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Audit and Regulatory
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The new Companies Act
Responsibility of directors vs the role of the Regulator

CIPC no longer required to approve company actions and documentation

The new Companies Act, 2008 (the Act) has now been effective for almost two years, and despite much anxiety and uneasiness about the quality of the legislation prior to its implementation, the transition from the old to the new Act can be described as (almost) smooth.

Responsibility of directors

A key feature of the new Act is that it clearly emphasises the responsibility and accountability of directors. By accepting their appointment to the position, the directors indicate that they will perform their duties to a certain standard, and it is a reasonable assumption of the shareholders that every individual director will apply his or her particular skills, experience and intelligence to the advantage of the company.

The Act codifies the standard of directors' conduct in section 76. The standard sets the bar very high for directors, with personal liability where the company suffers loss or damage as a result of the director's conduct not meeting the prescribed standard. The intention of the legislature seems to be to encourage directors to act honestly and to bear responsibility for their actions - directors should be accountable to shareholders and other stakeholders for their decisions and their actions. With the standard set so high, the unintended consequence may be that directors would not be prepared to take difficult decisions or expose the company to risk. Since calculated risk taking and risk exposure form an integral part of any business, the Act includes a number of provisions to ensure that directors are allowed to act without constant fear of personal exposure to liability claims. In this regard, the Act has codified the business judgement rule[1], and provides for the indemnification of directors under certain circumstances, as well as the possibility to insure the company and its directors against liability claims in certain circumstances.

In addition to the codified standard of directors' conduct, the Act also provides for personal liability in instances where anybody suffered loss or damage as a direct result of non-compliance with the provisions of the Act (see section 218(2)). The intention of the legislature here seems to be the decriminalisation of corporate law, and to move the onus for ensuring compliance to the directors individually, and to the company. The regulator and the State will only be required to ensure compliance in very specific instances (i.e. where the Act provides for the Companies and Intellectual property Commission (CIPC) to issue a compliance notice, or where non-compliance is specifically classified as an offence). In every other instance the provisions of the Act may be 'enforced' by means of civil action by the stakeholders of the company (shareholders, employees, creditors, members of the community, etc.).

Revised role of the CIPC

The Act specifically reduces the company's reliance on the regulator, the CIPC. Although companies still have to comply with an administrative process to inform the CIPC of its decisions (for example the appointment of directors, changing of auditors, change of year end, amendment of the Memorandum of Incorporation), none of

[1] In terms of the business judgment rule a director will have met the required standard if he or she has taken reasonable diligent steps to become informed about the subject matter, does not have a personal financial interest (or declared such a conflicting interest) and the director had a rational basis to believe that the decision was in the best interest of the company.

these decisions are dependent on the approval of the CIPC. In most instances, the company's decision is effective immediately and it merely needs to inform the CIPC of decisions or actions. However, in a few instances the effect of the decision is delayed until the necessary notices have been 'filed' with the CIPC.

Companies are often required to "file" a notice with the CIPC. Section 1 provides that "file", when used as a verb, means to <u>deliver</u> a document to the Commission in the manner and form, if any, prescribed for that document. If one looks at the Regulations, (Regulation 7 and Annexure 3), it clearly indicates that when a document is "delivered" to the CIPC, the date and time of delivery is determined as follows:

Method of delivery	Time of deemed delivery
By entering the required information in an electronic representation of that form on the internet website, if any, maintained by the Commission, if the document is a prescribed form; or	On the date and at the time recorded Commission's computer system, as verified by fax reply to the sender of the information.
By transmitting the document as a separate file attached to an electronic mail message addressed to the Commission; or	On the date and at the time recorded by the Commission's computer system, unless, within 1 business day after that date, the Commission advises the sender that the file is unreadable.
By sending a computer disk containing the document in electronic form, by registered post addressed to the Commission; or	On the date and at the time of delivery of the registered post to the Commission, as recorded by the post office, unless, within 1 business day after that date, the Commission advises the sender that the disk is unreadable.
By handing the document, or a computer disk containing the document in electronic form, to the Commission, or a responsible employee who is apparently in charge of the Commission's office.	On the date and at the time noted in a receipt issued by the Commission unless, the document is on a computer disk, and, within 1 business day after that date, the Commission advises the sender that the disk is unreadable.

It should be clear from the table above that "file" and "deliver" is defined so as to simply mean that a document must be submitted to the CIPC. There is no subsequent requirement for the CIPC to check or approve the particular action. Of course, the company needs to ensure that the particular filing complies with the provisions of the Act (relevant form completed correctly, required supporting documents attached, and the prescribed fee paid). Where the company fails to comply with the provisions of the Act, the company and its directors may be liable.

In order to illustrate the above conclusion, the provisions of the Act with respect to a few company actions will be investigated. To date, the CIPC still adheres to the approach followed by the old CIPRO, in that they regard it as a core function to check and approve all documents filed with them, and then inform the company as to whether or not the particular company action is approved or rejected. This approach is outdated, and not provided for in the new Act. On the contrary, section 6(8) and (9) clearly provides for a 'substance over form' approach, and indicates that even if there is a deviation from the design or content of a prescribed form, or in the manner of delivery, it does not invalidate the action taken.

