and liabilities including but not limited to:
  - a register of company's non-current assets
  - a record of any loan by the company to a shareholder, director, prescribed officer, employee or any related person
  - a record of any liabilities and obligations of the company
- A record of any property held by the company in a fiduciary capacity or in any capacity or manner contemplated in Section 65(2) of the Consumer Protection Act 2008
- A record of company's revenue and expenditure
- A record of inventory and stock in trade where the company trades in goods.

It is an offence for a company to fail to keep accurate or complete accounting records with the intention of deceiving or misleading any person or to falsify its accounting records.

Sections 29 and 30: Financial Statements & Annual Financial Statements (AFS)

It is the duty of directors to cause the financial statements or annual financial statements of the company to approved by the board and signed by an authorised director, and be presented to the first shareholders meeting after the statements have been approved by the board. If a company provides any financial statements including annual financial statements to any person for any reason, these must satisfy the requirements set out in Section 29.

Financial statements must not be false, misleading or incomplete in any material respect. Summaries must comply with prescribed requirements for summaries.

It is an offence to prepare or be party to the preparation, approval, dissemination or publication of any financial statement including any annual financial statements knowing that those statements fail in a material way to comply with the requirements of the Act, or are materially false or misleading. The Act places increased onus and liability on preparers of financial statements.

Audit and Independent Review

Directors are obliged to comply with Sections 28–30 of the Act. They have a duty to ensure that the company has an effective and independent audit committee (where applicable).

Section 30 provides that all companies must produce AFS each year within six months after the end of their financial year, and must determine whether it must be audited. AFS of all public companies and state-owned companies must be audited.

In the case of any other profit or non-profit company:

- AFS must be audited if so required by the regulations made in terms of sub-section 7, taking into account inter alia whether it is desirable in the public interest, having regard to the economic or social significance of the company as indicated by any relevant factors including its annual turnover, the size of its workforce and the nature and extent of its activities
- AFS can be either audited voluntarily if the company's MOI or a shareholders' resolution so requires or if the company's board has so determined, or independently reviewed in terms of sub-section 7.

Regulation 26(1)(d) relating to "Independent Review", states the minimum requirement for a professional person to conduct an independent review.

Regulation 26 sets out the criteria for determining the Public Interest Score (PIS) which must be calculated at the end of the financial year by every company. The PIS of a company determines the financial reporting standards that must be adopted and also determines whether the company is required to appoint a Social and Ethics Committee (whether or not that company is listed).

Section 30(3) Auditors Report, Directors Report and Disclosure of Remuneration

The AFS must include an auditors report if the statements are audited, and a report by the directors with respect to the state of affairs, the business and profit or loss of the company or group of companies (if the company is part of a group) including any matter considered material in enabling the shareholders to appreciate the company's state of affairs, and any prescribed information, and be approved by the board and signed by an authorised director, and be presented to the first shareholders meeting after the statements have been approved by the board. If required to be audited, the AFS must include particulars regarding remuneration and benefits received by each director or individual holding any prescribed office, amount of any pensions or compensation paid out and the number and class of securities issued to a director or prescribed officer and consideration paid for them, as well as details of all director or prescribed officer's service contracts.

The Amendment Bill proposes to clear the confusing wording of this section, and states the particulars applicable to remuneration should apply to prescribed officers as well, and that it will be a requirement that each individual is named. The proposed insertion of Section 30A provides that, in line with King IV ™, public and state-owned companies will be required to prepare and present a remuneration policy with details of the remuneration and benefits awarded to individual directors and prescribed officers – for approval by the shareholders by ordinary resolution, at the AGM. The remuneration policy must be presented thereafter for approval by ordinary resolution at the AGM and every three years or whenever any material change to the remuneration policy is made. The amendment sets out what must be included in the remuneration report – which would include a background statement, the remuneration policy, an implementation report, as well as the gap between their highest paid and lowest paid employees, the average remuneration of all employees etc. This report must be approved by the board and presented to the shareholders at the AGM and voted by the shareholders for approval. The implementation report and the remuneration policy shall be construed as separate documents with separate voting requirements which shall be approved by ordinary resolution.

Public Interest Score Formula
(For Purposes of Regulations 27–30, 43, 127 and 128)

Every company must calculate its public interest score for each financial year, calculated as the sum of the following:

- Number of points equal to the average number of employees of the company during the financial year
- One point for every R1 million (or portion thereof) in third party liability of the company at the financial year end
- One point for every R1 million (or portion thereof) in turnover during the financial year, and
- One point for every individual who at the end of the financial year, is known by the company:
  - in the case of a profit company, to directly or indirectly have a beneficial interest in any of the company's issued securities, or
  - in the case of a non-profit company, to be a member of the company or a member of an association that is a member of the company

Exemption of Owner-Managed Companies

If every person in a particular company both holds, or has a beneficial interest in, any securities issued by that company and is also a director of that company, then that company is exempt from the requirement to have its annual financial statements audited or independently reviewed. This exemption:

Does not apply to the company if it falls into a class of company that is required to have its annual financial statements audited in terms of the regulations contemplated in sub-section 7(a), and Does not relieve the company of any requirement to have its financial statements audited or reviewed in terms of another law or in terms of any agreement to which the company is a party.

ENHANCED ACCOUNTABILITY REQUIREMENTS

The Act contains provisions aimed at enhancing the self-regulation and accountability of certain companies.

These 'Chapter Three Provisions' are binding on:

- Public companies
- State-owned companies (SOC Ltd)
- Private, personal liability and non-profit companies which are required to have their annual financial statements audited under the Act; and
- Private, personal liability and non-profit companies where their MOI requires it

The above categories of companies must appoint:

- A person to serve as a company secretary
- A person to serve as an auditor
- An audit committee
- Every SOC Ltd company and every listed public company, and any other company that has in any two of the previous five years, scored above 500 points must also appoint a Social and Ethics Committee (unless exempted).

Section 86: The Company Secretary

It is compulsary for a public company or state-owned company to appoint a company secretary, upon its incorporation or within 40 business days of its incorporation either by the incorporators or subsequently by the directors of the company or through an ordinary resolution of the shareholders. It is not compulsary for a private company to appoint a company secretary. The company secretary must be permanently resident in South

Africa, have the requisite knowledge and experience to perform duties as set out in the Act, and is accountable to the board.

