

## Sections of the Companies Act that are in Checklist

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SECTIONS OF THE COMPANIES ACT NO. 71 (2008) (AS AMENDED)

### 4. Solvency and liquidity test

(1) For any purpose of this Act, 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-

(a) the assets of the company, as fairly valued, equal or exceed the liabilities of the company, as fairly valued; and [Para. (a) substituted by s. 2 (a) of Act No. 3 of 2011.]

(b) it appears that the company will be able to pay its debts as they become due in the ordinary course of business for a period of-

(i) 12 months after the date on which the test is considered; or

(ii) in the case of a distribution contemplated in paragraph (a) of the definition of "distribution" in section 1, 12 months following that distribution.

(2) For the purposes contemplated in subsection (1)-

(a) any financial information to be considered concerning the company must be based on-

(i) accounting records that satisfy the requirements of section 28; and

(ii) financial statements that satisfy the requirements of section 29;

(b) subject to paragraph (c), the board or any other person applying the solvency and liquidity test to a company-

(i) must consider a fair valuation of the company's assets and liabilities, including any reasonably foreseeable contingent assets and liabilities, irrespective of whether or not arising as a result of the proposed distribution, or otherwise; and

(ii) may consider any other valuation of the company's assets and liabilities that is reasonable in the circumstances; and

(c) unless the Memorandum of Incorporation of the company provides otherwise, when applying the test in respect of a distribution contemplated in paragraph (a) of the definition of "distribution" in section 1, a person is not to include as a liability any amount that would be required, if the company were to be liquidated at the time of the distribution, to satisfy the preferential rights upon liquidation of shareholders whose preferential rights upon liquidation are superior to the preferential rights upon liquidation of those receiving the distribution.

[Para. (c) substituted by s. 2 (b) of Act No. 3 of 2011.]

**15. Memorandum of Incorporation, shareholder agreements and rules of company.**

(1) Each provision of a company's Memorandum of Incorporation-

(a) must be consistent with this Act; and

(b) is void to the extent that it contravenes, or is inconsistent with, this Act, subject to section 6 (15). [Para. (b) substituted by s. 10 (a) of Act No. 3 of 2011.]

(2) The Memorandum of Incorporation of any company may-

(a) include any provision-

(i) dealing with a matter that this Act does not address;

[Sub-para. (i) substituted by s. 10 (b) of Act No. 3 of 2011.]

(ii) altering the effect of any alterable provision of this Act; or

[Sub-para. (ii) substituted by s. 10 (b) of Act No. 3 of 2011.]

(iii) imposing on the company a higher standard, greater restriction, longer period of time or any similarly more onerous requirement, than would otherwise apply to the company in terms of an unalterable provision of this Act;

[Sub-para. (iii) substituted by s. 10 (c) of Act No. 3 of 2011.]

(b) contain any restrictive conditions applicable to the company, and any requirement for the amendment of any such condition in addition to the requirements set out in section 16;

[Para. (b) substituted by s. 10 (d) of Act No. 3 of 2011.]

(c) prohibit the amendment of any particular provision of the Memorandum of Incorporation; or [Para. (c) substituted by s. 10 (e) of Act No. 3 of 2011.]

(d) not include any provision that negates, restricts, limits, qualifies, extends or otherwise alters the substance or effect of an unalterable provision of this Act, except to the extent contemplated in paragraph (a) (iii).

[Para. (d) substituted by s. 10 (f) of Act No. 3 of 2011.]

(3) Except to the extent that a company's Memorandum of Incorporation provides otherwise, the board of the company may make, amend or repeal any necessary or incidental rules relating to the governance of the company in respect of matters that are not addressed in this Act or the Memorandum of Incorporation, by-

(a) publishing a copy of those rules, in any manner required or permitted by the Memorandum of Incorporation, or the rules of the company; and

(b) filing a copy of those rules.