Appointment of directors

In terms of section 66(7):

> "A person becomes entitled to serve as a director of a company when that person
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> *(a)* has been <u>appointed or elected</u> in accordance with this Part, or holds an office, title, designation or similar status entitling that person to be an *ex officio* director of the company; and
> *(b)* has delivered to the company a <u>written consent</u> to serve as its director."

In turn, section 70(6) requires every company to file a notice (CoR39) within 10 business days after a person becomes or ceases to be a director of the company.

Thus, in terms of the Act the appointment of a director is effective as soon as he/she is appointed or elected, and has confirmed in writing that they are prepared to accept the appointment to the board. The CIPC has no role to play in the appointment of directors. The filing of the relevant notice does not affect the validity or the time of the appointment.

The question arises as to what would be the consequence if the CIPC fails to update its register of directors, delays the updating of the register, or includes incorrect information in the register?

Despite the requirement to file a notice of the appointment or removal of a director to the CIPC, the company is obliged to keep a record of its directors (section 24(3)(b) and 24(5)). This record may be accessed by any 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. Any other person has a right to inspect or copy the register of directors of a company, upon payment of a prescribed amount. As such one may conclude that the register held by the company should be regarded as the 'official' register of its directors, and it is this register that should be consulted where there is a discrepancy between the company's register and CIPC's register, or where there is confusion or uncertainty as to the identity of the company's directors.

Change of the financial year end

In order to determine the exact date and time on which the financial yearend is changed, one needs to look at the provisions of the Act. Section 27(4) of the Companies Act determines that:

> "The board of a company may change its financial year end at any time, by filing a notice of that change, but—
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> (*a*) it may not do so more than once during any financial year;
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> (*b*) the newly established financial year end must be later than the date on which the notice is filed; and
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> (*c*) the date as changed may not result in a financial year ending more than 15 months after the end of the preceding financial year."

As pointed out above, 'filing' in terms of the new Act simply means that the notice had been received by the CIPC (recorded in the CIPC's computer system, or the date on which registered or other mail is received by the CIPC). The CIPC is not required to approve or vet any decisions or actions of the company. The changing of the company's financial year end will be complete once the relevant notice (CoR25) was received by the CIPC.

Change of auditor

The Act requires certain companies to appoint an auditor (public companies, state owned companies, and any other category of company that meets the requirements set out in the Regulations). The Act provides for the appointment of the auditor by shareholders at the annual general meeting, and where a vacancy exists for the directors to fill the vacancy within 40 business days. Section 85(3) requires the company to file a notice (CoR44) within 10 business days after making the appointment. In addition, the company has to maintain a record of its auditors (section 85(1)). Again, the Act does not link the filing of the relevant notice to the effectiveness of the appointment. However, where an auditor resigns, the Act expressly states that the resignation of the auditor is effective when the notice is filed (section 91(1)). This implies that a resignation letter submitted to the company by the auditor is not sufficient to terminate the appointment of the auditor. In order to complete the action, the company has to file the CoR44. The resignation will only be effective on the date and time when the notice was received (and recorded) by the CIPC.

Amendment of the Memorandum of Incorporation (MOI)

Where a company amends its MOI, it has to file a Notice of Amendment (CoR15.2) within 10 days after such amendment (section 16(7) read with Regulation 15(3)). Where a company amends its MOI by means of a special resolution of shareholders (as provided for in section 16(1)(c)), the amendment will not be effective immediately. This constitutes the one instance where the Act delays the effectiveness of a special resolution of shareholders. Under other circumstances, a special resolution will take effect as soon as the required number of votes is obtained. However, where a special resolution is obtained to amend the MOI, the amendment to a company's Memorandum of Incorporation takes effect on the later of the date on, and time at, which the Notice of Amendment is filed, or the date, if any, set out in the Notice of Amendment (section 16(9)).

Conclusion

The new approach to enforcement of the Act, as illustrated by the examples above is in line with the Government's objectives for reform of our corporate law. The high-level objectives of the new Companies Act (as per a DTI presentation to Cabinet, dated 31 January 2007) were to:

- Reduce regulatory burden for small and medium-sized firms (mostly owner-managed, privately owned)
- Enhance protection of investors through enhanced governance and accountability (esp. public interest companies), minority protection and shareholder recourse
- Create a more flexible environment, without comprising regulatory standards and objectives, to enhance

investment.

The effect of the corporate law reform is clearly that the regulator now regulates with a much lighter touch, and that companies and directors need to bear responsibility for their actions. As a consequence, this new regulatory regime allows companies to take and implement is own decisions much easier and quicker, without having to wait for approval or a go-ahead by the CIPC. In most instances, mere 'filing' and 'delivery' will suffice to ensure compliance with the Act. Where documents are rejected by the CIPC, it does not invalidate the particular company action – it merely implies that the company needs to improve its administrative game. Of course the new approach also points to the need for directors to carefully consider their decisions and actions, and to take into account the wider context and impact of such decisions. The Act clearly made it easier for companies to conduct business and has upped the ante for directors.

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