



The Non-Profit Lawyer

COMPANIES ACT & REGULATIONS - IN OPERATION

By Ricardo Wyngaard

The Companies Act of 2008 (the Act) and Companies Regulations, 2011 (the Regulations) came into operation on 01 May 2011. The Act has, to a large extent, been amended by the Companies Amendment Act, 2011. This brief article focuses on some of the key issues that should be taken note of by s21 companies and those who will be establishing non-profit companies.

S21 companies will, unless otherwise provided, continue to exist as if incorporated in terms of the provisions of the Act which automatically applies to existing s21 companies from 01 May 2011.

Submitting Annual Returns

Section 33 (1) of the Act requires every company to file an annual return with the prescribed fee within 30 days after the anniversary date of its incorporation. The now-defunct CIPRO issued a notice on 26 April 2011 in which it stated that: *"The Companies and Intellectual Property Commission (CIPC) will enforce compliance of annual returns by non-profit companies (or section 21 companies). Thus, as from such date, non-profit companies that become due for compliance with annual returns for the current year will be required to comply with the provisions of the Act."*

Every company must, in terms of section 33(3) of the Act, annually designate in its annual return, a director, employee or other person who is responsible for the company's compliance with the requirements listed in Part C of Chapter 2 of the Act.

The Public Interest Score

Non-profit companies are, in terms of the Regulations, categorised according to a 'public interest score' and must adhere to the minimum financial reporting standards stipulated for its particular category. Every company must calculate its 'public interest score' at the end of each financial year. Factors that determine the 'public interest score' include: the number of employees, the company's turnover and number of members of the Company. The financial reporting standards can, depending on the category, either be; the International Financial Reporting Standards (IFRS), IFRS for SMEs, SA GAAP, or the standards determined by the Company.

Directors

Companies have to ensure that all directors, officers, company secretaries and auditors are not ineligible to be or disqualified from serving in their respective positions. As stated in earlier editions, members of board committees may, in terms of the Act, be held liable if they breach any provision of the Act and any provision of the company's Memorandum of Incorporation. This liability extends to committee members who are not members of the board of directors.

Transitional Provisions

S21 companies have until 30 April 2013 to file a Memorandum of Incorporation and change its name, without charge, to bring it in harmony with the new Act – otherwise it will be deemed to have done so after that date. It is advisable to do so during the transitional period.

ABOUT NPO LEGAL ISSUES:

This is an electronic newsletter published by:
RICARDO WYNGAARD ATTORNEYS which is aimed at updating the non-profit sector on relevant legal issues.

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RICARDO WYNGAARD ATTORNEYS is a law practice that specialises in rendering advice and assistance on non-profit law and governance.

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CPA Regulations – In Operation

By Ricardo Wyngaard

The Consumer Protection Act Regulations also came into operation during May 2011. It is important to note that the Minister of Trade and Industry has now decided that juristic persons, including NPOs, with an asset value or annual turnover less than **R2m** at time of a transaction, also qualify as 'consumers'. This was changed from the initial R3m.

Promotional Competitions in terms of CPA

Mr. Phiroshaw Camay

Co-operative for Research and Education

The Consumer Protection Act (the CPA), which came into force on 01 April 2011, repeals section 54 of the Lotteries Act which regulated promotional competitions and introduces a new definition of "promotional competition". The CPA makes provision that if a competition satisfies the requirements set out therein and the prize offered exceeds a prescribed threshold, the competition will qualify as a promotional competition. It will therefore be governed by the CPA.

The promoters of the competition will have to comply with all relevant aspects of the CPA. The CPA also contains a number of requirements to promote competitions.

De-registration of NPOs

By Ricardo Wyngaard

I recently visited the offices of the Directorate for Nonprofit Organisations in Pretoria. During this visit I was informed that large numbers of registered NPOs face potential de-registration for having failed to submit financial and narrative reports. The NPO Act requires all registered NPOs to submit their financial and narrative reports within 9 months of their financial year-end. If this does not happen, the director for NPOs must send a compliance notice to the defaulting NPO giving it one month to comply. If there is still non-compliance, the NPO must be de-registered by the director.

NPOs can forfeit their funding if de-registered as donor agreements may stipulate that NPOs should maintain their registered status in terms of the NPO Act for the duration of the funding. Access the model report form at the Directorate's website:

<http://www.dsd.gov.za/npo/index.php>

Click on **NPO DOCUMENTS** and then **GUIDELINES**.

Name Reservation to Companies Act

By Ricardo Wyngaard

Section 12 of the Companies Act provides that a person may reserve one or more names to be used at a later time – for the incorporation of a new company or for an amended name of an existing company. A name gets reserved for a period of six months. This time period may be extended by the Commission on good cause shown.

The most important change that has been introduced by the Companies Act, is that the application for name reservation does not have to precede an application to incorporate a NPC. The incorporators do not have to wait for the name to be reserved before application is made for incorporation of the company. The application for the name reservation and the incorporation of the company can be done simultaneously. The Department of Trade and Industry has explained the position as follows:

“Basically the new process for the approval of a name will be that an incorporator will submit four choices of names on the Notice of Incorporation, which is the founding incorporation document of a company, containing information on type of business, directors, registered company addresses etc.

The Companies and Intellectual Property Commission [which replaces CIPRO as the registrar and regulator of companies] will then put those name choices through a checking and testing process to determine if they are suitable to be approved. Suitability for approval of a name will rest on three criteria as per S11 of the new Companies Act...”

The Department further stated:

“However, the rejection of all the names does not delay the formal incorporation of the company, as the unique designated company registration number assigned by the Commission, becomes the name of the company.”

Section 11 of the Act also provides that a company name may comprise words in any language, together with any letters, numbers or punctuation marks, any of these symbols: **+**, **&**, **#**, **,**, **%**, **=**; and any other symbol permitted by the regulations.

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