(4) A rule contemplated in subsection (3)-

(a) must be consistent with this Act and the company's Memorandum of Incorporation, and any such rule that is inconsistent with this Act or the company's Memorandum of Incorporation is void to the extent of the inconsistency;

(b) takes effect on a date that is the later of-

(i) 10 business days after the rule is filed in terms of subsection (3) (b); or [Sub-para. (i) substituted by s. 10 (g) of Act No. 3 of 2011.]

(ii) the date, if any, specified in the rule; and

(c) is binding-

(i) on an interim basis from the time it takes effect until it is put to a vote at the next general shareholders meeting of the company; and

(ii) on a permanent basis only if it has been ratified by an ordinary resolution at the meeting contemplated in subparagraph (i).

(5) If a rule that has been filed in terms of subsection (3) is subsequently-

(a) ratified as contemplated in subsection (4) (c), the company must file a notice of ratification within five business days in the prescribed manner and form; or

(b) not ratified when put to a vote-

(i) the company must file a notice of non-ratification within five business days after the vote, in the prescribed manner and form; and

(ii) the company's board may not make a substantially similar rule within the ensuing 12 months, unless it has been approved in advance by ordinary resolution of the shareholders.

[Sub-s. (5) substituted by s. 10 (h) of Act No. 3 of 2011.]

(5A) Any failure to ratify the rules of a company does not affect the validity of anything done in terms of those rules during the period that they had an interim effect as provided in subsection (4) (c) (i).

[Sub-s. (5A) inserted by s. 10 (i) of Act No. 3 of 2011.]

(6) A company's Memorandum of Incorporation, and any rules of the company, are binding-

(a) between the company and each shareholder;

(b) between or among the shareholders of the company; and

(c) between the company and-

(i) each director or prescribed officer of the company; or

(ii) any other person serving the company as a member of a committee of the board, in the exercise of their respective functions within the company.

[Sub-para. (ii) substituted by s. 10 (j) of Act No. 3 of 2011.]

(7) The shareholders of a company may enter into any agreement with one another concerning any matter relating to the company, but any such agreement must be consistent with this Act and the company's Memorandum of Incorporation, and any provision of such an agreement that is inconsistent with this Act or the company's Memorandum of Incorporation is void to the extent of the inconsistency.

**26. Access to company records.**-(1) 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 following records of the company-

(a) the company's Memorandum of Incorporation and any amendments to it, and any rules made by the company, as mentioned in section 24 (3) (a);

(b) the records in respect of the company's directors, as mentioned in section 24 (3) (b);

(c) the reports to annual meetings, and annual financial statements, as mentioned in section 24 (3) (c) (i) and (ii);

(d) the notices and minutes of annual meetings, and communications mentioned in section 24 (3) (d) and (e), but the reference in section 24 (3) (d) to shareholders meetings, and the reference in section 24 (3) (e) to communications sent to holders of a company's securities, must be regarded in the case of a non-profit company as referring to a meeting of members, or communication to members, respectively; and

(e) the securities register of a profit company, or the members register of a non-profit company that has members, as mentioned in section 24 (4).

[Sub-s. (1) substituted by s. 17 (a) of Act No. 3 of 2011.]

(2) A person not contemplated in subsection (1) 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 of a company, upon payment of an amount not exceeding the prescribed maximum fee for any such inspection.

[Sub-s. (2) substituted by s. 17 (a) of Act No. 3 of 2011.]

(3) In addition to the information rights set out in subsections (1) and (2), the Memorandum of Incorporation of a company 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, 2000 (Act No. 2 of 2000).

[Sub-s. (3) inserted by s. 17 (a) of Act No. 3 of 2011.]

(4) A person may exercise the rights set out in subsection (1) or (2), or contemplated in subsection (3)-

(a) for a reasonable period during business hours;

(b) by direct request made to a company in the prescribed manner, either in person or through an attorney or other personal representative designated in writing; or

(c) in accordance with the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000).  
[Sub-s. (4) inserted by s. 17 (a) of Act No. 3 of 2011.]

(5) Where a company receives a request in terms of subsection (4) (b) it must within 14 business days comply with the request by providing the opportunity to inspect or copy the register concerned to the person making such request.