Duties of a company secretary include:

- Providing the directors of the company with guidance
- Making directors aware of relevant laws and any failure to comply
- Recording minutes as required by the Act
- Certifying in the AFS of the company that the company has lodged all returns required of a public company in terms of the Act
- Ensuring that the company's AFS are distributed to every person who is entitled thereto
- Filing information returns in terms of the annual transparency and accountability report.

Section 90: Appointment of Auditor

Public and state-owned companies must appoint an auditor upon incorporation and each year at the annual meeting. Where the audit of any other company is required in the public interest (as indicated by prescribed criteria in any financial year), those annual financial statements must be audited.

The Amendment Bill proposes an amendment to Section 90 by removing the requirement for auditors to be appointed at the AGM, and that auditors can rather be appointed at a shareholders meeting at which the requirement first applies to the company, and annually at a general meeting of shareholders thereafter.

The auditor must be a registered auditor and must be acceptable to the company's audit committee as being independent of the company.

The auditor must not be:

- A director, prescribed officer, or employee or consultant of the company
- Anyone who was or has been engaged for more than one year in the maintenance of any of the company's financial records or the preparation of any of its financial statements
- A director, officer or employee of a person appointed as company secretary or of the person performing the secretarial work for the company
- A person who is disqualified in terms of Section 69(8) to serve as a director of any particular company
- A person who, alone or with a partner or employees, habitually or regularly performs the duties of accountant or bookkeeper of the company, and related secretarial services, or is related to any such person
- A person who at any time during the five consecutive financial years immediately preceding the date of appointment was a person contemplated above.
  The Amendment Bill proposes that this period be reduced to two years.

Section 92: Rotation of Auditor

The same individual may not serve as the auditor or designated auditor for more than five consecutive financial years.

If an individual has served as auditor or designated auditor for two or more consecutive financial years and then ceases to be the auditor or designated auditor, that individual may not be appointed again until after the expiry of at least two further financial years. If a company has appointed 2 or more persons as joint auditors, the company must manage the rotation in such a manner that all of the joint auditors do not relinquish office in the same year.

Section 93 sets out the rights and restricted functions of auditors who may not perform any services that would place him in a conflict of interest as determined by the Independent Regulatory Board for Auditors (IRBA) in terms of the Auditing Profession Act or any other services determined by its audit committee.

Section 94: Election of an Audit Committee

At each AGM, a SOC Ltd, public company or one that is required only by its MOI to have an audit committee must elect an audit committee. The shareholders and not the board of directors must elect an audit committee for the following financial year (subject to certain exemptions).

The audit committee must have at least three members who must also be independent non-executive directors of the company. In terms of the Act, members of the audit committee must also meet specific qualifications.

At least one third of the members of a company's audit committee at any particular time must have academic qualifications or experience in, economics, law, corporate governance, finance, accounting, commerce, industry, public affairs or human resource management.

The audit committee is required to comply with specific statutory duties as are clearly set out in the Act in Section 94(7), in respect to each financial year for which it is appointed.

The audit committee is required to report on the processes that were followed in appointing auditors and in carrying out their responsibilities, which includes determining the fees to be paid to the auditor and the auditor's terms of engagement.

They are also must comment on the annual financial statements and the policies and procedures that were followed by the company and the appointed auditors, detailing whether the audit process was conducted independently.

A company must pay all expenses reasonably incurred by its audit committee including the fees of any consultant or specialist engaged by the committee to assist it with its duties (if the audit committee considers it appropriate).

If a holding company has an audit committee, the subsidiary does not require one, if the audit committee of the holding company will perform the functions required under this section on behalf of that subsidiary company.

Additional Sections in Act relating to Enhanced Accountability and Transparency Requirements

Section 159: Protection of Whistle-Blowers

A public company or SOC Ltd company must directly or indirectly –

- Establish and maintain a system to receive confidential disclosures of any person as contemplated in Section 159 and act on them, and
- Routinely publicise the availability of that system to directors, secretaries, other officers, employees, registered trade unions of the company, a supplier of goods or services to a company or an employee of such a supplier
- Any provision of a company's MOI or an agreement is void to the extent it purports to limit or negate Section 159.

Regulation 43: Appointment of a Social and Ethics Committee

This is compulsory for those companies prescribed by the Regulation 43 to have a Social and Ethics Committee [listed public company or SOC Ltd or any other company that has in any two of the previous five years achieved a Public Interest Score above 500 points], unless:

- It is a subsidiary of another company that has a social and ethics committee which will perform the functions required by the regulation on behalf of that subsidiary company, or
- Has been exempted by the Tribunal on application. (Revocable exemptions for five years at a time are allowed on grounds of redundancy or no basis for public interest considering the company's activities or because the company already has a formal mechanism within its structures that substantially performs the same functions).

Regulation 43 sets out the composition, election of committee members and their functions in detail.

The committee must comprise not less than three directors or prescribed officers of the company, at least one of whom must be a director who is not involved in the day-to-day management of the company's business, and must not have been so involved within the previous three financial years.

A company required to have a Social and Ethics Committee is required to elect members to that Committee at each AGM of the company.

The board must appoint an advisory panel to the committee who represent the community and public interest having regard to the location and nature of the company's activities. **The Amendment Bill proposes that Section 61 be amended by requiring, inter alia, the presentation of a Social & Ethics Committee Report to shareholders at the AGM (where applicable)**.

SOLVENCY AND LIQUIDITY TEST

Section 4: Directors have a duty to monitor the company's financial position and ensure that the company meets the solvency and liquidity test.

Solvency relates to the net worth or net asset value of the business, where assets are valued on the basis of their market values and realisable values. The balance sheet should reflect the solvency position of the business.

Liquidity is used to describe how easily the assets can be converted into cash, and to describe the relationship between a company's liquid assets and short-term financial obligations, when and as they become due.

The solvency and liquidity test is an accounting exercise. The Act states how the various values are to be calculated and what assets and liabilities are to be taken into account.

Some of the transactions that will require that the solvency and liquidity test be satisfied include:

- The provision of financial assistance to third parties for the acquisition of the company's own shares – for example, where the company lends money to a person to enable the latter to acquire the company's shares (Section 44)
- Loans or other financial assistance to related parties, including subsidiary companies, holding companies and directors (Section 45). **The Amendment Bill proposes that the provision of financial assistance by a company to its subsidiary does not need the adoption of a special resolution**
- Dividends or other "distributions" (as defined in Sections 1 and 46)
- The issuing of capitalisation shares on terms whereby the recipient can choose whether to take the shares or to take cash (Section 47)
- Share buy-backs – in other words, where the company buys back its own shares (Section 48). **The Amendment Bill proposes an amendment to Section 48 requiring that no special resolution has to be adopted when the company is implementing a pro-rata share buy-back where the shareholders affected are also the directors of the company**
- An amalgamation or merger with another company (Section 113).

In order to remain compliant with the Act, directors must constantly monitor whether a transaction that the company proposes to enter into will require that the statutory liquidity and solvency test be satisfied as well as the additional provisions of each particular section of the Act.

Directors must then take account of the necessary information to enable them to make the requisite determination of the company's solvency and liquidity.

In terms of the Act, a director will be personally liable for any loss, damage or costs sustained by the company if the director acquiesced in the conduct of the business of the company in insolvent circumstances, or otherwise failed to vote against a resolution to which the solvency and liquidity test was applicable in circumstances where the company did not satisfy that test.

Such personal liability extends not only to board members but also to prescribed officers.

Liability is joint and several with any other person who may be liable for the same act or omission. Being present at a meeting means that the director is required to either vote for or against the proposed resolution, for example, the declaration of a dividend or distribution. The recording of the vote should be minuted, for record purposes.

A court, on application, can also place such a director on probation in terms of Section 162(7)(a)(i).

A director could also be seen to be engaging in reckless trading as per Section 22, and incur consequences as per that Section.

A company satisfies the solvency and liquidity test at a particular time if, considering all reasonably foreseeable financial circumstances of the company at that time:

- The assets of the company as fairly valued, equal or exceed the liabilities of the company, as fairly valued, and
- It appears that the company will be able to pay its debts as they become due in the course of business for a period of twelve months after the date on which the test is considered, or in the case of a distribution, twelve months following that distribution.

Any financial information to be considered concerning the company must be based on:

- Accounting records which satisfy requirements of Section 28
- Financial statements which satisfy requirements of Section 29.

RECKLESS TRADING

A company must not carry on its business recklessly, with gross negligence with intent to defraud any person or for any fraudulent purpose.

If the Commission has reasonable grounds to believe that a company is engaging in reckless conduct or is unable to pay its debts as they become due and payable in the normal course of business, it may issue a notice to the company, to show cause why the company should be permitted to continue carrying on its business, or to trade, as the case may be.

The company is required to provide information to the Commission within 20 business days of having received the notice.

If the company fails to satisfy the Commission that it is not engaging in prohibited conduct or that it is able to pay its debts as they become due and payable in the normal course of business, the Commission may issue a compliance notice to the company requiring it to cease carrying on its business or trading.

The Commission could also accept the information and confirm the company's right to continue carrying on business.

If a person to whom a compliance notice has been issued fails to comply with the notice, the Commission or the Executive Director (in the case of the Take-over Regulation Panel), as the case may be, may either:

- Apply to a court for the imposition of an administrative fine, or
- Refer the matter to the National Prosecuting Authority for prosecution as an offence in terms of Section 214(3), but may not do both in respect of any particular compliance notice
- A director could still be subject to significant civil liabilities for any loss, damage or cost suffered by the company as a result of a contravention of Section 22
- Directors have a duty to initiate voluntarily Business Rescue Proceedings where it seems the company will become insolvent, so as to avoid the serious consequences contemplated in this Section.

PROBATION AND DELINQUENCY

Directors must understand the serious impact of Section 162 of the Act (declaration of delinquent directors) which states that a director may be declared delinquent, or placed on probation, if that person is, or was, a director within two years of the court application. **The Zondo Commission of Enquiry into State Capture made a recommendation to amend the Companies Act to extend this time bar to five years, and this proposal is contained in the Companies Second Amendment Bill, 2023.**

The Act introduces a remedy to shareholders and other stakeholders (namely the company, a shareholder, director, company secretary, prescribed officer, a registered trade union that represents employees of the company or other representative of the employees) to hold directors accountable by an application to Court, to declare a person delinquent (and thus prohibited from being a director) or under probation (and restricted from serving as a director in terms of the conditions of the probation).

The director in question must be a current director or within the twenty-four months **(proposed to be changed to 5 years)** immediately preceding the application, have been a director of the company, and the Commission must keep a register of all those persons declared delinquent or on probation.

A director may also face civil claims and potential criminal liability.

Grounds for Probation

- Was present at a meeting and failed to vote against a resolution despite the inability of the company to satisfy the solvency and liquidity test
- Acted in a manner materially inconsistent with the duties of a director
- Acted in or supported a decision of the company to act in a manner that was oppressive or unfairly prejudicial
- Within ten years after the effective date (1 May 2011), was a director of more than one company or a managing member of more than one close corporation (concurrently, sequentially or at unrelated times), and during that time two or more of those companies or close corporations failed to fully pay all of their creditors or meet all their obligations (except under a business rescue plan resulting from a board resolution or a compromise with creditors).

Grounds for Delinquency

- Acted as a director or prescribed officer whilst ineligible or disqualified by the Act or by the Close Corporations Act
- Acted as a director in a manner that contravened a probation order

- Grossly abused the position of director
- Took personal advantage of information or an opportunity, or intentionally or by gross negligence inflicted harm on the company or a subsidiary of the company
- Acted in a manner which reflects “wilful misconduct” or a “breach of trust” – (unauthorised acts, reckless trading or fraud)
- Was repeatedly subject to a compliance notice or similar enforcement mechanism
- Was personally convicted, at least twice, of an offence or subjected to an administrative fine or penalty in terms of any legislation
- Within a period of five years, acted as a director of one or more companies or was a managing member of one or more close corporations (CC’s), or controlled or participated in the control of a juristic person (irrespective of whether concurrently, sequentially or at unrelated times) that was convicted of an offence or subjected to an administrative fine or similar penalty in terms of any legislation.

All references to director apply equally to members of CC’s who are participating in its management regarding probation and delinquency, and all references to a company applies equally to CC’s.

Effect of Delinquency or a Probation Order

The effect of an order of delinquency is that a person is disqualified from being a director of a company. The order may be conditional and subsist for seven years or longer, as determined by the court. Under certain circumstances the order may be unconditional and subsist for the lifetime of the delinquent director.

A person who has been placed under probation may not serve as a director, except to the extent permitted by the order of probation. The probation order may be subject to any conditions the court considers appropriate and generally subsists for up to five years.

A court may order as a condition applicable to the declaration that the person undertake a designated program of remedial education relevant to the conduct of a director and/or do community service and/or pay compensation to any person adversely affected by his conduct as a director/member (to the extent that such a victim does not otherwise have a legal basis to claim compensation).