[Sub-s. (5) inserted by s. 17 (a) of Act No. 3 of 2011.]

(6) The register of members and register of directors of a company, must, during business hours for reasonable periods be open to inspection by any member, free of charge and by any other person, upon payment for each inspection of an amount not more than R100,00.

[Sub-s. (6), previously sub-s. (3), renumbered by s. 17 (b) of Act No. 3 of 2011.]

(7) The rights of access to information set out in this section are in addition to, and not in substitution for, any rights a person may have to access information in terms of-

- (a) section 32 of the Constitution;
- (b) the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000); or
- (c) any other public regulation.

[Sub-s. (7), previously sub-s. (4), renumbered by s. 17 (b) of Act No. 3 of 2011.]

(8) The Minister may make regulations respecting the exercise of the rights set out in this section. [Sub-s. (8), previously sub-s. (5), renumbered by s. 17 (b) of Act No. 3 of 2011.]

(9) It is an offence for a company to-

(a) fail to accommodate 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; or

[Para. (a) substituted by s. 17 (c) of Act No. 3 of 2011.]

(b) 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.

[Sub-s. (9), previously sub-s. (6), renumbered by s. 17 (b) of Act No. 3 of 2011. Para. (b) substituted by s. 17 (c) of Act No. 3 of 2011.]

**27. Financial year of company.**-(1) A company must have a financial year, ending on a date set out in the company's Notice of Incorporation, subject to any change made in terms of subsection (4).

(2) The first financial year of a company-

(a) begins on the date that the incorporation of the company is registered, as stated in its registration certificate; and

(b) ends on the date set out in the Notice of Incorporation, which may not be more than 15 months after the date contemplated in paragraph (a).

(3) The second and each subsequent financial year of a company-

(a) begins when the preceding financial year ends; and

(b) ends on the first anniversary of the date contemplated in paragraph (a), unless the financial year end has been changed as contemplated in subsection (4).

(4) The board of a company may change its financial year end at any time, by filing a notice of that change, but-

(a) it may not do so more than once during any financial year;

(b) the newly established financial year end must be later than the date on which the notice is filed; and

(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.

(5) Despite subsection (2) (b) or (3), the financial year of a company that has changed the date contemplated in subsection (1) ends on the date as changed.

(6) . . . . .

[Sub-s. (6) deleted by s. 18 of Act No. 3 of 2011.]

(7) The financial year of the company is its annual accounting period.

**28. Accounting records.**-(1) A company must keep accurate and complete accounting records in one of the official languages of the Republic-

(a) as necessary to enable the company to satisfy its obligations in terms of this Act or any other law with respect to the preparation of financial statements; and

(b) including any prescribed accounting records, which must be kept in the prescribed manner and form.

(2) A company's accounting records must be kept at, or be accessible from, the registered office of the company.

(3) It is an offence for-

(a) a company-

(i) with an intention to deceive or mislead any person-

(aa) to fail to keep accurate or complete accounting records;

(bb) to keep records other than in the prescribed manner and form, if any; or

(ii) to falsify any of its accounting records, or permit any person to do so; or

(b) any person to falsify a company's accounting records.

(4) For greater certainty, the Commission may issue a compliance notice, as contemplated in section 171, to a company in respect of any failure by the company to comply with the requirements of this section, irrespective whether that failure constitutes an offence in terms of subsection (3).

**29. Financial statements.**-(1) If a company provides any financial statements, including any annual financial statements, to any person for any reason, those statements must-

(a) satisfy the financial reporting standards as to form and content, if any such standards are prescribed;

(b) present fairly the state of affairs and business of the company, and explain the transactions and financial position of the business of the company;

(c) show the company's assets, liabilities and equity, as well as its income and expenses, and any other prescribed information;

(d) set out the date on which the statements were published, and the accounting period to which the statements apply; and

[Para. (d) substituted by s. 19 (a) of Act No. 3 of 2011.]

(e) bear, on the first page of the statements, a prominent notice indicating-

(i) whether the statements-

(aa) have been audited in compliance with any applicable requirements of this Act;

(bb) if not audited, have been independently reviewed in compliance with any applicable requirements of this Act; or

(cc) have not been audited or independently reviewed; and

(ii) the name, and professional designation, if any, of the individual who prepared, or supervised the preparation of, those statements.

(2) Any financial statements prepared by a company, including any annual financial statements of a company as contemplated in section 30, must not be-

(a) false or misleading in any material respect; or

(b) incomplete in any material particular, subject only to subsection (3).

(3) A company may provide any person with a summary of any particular financial statements, but-

(a) any such summary must comply with any prescribed requirements; and

(b) the first page of the summary must bear a prominent notice-

(i) stating that it is a summary of particular financial statements prepared by the company, and setting out the date of those statements;

(ii) stating whether the financial statements that it summarises have been audited, independently reviewed, or are unaudited, as contemplated in subsection (1) (e);

(iii) stating the name, and professional designation, if any, of the individual who prepared, or supervised the preparation of, the financial statements that it summarises; and

(iv) setting out the steps required to obtain a copy of the financial statements that it summarises.

(4) Subject to subsection (5), the Minister, after consulting the Council, may make regulations prescribing-

(a) financial reporting standards contemplated in this Part; or

(b) form and content requirements for summaries contemplated in subsection (3).

(5) Any regulations contemplated in subsection (4)-

(a) must promote sound and consistent accounting practices;

(b) in the case of financial reporting standards for public companies, must be in accordance with the International Financial Reporting Standards of the International Accounting Standards Board or its successor body; and

[Para. (b) substituted by s. 19 (b) of Act No. 3 of 2011.]

(c) may establish different standards applicable to-

(i) profit and non-profit companies; and

(ii) different categories of profit companies.

(6) Subject to section 214 (2), a person is guilty of an offence if the person is a party to the preparation, approval, dissemination or publication of-

(a) any financial statements, including any annual financial statements contemplated in section 30, knowing that those statements-

(i) fail in a material way to comply with the requirements of subsection (1); or [Sub-para. (i) substituted by s. 19 (c) of Act No. 3 of 2011.]

(ii) are materially false or misleading, as contemplated in subsection (2); or

(b) a summary of any financial statements, knowing that-

(i) the statements that it summarises do not comply with the requirements of subsection (1), or are materially false or misleading, as contemplated in subsection (2); or

(ii) the summary does not comply with the requirements of subsection (3), or is materially false or misleading.

**30. Annual financial statements.**-(1) Each year, a company must prepare annual financial statements within six months after the end of its financial year, or such shorter period as may be appropriate to provide the required notice of an annual general meeting in terms of section 61 (7).

(2) The annual financial statements must-

(a) be audited, in the case of a public company; or

(b) in the case of any other profit or non-profit company-

(i) be audited, if so required by the regulations made in terms of subsection (7) taking into account 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-

[Sub-para. (i) substituted by s. 20 (b) of Act No. 3 of 2011.]

(aa) its annual turnover;

(bb) the size of its workforce; or

(cc) the nature and extent of its activities; or

(ii) be either-

(aa) audited voluntarily if the company's Memorandum of Incorporation, or a shareholders resolution, so requires or if the Company's board has so determined; or

[Sub-item (aa) substituted by s. 20 (c) of Act No. 3 of 2011.]

(bb) independently reviewed in a manner that satisfies the regulations made in terms of subsection (7), subject to subsection (2A).

[Para. (b) amended by s. 20 (a) of Act No. 3 of 2011. Sub-item (bb) substituted by s. 20 (c) of Act No. 3 of 2011.]

(2A) If, with respect to a particular company, every person who is a holder of, or has a beneficial interest in, any securities issued by that company is also a director of the company, that company is exempt from the requirements in this section to have its annual financial statements audited or independently reviewed, but this exemption-

(a) does not apply to the company if it falls into a class of company that is required to have its annual financial statement audited in terms of the regulations contemplated in subsection (7) (a); and

(b) 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.

[Sub-s. (2A) inserted by s. 20 (d) of Act No. 3 of 2011.]