Application to Suspend or Set Aside a Delinquency or Probation Order

Where a director has been declared delinquent for consenting to serve as a director or for acting in the capacity of a director while ineligible or disqualified, or on account of contravening a probation order there is no relief, the declaration of delinquency subsists for his lifetime and it may not be suspended or set aside.

However, in other instances, three years after the order of delinquency is made, the delinquent director may apply to court to suspend the order, and substitute an order of probation (with or without conditions).

If the order of delinquency is suspended, the court may, on application, set it aside after two years of suspension.

A person subject to an order of probation may apply to court to set aside the order at any time two years after it is made.

LIABILITY OF DIRECTORS

Generally, the directors are not personally liable for the debts of the company.

In a personal liability company (incorporated), the directors and past directors are jointly and severally liable together with the company for the debts and liabilities of the company that were contracted during their respective terms of office.

Directors may be exposed to personal liability in the event that they do not discharge their duties properly.

When a company becomes financially distressed or is trading in insolvent circumstances, it is the duty of directors to take legal and financial advice and if necessary place their company into either business rescue proceedings or into liquidation, or to cease trading.

Should the company continue to incur debts, where in the opinion of a reasonable businessman, there would be no reasonable prospect of creditors receiving payment when due, it could be inferred that the company is being carried on recklessly or negligently, and the provisions of Section 22 may come into play.

The Act sets out the circumstances in which a director can be held liable for loss, damages or costs of the company, incur civil liability to shareholders and third parties and/or criminal sanctions.

Criminal Liability

The Act aims to de-criminalise sanctions where possible and rather to enforce company law administratively via appropriate bodies.

There are very few remaining offences – only those arising out of a refusal to respond to a summons, to give evidence and perjury.

In addition, in order to improve corporate accountability, the Act (Section 216) states that it will be an offence, punishable by a fine or up to ten year's imprisonment (or both) for a director who:

- Commits a breach of confidence
- Makes false statements, or participates in reckless conduct and non-compliance
- Is party to the falsification of any accounting records of a company
- Knowingly, and with a fraudulent purpose provides false or misleading information in any circumstances required by the Act
- Knowingly is party to an act or omission by a company calculated to defraud a creditor or employee of the company, or a holder of the company's securities or with another fraudulent purpose
- Is a party to the preparation, approval, dissemination or publication of a prospectus or a written statement contemplated in Section 101, that contains an untrue statement as defined and described in Section 95.

Any such offences must be referred by the Commission to the National Prosecuting Authority (NPA) for trial in the Magistrate's Court.

It is also an offence to fail to satisfy a compliance notice issued in terms of this Act, however should an administrative fine have been imposed by a court in respect of the non-compliance, then no person can also be prosecuted for such an offence.

In terms of Section 214(4), if a company contravenes Section 99(1) (2), (3), (4), (5), (8) or (9) (which deals with general restrictions on offers to the public), then every director or prescribed officer of the company who knowingly was a party to the contravention is guilty of an offence and liable to any other person for any losses sustained as a consequence of that contravention.

Such offences may also lead to directors also incurring civil liability.

All other offences may lead to a fine or up to twelve months imprisonment (or both).

Civil Liability

A Breach of Fiduciary Duty

A director is generally liable for a breach of fiduciary duty (in accordance with the common law principles relating thereto), for any losses damages or cost sustained by the company from breach of Sections 75, 76(2), 76(3)(a) or (b) (relating to non-disclosure of personal financial interests, misusing the position as director to gain personal advantage, or not acting in good faith and for proper purpose or in the best interests of the company).

Delict

A director is generally liable, in accordance with the principles of common law relating to delict for any loss, damages or costs sustained by the company as a consequence of any breach by the director of a duty contemplated in Section 76(3)(c) (acting with the degree of care, skill and diligence that may be reasonably expected of such a person), or a duty as set out per the MOI, or any provision of the Act not otherwise mentioned in Section 77.

The code of conduct for directors as set out in Section 76 of the Act is extended to members of committees even if the member is not a director on the board, and thus the consequent liability relating to the transgression of any such duties will also apply to members of the committees.

Codified Liability

Section 77 codifies liability for directors and prescribed officers. It sets out civil liability (delict and breach of fiduciary duty), and then in sub-section 3, sets out specific statutory liabilities.

- Section 77 is applicable to an extended definition of director
- The liability that is incurred in terms of Section 77 is joint and several with any other person who may be held liable for the same act
- Any person with a claim can bring it against all the directors or any one particular director. A single director can therefore be held liable for the totality of damages suffered by a third party as a result of a breach of fiduciary duties
- An action to recover loss, damages or costs may not commence more than three years after the act or omission. **The Companies Second Amendment Bill, 2023 proposes to empower a Court to extend this time period, on good cause shown, on the basis that such extended period may also cover acts or omissions that occurred during the period before the extension.**

Specific Statutory Liability

A director is liable for loss, damages or costs sustained by the company as a direct or indirect consequence of the director having:

- **Section 77(3)(a)** – acted in the name of the company despite knowing he did not have the authority to do so
- **Section 77(3)(b)** – acquiescing to carrying on of company's business despite knowing that it was being conducted recklessly
- **Section 77(3)(c)** – being party to an act or omission by the company despite knowing that it was calculated to defraud a creditor, employee or shareholder, or had another fraudulent purpose

- **Section 77(3)(d)** – for signing or consenting to the publication of any financial statements that were false or misleading in a material respect or a prospectus which contained an untrue statement, despite knowing that the statement was false, misleading or untrue (conditions apply)
- **Section 77(3)(e)** being present at a meeting of the board, or participating in the making of a decision in terms of Section 74, and failing to vote against:
  - the issuing of unauthorised shares, despite knowing that those shares had not been authorised in accordance with Section 36
  - the issuing of authorised securities despite knowing that such issue was inconsistent with Section 41
  - the provision of financial assistance to any person contemplated in Section 44 for the acquisition of securities of the company despite knowing that this financial assistance was inconsistent with Section 44 or the company's MOI
  - the provision of financial assistance to a director despite knowing that this financial assistance was inconsistent with the Act or the company's MOI
  - a resolution approving a distribution despite knowing that the distribution was contrary to Section 46, subject to sub-section (4)
  - the acquisition by the company of any of its shares or the shares of its holding company despite knowing that the acquisition was contrary to Section 46 or Section 48
  - an allotment by the company despite knowing that the allotment was contrary to any provision of Chapter 4 of the Act.
  - for granting unauthorised options
  - for agreeing to the granting of financial assistance to directors or other parties, when not in accordance with requirements (Section 45)
  - for knowingly failing to vote against a share purchase which did not accord with legislative requirements
  - **Section 46:** A director will only be liable for failing to vote against a distribution if, immediately after so voting, the company failed to satisfy the solvency and liquidity test and this was reasonably predictable.

Directors liability under POPIA

- Non-compliance with the provisions of POPIA by a Responsible Party could lead to the data subject lodging a complaint with the Information Regulator, which would lead to an investigation and possible Administrative Fine. Examples of non-compliance by a Responsible Party are a breach of any of the 8 lawful conditions for processing, non compliance with certain sections of POPIA (for example Section 22 which requires that the Responsible Party inform the Information Regulator of a data breach), sending unsolicited direct marketing, and sharing information cross-border where it is not allowed.

- The Responsible Party may also be found to have committed a criminal offence in certain circumstances. Chapter 11 of POPIA lists the offences as: obstruction of information, obstruction of the execution of a warrant, failure to comply with an Enforcement or Information Notice issued by the Information Regulator, unlawful acts by Responsible Party with an account number, unlawful acts by third parties in connection with an account number, breach of confidentiality (breach of Section 54 – where a person acting on behalf of or under the direction of the Information Regulator must keep all personal information that he is privy to during the course of his duties, as confidential), and offences by witnesses (e.g. failure to attend and give evidence when summoned to do so).

Penalties: Any person convicted of an offence in terms of POPIA (as listed above), will be liable to penalties which range from R1 million and/or 1 year imprisonment to R10 million and/or 10 year's imprisonment – depending on the severity of the offence.

Administrative fines of up to R10 million may be imposed by the Information Regulator on the Responsible Party – as set out in an infringement notice.

A Responsible Party may also be subject to a **civil claim for damages** brought by a data subject (or the Information Regulator at the request of the data subject), in terms of Section 99, as well as reputational damage. Section 99 applies irrespective of whether there is intent or negligence on the part of the Responsible Party.

Directors may also be declared unfit to serve as a director in terms of the Companies Act (no. 71 of 2008). Failure to execute the required POPIA risk assessments and policies by a Responsible Party (which ultimately becomes the responsibility of the board) can result in an Administrative fine and potential liability claims against directors and officers.

REMEDIES AND ENFORCEMENT

The Act provides for statutory remedies and regulatory bodies, using a system of administrative enforcement in place of criminal sanctions to ensure compliance.

Minority shareholders and other stakeholders, such as employees have protection, powers and remedies under the Act, including the ability to bring class actions.

Any stakeholder, including a shareholder, has free recourse to lay a complaint against a director or company with the Companies Tribunal.

Sections 20 and 218 of the Act enable shareholders to sue directors/officers for civil damages, or any losses suffered by them (civil liability).

Restraining Orders

Section 20(4): One or more shareholders, directors or prescribed officers or trade union representing employees of the company may apply to the High Court for an appropriate order to restrain a company from doing anything inconsistent with the Act.

Section 20(5): One or more shareholders or directors or prescribed officers may apply to the High Court for an appropriate order to restrain the company or its directors from doing anything inconsistent with any of the limits, restrictions or qualifications of the MOI, (without prejudice to any rights to damages of a third party who obtained such rights in good faith and did not have actual knowledge of the limit, restriction or qualification).

Section 20(6) provides a specific remedy for shareholders – each shareholder of a company has a claim for damages against any person, including a director, who intentionally, fraudulently or due to gross negligence causes the company to do anything inconsistent with the Act or the MOI, unless the action has been ratified by shareholders by special resolution.

Section 218(2) provides a general remedy to any person, (including an employee or shareholder) to bring a civil action against a person who contravenes the Act for any loss or damages suffered by that person as a result of that contravention.

Section 81(1)(d) gives significant power to minority shareholders stating that the company, one or more directors or shareholders may apply to court for the winding-up of a solvent company on the grounds that either:

- The directors are deadlocked in the management of the company and the shareholders are unable to break the deadlock which is causing irreparable harm to the company or
- The shareholders are deadlocked in voting power and have failed for a period that includes at least two consecutive AGM dates, to elect successors to directors whose terms have expired, or
- It is otherwise just and equitable for the company to be wound up.

Section 81(1)(e) provides that one or more shareholders can apply to wind up a solvent company if the directors or prescribed officers or other persons in control of the company are acting in a manner that is fraudulent, or illegal or that the company's assets are being misapplied or wasted.

Section 163 – a shareholder or director may apply to court for relief if the powers of a director or prescribed officer or a person related to the company are being exercised in a manner that is oppressive, unfairly prejudicial or unfairly disregards the interests of the applicant.

Section 165 allows for a general derivative notice whereby an aggrieved party, such as a shareholder, director or even a representative of a trade union is able to send a notice to the company to enforce its rights and to demand to protect its or the company's legal interests.

The Act also provides a right for dissenting shareholders in a fundamental transaction to have their shares appraised and to be compensated for the fair value of those shares.

Right to Seek Specific Remedies

Application can be made to Court in matters such as protecting the rights of security holders, declaring a director delinquent or on probation, or relief from oppressive or prejudicial conduct.

Application can be made to Companies Tribunal or Human Rights Commission in disputes concerning reservation or registration of company names.

Voluntary Resolution of Disputes – filing of complaint to Company Tribunal or Alternative Dispute Resolution Agent.

Complaints to Commission or Take-Over Regulation Panel – a person can file a complaint with the Panel (relating to fundamental transactions, takeovers and offers) or Commission (regarding any other matter arising in terms of the Act) who may direct that an investigation is conducted.

Following an investigation into a complaint, the Commission or Panel may:

- End the matter;
- Urge the parties to attempt the voluntary alternative resolution of their dispute;
- Advise the complainants of any right they may have to seek a remedy in court;
- Commence proceedings in a court on behalf of a complainant, if the complainant so requests;
- Refer the matter to another regulator if there is a possibility that the matter falls with their jurisdiction; or
- Issue a compliance notice, but only in respect of a matter for which the complainant does not otherwise have a remedy in a court.

The Commission or Panel may also apply for leave to intervene in any court proceedings arising in terms of the Act in order to represent an interest that would not otherwise be represented.

A compliance order may be issued against a company or against an individual if the individual was implicated in the contravention of the Act.