(3) The annual financial statements of a company must-

(a) include an auditor's report, if the statements are audited;

(b) include a report by the directors with respect to the state of affairs, the business and profit or loss of the company, or of the group of companies, if the company is part of a group, including-

(i) any matter material for the shareholders to appreciate the company's state of affairs; and

(ii) any prescribed information;

(c) be approved by the board and signed by an authorised director; and

(d) be presented to the first shareholders meeting after the statements have been approved by the board.

(4) The annual financial statements of each company that is required in terms of this Act to have its annual financial statements audited, must include particulars showing-

(a) the remuneration, as defined in subsection (6), and benefits received by each director, or individual holding any prescribed office in the company;

(b) the amount of-

(i) any pensions paid by the company to or receivable by current or past directors or individuals who hold or have held any prescribed office in the company;

(ii) any amount paid or payable by the company to a pension scheme with respect to current or past directors or individuals who hold or have held any prescribed office in the company;

(c) the amount of any compensation paid in respect of loss of office to current or past directors or individuals who hold or have held any prescribed office in the company;

(d) the number and class of any securities issued to a director or person holding any prescribed office in the company, or to any person related to any of them, and the consideration received by the company for those securities; and

(e) details of service contracts of current directors and individuals who hold any prescribed office in the company.

(5) The information to be disclosed under subsection (4) must satisfy the prescribed standards, and must show the amount of any remuneration or benefits paid to or receivable by persons in respect of-

(a) services rendered as directors or prescribed officers of the company; or

(b) services rendered while being directors or prescribed officers of the company-

(i) as directors or prescribed officers of any other company within the same group of companies; or

(ii) otherwise in connection with the carrying on of the affairs of the company or any other company within the same group of companies.

(6) For the purposes of subsections (4) and (5), "remuneration" includes-

(a) fees paid to directors for services rendered by them to or on behalf of the company, including any amount paid to a person in respect of the person's accepting the office of director;

(b) salary, bonuses and performance-related payments;

(c) expense allowances, to the extent that the director is not required to account for the allowance;

(d) contributions paid under any pension scheme not otherwise required to be disclosed in terms of subsection (4) (b);

(e) the value of any option or right given directly or indirectly to a director, past director or future director, or person related to any of them, as contemplated in section 42;

(f) financial assistance to a director, past director or future director, or person related to any of them, for the subscription of options or securities, or the purchase of securities, as contemplated in section 44; and

[Para. (f) substituted by s. 20 (e) of Act No. 3 of 2011.]

(g) with respect to any loan or other financial assistance by the company to a director, past director or future director, or a person related to any of them, or any loan made by a third party to any such person, as contemplated in section 45, if the company is a guarantor of that loan, the value of-

(i) any interest deferred, waived or forgiven; or

(ii) the difference in value between-

(aa) the interest that would reasonably be charged in comparable circumstances at fair market rates in an arm's length transaction; and

(bb) the interest actually charged to the borrower, if less.

(7) The Minister may make regulations, including different requirements for different categories of companies, prescribing-

(a) the categories of any profit or non-profit companies that are required to have their respective annual financial statements audited, as contemplated in subsection (2) (b) (i); and

[Para. (a) substituted by s. 20 (f) of Act No. 3 of 2011.]

(b) the manner, form and procedures for the conduct of an independent review under subsection (2) (b) (ii) (bb), as well as the professional qualifications, if any, and duties of persons who may conduct such reviews and the accreditation of professions whose members may conduct such reviews.

[Para. (b) substituted by s. 20 (g) of Act No. 3 of 2011.]

(8) Despite section 1 of the Auditing Profession Act, an independent review of a company's annual financial statements required by this section does not constitute an audit within the meaning of that Act.

[Sub-s. (8) inserted by s. 20 (h) of Act No. 3 of 2011.]

**32. Use of company name and registration number.-(1) A company or external company must-**

(a) provide its full registered name or registration number to any person on demand; and

(b) not misstate its name or registration number in a manner likely to mislead or deceive any person.

(2) If the Commission has issued to a company a registration certificate with an interim name, as contemplated in section 14 (2) (b), the company must use its interim name, until its name has been amended.

(3) A person must not-

(a) use the name or registration number of a company in a manner likely to convey an impression that the person is acting or communicating on behalf of that company, unless the company has authorised that person to do so; or

(b) use a form of name for any purpose if, in the circumstances, the use of that form of name is likely to convey a false impression that the name is the name of a company.

(4) Every company must have its name and registration number mentioned in legible characters in all notices and other official publications of the company, including such notices and publications in electronic format as contemplated in the Electronic Communications and Transactions Act, and in 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.

(5) Contravention of subsection (1), (2), (3) or (4) is an offence.

(6) . . . . .

[Sub-s. (6) deleted by s. 22 of Act No. 3 of 2011.]

(7) . . . . .

[Sub-s. (7) deleted by s. 22 of Act No. 3 of 2011.]

**33. Annual return.-(1) Every company must file an annual return in the prescribed form with the prescribed fee, and within the prescribed period after the end of the anniversary of the date of its incorporation, including in that return-**

(a) a copy of its annual financial statements, if it is required to have such statements audited in terms of section 30 (2) or the regulations contemplated in section 30 (7); and

[Para. (a) substituted by s. 23 of Act No. 3 of 2011.]

(b) any other prescribed information.

(2) Every external company must file an annual return in the prescribed form with the prescribed fee, and within the prescribed period after the anniversary of the date on which it was registered in terms of section 23 (1).

(3) Each year, in its annual return filed in terms of subsection (1), every company must designate a director, employee or other person who is responsible for the company's compliance with the requirements of this Part, and Chapter 3, if it applies to the company.

**44. Financial assistance for subscription of securities.**-(1) In this section, "financial assistance" does not include lending money in the ordinary course of business by a company whose primary business is the lending of money.

(2) Except to the extent that the Memorandum of Incorporation of a company 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 subsections (3) and (4).

[Sub-s. (2) substituted by s. 30 (a) of Act No. 3 of 2011.]

(3) Despite any provision of a company's Memorandum of Incorporation to the contrary, the board may not authorise any financial assistance contemplated in subsection (2), unless-

(a) the particular provision of financial assistance is-

(i) pursuant to an employee share scheme that satisfies the requirements of section 97; or

(ii) pursuant to a special resolution of the shareholders, adopted within the previous two years, which approved such assistance either for the specific recipient, or generally for a category of potential recipients, and the specific recipient falls within that category; and

(b) the board is satisfied that-

(i) immediately after providing the financial assistance, the company would satisfy the solvency and liquidity test; and

(ii) the terms under which the financial assistance is proposed to be given are fair and reasonable to the company.

(4) In addition to satisfying the requirements of subsection (3), the board must ensure that any conditions or restrictions respecting the granting of financial assistance set out in the company's Memorandum of Incorporation have been satisfied.

(5) A decision by the board of a company to provide financial assistance contemplated in subsection (2), or an agreement with respect to the provision of any such assistance, is void to the extent that the provision of that assistance would be inconsistent with-

(a) this section; or

(b) a prohibition, condition or requirement contemplated in subsection (4).

(6) If a resolution or an agreement is void in terms of subsection (5) a director of the company is liable to the extent set out in section 77 (3) (e) (iv) if the director-

(a) was present at the meeting when the board approved the resolution or agreement, or participated in the making of such a decision in terms of section 74; and

(b) failed to vote against the resolution or agreement, despite knowing that the provision of financial assistance was inconsistent with this section or a prohibition, condition or requirement contemplated in subsection (4).

[Sub-s. (6) amended by s. 30 (b) of Act No. 3 of 2011.]

**45. Loans or other financial assistance to directors.**-(1) In this section, "financial assistance"-

(a) includes lending money, guaranteeing a loan or other obligation, and securing any debt or obligation; but

(b) does not include-

(i) lending money in the ordinary course of business by a company whose primary business is the lending of money;

(ii) an accountable advance to meet-

(aa) legal expenses in relation to a matter concerning the company; or

(bb) anticipated expenses to be incurred by the person on behalf of the company; or

(iii) an amount to defray the person's expenses for removal at the company's request.