Administrative Fines

A court, on application by the Commission or Panel, may impose an administrative fine for failure to obey a compliance notice. The fine may not exceed the greater of:

- 10% of the respondent's turnover for the period during which the company failed to comply with the compliance notice, and
- The maximum prescribed in terms of sub-section (5). Regulation 163 prescribes this as R1 million.

Under certain circumstances, the court may refer the matter to the National Prosecuting Authority.

In the case of a company that has failed to comply, been fined, and continues to contravene the Act, the Commission or Panel may apply to a court for an order dissolving the company.

A derivative action is when the shareholders sue a third party (such as a director or officer) on behalf of the company.

A class action is when a group of people take a person (such as a director or officer) to court.

Section 157 of the Act simplifies the application for a class action which can be made to a Court, the Companies Tribunal, the Take-Over Panel, or the Commission.

For example: A class action complaint from outside investors stating that directors failed to disclose material information, which could have indicated that the company would eventually be liquidated.

The Act does provide some form of relief to directors – by way of Indemnification and Insurance for directors.

In terms of the Act, a possible defence known as 'the business judgement rule' is available to a director who asserts that he had no financial conflict, was reasonably informed and made a rational business decision in the circumstances.

ACTIONS REQUIRING SHAREHOLDER APPROVAL

The directors are ultimately responsible to the shareholders. They act as their "agents", and are required at all times to act in the shareholder's best interests. The doctrine of separation of powers, whereby the directors are ultimately responsible and answerable to shareholders, has always been entrenched in South African law. This doctrine ensures that the correct checks and balances on power and control are upheld in a company. The Act does provide for shareholder approval for certain transactions carried out by directors, including (but not limited to):

- Disposal of greater part of assets or undertaking
- Amendment of MOI
- The issue of shares in certain cases
- Making additional rule/s permanent.

The company's MOI can also list additional scenarios when shareholder approval will be required for director actions. As long as the MOI is consistent with the Act, a company may tailor its MOI in such a way as to limit directors actions substantially by increasing shareholder activism.

General Ratification by Shareholders of Directors' Actions

Section 20 (2) – (3): The shareholders may ratify by special resolution any action by a company or the directors that is inconsistent with any limitations, restrictions or qualifications listed in the MOI of the company. The action of the director cannot be ratified if it is in contravention of the Act. A director must act within the powers and authority conferred on him by the law, the MOI, the shareholders, and fellow directors. Where a director acts beyond his legal power or authority, the shareholders may ratify the transaction retrospectively by special resolution. Alternatively, the shareholders may elect to repudiate the action, whereupon the erring director may be held personally liable to the company for any loss suffered by the company as a result thereof.

The Act sets out a comprehensive list of actions requiring authorisation by special resolution of shareholders in Section 65(11).

RING-FENCED AND PERSONAL LIABILITY COMPANIES

The Act provides that the public will not deemed to be acquainted with or have knowledge of any provision of a company's MOI merely because it is filed with the Commission or is available for inspection at the company's office, except for the following two specific scenarios:

A company's MOI may restrict the purpose, objectives or powers of the company; and may contain additional requirements or even prohibit the amendment of these restrictions or limitations. In such a case, the company is required to have the word **Ring-Fenced** or RF subjoined to its name, and its Notice of Incorporation or subsequent Notice of Amendment is required to draw attention to the relevant provision and its location in the MOI. All persons or the public are then regarded as having notice and knowledge of such a provision in the company's MOI.

In regard to a **Personal Liability Company**, all persons are also regarded as having notice and knowledge of the fact that it is a personal liability company (Incorporated). This means that the directors and past directors are jointly and severally liable, together with the company, for any debts and liabilities of the company as are or were contracted during their respective periods of office.

INDEMNIFICATION AND DIRECTOR'S INSURANCE

Section 78 applies to the extended definition of a director.

Section 78(2): Director may not be Relieved of Liability

Subject to sub-sections (4) to (6), any provision of any agreement, the MOI, or rules of the company, or resolution adopted by a company, whether express or implied, is void to the extent that it directly or indirectly purports to relieve a director of a duty contemplated in Section 75 or 76, or liability contemplated in Section 77, or which negates, limits or restricts any legal consequences arising from an act or omission that constitutes willful misconduct or willful breach of trust on the part of the director.

Section 78(3): Fines

Subject to sub-section (3A), a company may not directly or indirectly pay any fine that may be imposed on a director of the company, or on a director of a related company, as a consequence of that director having been convicted of an offence, unless the conviction was based on strict liability.

Section 78(3A): Sub-section (3) does not apply to a private or personal liability company if a single individual is the sole shareholder and sole director of that company, or two or more related individuals are the only shareholders of that company, and there are no directors other than one or more of those individuals.

Section 78(4): Indemnity of Directors/Company may Advance Legal Expenses

Except to the extent that a company's MOI provides otherwise, the company:

- May advance expenses to a director to defend litigation in any proceedings arising out of his service to the company
- May directly or indirectly indemnify the director for such expenses, irrespective of whether it has advanced those expenses, if the proceedings are abandoned or exculpate the director or arise in respect of any liability for which the company may indemnify the director.

Section 78(6): The company may not indemnify a director in respect of any liability resulting from the director's failure to act in good faith and for a proper purpose or in the best interests of the company or with the degree of care, skill and diligence required, willful misconduct or willful breach of trust, or an offence or fine in terms of national legislation.

Section 78(7): Directors' Insurance

Except to the extent that the MOI of a company provides otherwise, a company may purchase insurance to protect:

- A director against any liability or expenses for which the company is permitted to indemnify a director
- The company against any contingency including, but not limited to:
  - any expenses:
    - that the company is permitted to advance in accordance with sub-section (4)(a), or
    - for which the company is permitted to indemnify a director in accordance with sub-section (4)(b), or
  - any liability for which the company is permitted to indemnify a director in accordance with sub-section (5).

In terms of Section 78 of the Act, there are two types of insurance available:

Insurance where the director is the insured: The director himself is covered should he incur liability.

Insurance where the company is the insured: The company is covered in case of loss resulting from a director's breach of duty towards the company, or in case of the company being sued by a third party for the acts of a director.

BUSINESS RESCUE

Directors are duty bound to constantly monitor the company's financial position, to determine whether voluntary business rescue proceedings need to be initiated.

Failure to implement business rescue proceedings could result in the director being charged with reckless trading and be exposed to personal liability.

It is incumbent upon directors to ensure that they place their companies into either business rescue or liquidation, or to cease trading, when the warning signs become evident.

Directors should be aware of the practicalities of business rescue, and the duties and powers of the business rescue practitioner.

Where the director has reasonable grounds to believe that:

- The company is financially distressed, and
- There is a reasonable prospect of rescuing the company business rescue proceedings must be initiated by the directors by board resolution.

Such resolution must be filed with the Commission before it is of any force or effect, and may not be adopted if liquidation proceedings have already been initiated against the company.

If a company is financially distressed and directors decide not to place it into business rescue, the directors will be under a statutory obligation to deliver a written notice to each affected person, confirming that the company is financially distressed and is not being placed into business rescue and providing reasons for this.

The Amendment Bill proposes to amend Sections 135 and 145 by stating that any amounts due by a company under business rescue to a landlord for rent or services will be regarded as "post commencement financing" and the landlord will have a voting interest in the business rescue proceedings to the extent of its claim. Post commencement finance, whether secured or unsecured, enjoys preference over unsecured creditors.

The 'Business Rescue' clause in the Companies Act 71 of 2008, also applies to CC's.

DEFENCES AND RELIEF FOR DIRECTORS

Ignorance of the law is no excuse, and will not hold up as a defence for directors.

The Business Judgement Rule

Sections 76(4)(b) and 76(5): The Business Judgement Rule is regarded as the main form of protection for directors. It is based on the idea that a director who has relied on the professional opinions of accountants, attorneys, and other business advisors that influenced their business decisions (and which turned out not to be in the best interests of the Company), may raise this as a defence against liability. In other words, he will not be held liable for bad outcomes as long as such decisions were made in good faith, with due diligence and on an informed basis, and which the director thought were in the best interests of the company.

In theory, directors should be held liable for decisions which have an adverse effect on a company. However, certain situations may arise where a director would be unfairly prejudiced by the provisions of 'Standards of Directors' Conduct'.

The business judgement rule can only be used if all of the requirements of the Act are met. Where a director ignores relevant information or advice given to him and conducts business in bad faith, the business judgment rule will not apply. This defence is not available to members of CC's.

ROLE OF THE PUBLIC OFFICER IN THE COMPANY

- The Income Tax Act requires that all companies have to appoint a public officer with the South African Revenue Service (SARS).
- To qualify as a public officer, a person has to be a natural person who is resident in South Africa, is approved by SARS, and has a tax number. It is usually one of the directors of the company or members of a CC who is appointed, or it could be a senior official in the company.
- The appointment must be made within one month of the company commencing business activities, or acquiring an office in South Africa. The appointment is not registered with the Commission, but with SARS.

- Where there is a change of public officer, the company must notify SARS within 14 days of the change taking effect. Failure to do so may result in hefty penalties, and SARS will, by default, designate a director, member, or company secretary as the public officer. In addition, the non-appointment of a public officer does not exonerate the company from complying with the provisions of the Income Tax Act.
- The role of the public officer is of extreme importance in a company. He is the "face of the company" for taxation purposes. All actions carried out in his or her capacity as a public officer are deemed to have been done by the company.
- His duties are to attend to the tax affairs of the company, including (but not limited to) attending to the submission of annual and provisional tax returns, registration of the company as taxpayer and employer, submission of employee tax, VAT returns, monthly declarations, and acceptance of notices served against the company. He should be empowered by the company to properly fulfill these duties.
- By signing returns, the public officer declares that all the information provided therein is true. Where the information is found to be false, action may be taken against the public officer in his personal capacity.
- Companies and directors should be aware of the requirement to appoint a public officer, and the duties and risk imposed upon the person taking up such a position.

NON-PROFIT COMPANIES (NPC'S)

Section 1 of the Act defines a NPC as a company incorporated for a public benefit object, or an object relating to one or more cultural or social activities, or communal or group interests, and where the income and property are not distributable to its incorporators, members, directors, officers or related persons, except in regards to:

- Reasonable remuneration
- Reimbursement for expenses incurred to advance the object of the company
- Payment in terms of a bona fide agreement
- Payment in respect of rights of a person, which rights are administered by the company, or
- Legal obligations of the company.

Formation of a NPC

- A NPC is required to be formally registered with Commission, with a MOI which specifically states that it is incorporated for a public benefit or an object relating to one or more cultural or social activities, or communal or group interests.
- It must be incorporated by at least 3 persons acting together, an organ of state or by a legal entity, and must have a minimum of 3 directors.
- It can be formed without members or it can have voting or non-voting members, and membership can be held by juristic persons, including profit companies.
- It is a separate legal entity distinct from its members or directors, and any assets are registered in the name of the NPC.

Section 10 and Schedule 1 of the Act

- A special set of fundamental rules for NPC's is set out in Section 10 and Schedule 1 of the Act, which sets out on-going regulatory, governance and accountability requirements. These rules provide clarity to both those working within the organisation and to those stakeholders outside the organisation.

Financial Statements and Audits of a NPC

- Financial statements must be prepared within six months of the financial year end
- There is no audit required unless the NPC passes a public interest score, or meets any other requirements set out in Regulation 28 of the Act, or elects for a voluntary audit
- An annual return must be filed within 30 business days after the anniversary of the date of incorporation, and if the NPC is required to be audited, the annual return must be accompanied by the company's AFS (in iXBRL format), and a compliance checklist, where applicable. A Beneficial Ownership Register is required to be filed together with the annual return
- Company secretary not mandatory and neither is an audit committee
- An AGM is only required if it is stated in the NPC's MOI
- It is not required to, but may register as a Non-Profit Organisation (NPO) in terms of the Non-Profit Organisation Act. In doing so, it may become eligible for certain government benefits, and acquire the status of a NPO registered entity
- Regulation 25(4) states that NPC's must maintain adequate records of all revenue received from donations, grants and members' fees or in terms of funding contracts or arrangements with any party.

IMPORTANT LAWS AFFECTING BUSINESSES IN SOUTH AFRICA

Knowledge of and compliance with both the common law and legislation is essential for good governance. Not only do directors need to make sure that they are maintaining the highest standard in respect of their duties, but they must also ensure that they are complying with the administrative provisions of other legislation, such as the Income Tax Act. In addition, it is important that directors have a working knowledge of the guidance provided in King IV™.

While the list below is not exhaustive, important legislation (and amendments), including those expanded upon in the Table below, include:

- The Companies Act
- The Close Corporations Act
- The South African Income Tax Act
- The Labour Relations Act
- The Occupational Health and Safety Act
- The Compensation for Occupational Injuries and Diseases Act
- The Employment Equity Act
- The General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Act
- The Promotion of Access to Information Act
- The Protection of Personal Information Act
- The Financial Intelligence Centre Act
- The Trade Marks Act
- The Business Names Act
- The Consumer Protection Act
- The Competition Act
- The Electronic Communications and Transactions Act
- The National Credit Act
- The Basic Conditions of Employment Act
- The Broad-Based Black Economic Empowerment Act
- The Securities Transfer Tax Act
- The VAT Act
- The Skills Development Act
- The Unemployment Insurance Act
- The Insolvency Act
- Industry or sector specific legislation
- Listed companies must adhere to JSE securities exchange regulations.

Directors need to continually be aware of amendments and changes to legislation affecting a company.

Important Definitions in the Act

Accounting Records means information in written or electronic form concerning the financial affairs of a company as required in terms of this Act, including but not limited to, purchase and sales records, general and subsidiary ledgers and other documents and books used in the preparation of financial statements.

Related and inter-related persons, and control: A related person is: (a) an individual is related to another individual if they (i) are married, or live together in a relationship similar to a marriage; or (ii) are separated by no more than two degrees of natural or adopted consanguinity or affinity. It also includes: (b) an individual who is related to a juristic person if the individual directly or indirectly controls the juristic person ('control is defined in Section 2(2) of the Act; and (c) a juristic person is related to another juristic person if (i) either of them directly or indirectly controls the other, or the business of the other or (ii) either is a subsidiary of the other; or (iii) a person directly or indirectly controls each of them, or the business of each of them.

Securities means any shares, debentures or other instruments irrespective of their form or title issued or authorised to be issued by a profit company. **The Amendment Bill proposes amending this definition by deleting the words "or other instruments."**

Shareholder subject to Section 57(1) means the holder of a share issued by a company and who is entered as such in the certificated or uncertificated securities register as the case may be.

The General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Act, 2022 has amended the Companies Act, and has introduced two new definitions as follows:

Beneficial Owner in respect of a company, means an individual who directly or indirectly ultimately owns that company or exercises effective control of that company, including through- (a) the holding of beneficial interests in the securities of that company; (b) the exercise of, or control of the exercise of the voting rights associated with securities of that company; (c) the exercise of, or control of the exercise of the right to appoint or remove members of the board of directors of that company; (d) the holding of beneficial interests in the securities, or the ability to exercise control, including through a chain of ownership or control, of a holding company of that company; (e) the ability to exercise control, including through a chain of ownership or control, of (i) a juristic person other than a holding company of that company (ii) a body of persons corporate or unincorporate (iii) a person acting on behalf of a partnership (iv) a person acting in pursuance of the provisions of a trust agreement; (f) the ability to otherwise materially influence the management of that company.

Affected company means a regulated company as set out in section 117(1)(i) and a private company that is controlled by or a subsidiary of a regulated company as a result of any circumstances contemplated in section 2(2)(a) or 3(1)(a)

A regulated company means a company to which Part B and Part C of the Companies Act and Takeover Regulations apply, as determined in accordance with section 118(1) and (2) – in other words, a public company, and a state-owned company. A private company will be deemed to be a regulated company if it meets one of two criteria – namely: (1) if the percentage of the issued securities have been transferred (other than by transfer between or among related or inter-related persons) within a 2 year period immediately before the date of a particular affected transaction or offer that exceeds the prescribed percentage of 10% (prescribed in terms of Regulation 91), OR (2) if the MOI of a private profit company expressly provides that it is a regulated company irrespective of whether the criteria in (1) apply or not. An example of an affected transaction is e.g. the disposal of all or the greater part of the assets of a business. Section 117(1)(c) sets out the definition of what an 'affected transaction' is in more detail.

Summary of Proposed Companies Act Amendments	
Insert certain definitions and amend the definition of "securities"	Provide for circumstances under which a private company will be a regulated company
Clarify when a Notice of Amendment of a MOI takes effect	Provide for the publication of the application for exemption from the requirement to appoint a social and ethics committee
Provide for CIPC to publish, as prescribed, the notice of the location of a company's records	Deal with the composition of a social and ethics committee
Differentiate where the right to gain access to companies' records may be limited	Provide for a social and ethics committee report and remuneration report to also be presented at an AGM of a public company
Provide for the preparation, presentation and voting on companies' remuneration policy & directors' remuneration report	Provide for the preparation by the social and ethics committee of a social and ethics committee report as prescribed to be presented at the AGM or shareholders meeting (as the case may be)
Provide for the filing of a copy of the annual financial statements	Extend the definition of an employee share scheme to include situations where there are purchases of shares of a company
Empower the court to validate the irregular creation, allotment or issue of shares	Provide for post-commencement finance for unpaid amounts that are due to the landlord during business rescue proceedings

Clarify that shares which are not fully paid are to be transferred to a stakeholder and dealt with in terms of a stakeholder agreement	Provide, in respect of a private company, personal liability company or non-profit company, for the appointment of an auditor at a shareholder's meeting if such appointment is a requirement in terms of the Act
Exclude the subsidiary company from the requirements relating to financial assistance	Provide for CIPC to substitute a contested name of a company under certain circumstances
Provide for instances where a special resolution is required for the acquisition by a company of its own shares	To provide for the determination by the Minister, in consultation with the Panel, of financial thresholds for purposes of identifying the private companies to which Parts B and C of Chapter 5 of the Act apply
Provide for pronouncements that may be issued by the Financial Reporting Standards Council	Provide for mediation, conciliation and arbitration by the Companies Tribunal only in respect of relief or complaints in terms of the Act; to further provide for the operation and governance of the Companies Tribunal

Directors' Checklist

- Appointment of Public Officer, and Information Officer
- Submission of CIPC annual returns, together with the company's beneficial ownership register, annual financial statements and compliance checklist (where applicable)
- Updating the register of directors and members
- Updating of the securities register
- Keeping financial and accounting records in the prescribed form
- Ensuring that annual financial statements are produced every year within 6 months after the end of their financial year
- Displaying the business name correctly on all documents
- Ensuring that all statutory submissions and payments to SARS are made timeously (VAT, PAYE, UIF etc.)
- Monitor the company's financial position and ensure that the company meets the solvency and liquidity test, where applicable
- Directors knowledge of legislation and compliance requirements

The checklist is intended as a "quick" checklist for directors, and does not purport to include all of the directors' duties and responsibilities contained in the Act.