(2) Except to the extent that the Memorandum of Incorporation of a company provides otherwise, the board may authorise the company to provide direct 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 corporation, or to a member of a related or inter-related corporation, or to a person related to any such company, corporation, director, prescribed officer or member, subject to subsections (3) and (4).

(3) Despite any provision of a company's Memorandum of Incorporation to the contrary, the board may not authorise any financial assistance contemplated in subsection (2), unless-

(a) the particular provision of financial assistance is-

(i) pursuant to an employee share scheme that satisfies the requirements of section 97; or

(ii) pursuant to a special resolution of the shareholders, adopted within the previous two years, which approved such assistance either for the specific recipient, or generally for a category of potential recipients, and the specific recipient falls within that category; and

(b) the board is satisfied that-

(i) immediately after providing the financial assistance, the company would satisfy the solvency and liquidity test; and

(ii) the terms under which the financial assistance is proposed to be given are fair and reasonable to the company.

[Para. (b) substituted by s. 31 (a) of Act No. 3 of 2011.]

(4) In addition to satisfying the requirements of subsection (3), the board must ensure that any conditions or restrictions respecting the granting of financial assistance set out in the company's Memorandum of Incorporation have been satisfied.

(5) If the board of a company adopts a resolution to do anything contemplated in subsection (2), the company must provide written notice of that resolution to all shareholders, unless every shareholder is also a director of the company, and to any trade union representing its employees-

(a) within 10 business days after the board adopts the resolution, if the total value of all loans, debts, obligations or assistance contemplated in that resolution, 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

(b) within 30 business days after the end of the financial year, in any other case.

(6) A resolution by the board of a company to provide financial assistance contemplated in subsection (2), or an agreement with respect to the provision of any such assistance, is void to the extent that the provision of that assistance would be inconsistent with-

(a) this section; or

(b) a prohibition, condition or requirement contemplated in subsection (4).

(7) If a resolution or an agreement is void in terms of subsection (6) a director of the company is liable to the extent set out in section 77 (3) (e) (v) if the director-

(a) was present at the meeting when the board approved the resolution or agreement, or participated in the making of such a decision in terms of section 74; and

(b) failed to vote against the resolution or agreement, despite knowing that the provision of financial assistance was inconsistent with this section or a prohibition, condition or requirement contemplated in subsection (4).

[Sub-s. (7) amended by s. 31 (b) of Act No. 3 of 2011.]

**50. Securities register and numbering.**-(1) Every company must-

(a) establish or cause to be established a register of its issued securities in the prescribed form; and

(b) maintain its securities register in accordance with the prescribed standards.

(2) As soon as practicable after issuing any securities a company must enter or cause to be entered in its securities register, in respect of every class of securities that it has issued-

(a) the total number of those securities that are held in uncertificated form; and

(b) with respect to certificated securities-

(i) the names and addresses of the persons to whom the securities were issued;

(ii) the number of securities issued to each of them;

(iii) the number of, and prescribed circumstances relating to, any securities-

(aa) that have been placed in trust as contemplated in section 40 (6) (d); or

(bb) whose transfer has been restricted;

(iv) in the case of securities contemplated in section 43-

(aa) the number of those securities issued and outstanding; and

[Sub-item (aa) substituted by s. 34 of Act No. 3 of 2011.]

(bb) the names and addresses of the registered owner of the security and any holders of a beneficial interest in the security; and

(v) any other prescribed information.

(3) If a company has issued uncertificated securities, or has issued securities that have ceased to be certificated, as contemplated in section 49 (5), a record must be administered and maintained by a participant or central securities depository in the prescribed form, as the company's uncertificated securities register, which-

(a) forms part of that company's securities register; and

- (b) must contain, with respect to all securities contemplated in this subsection, any details-
- (i) referred to in subsection (2) (b), read with the changes required by the context; or
- (ii) determined by the rules of the central securities depository.

(4) A securities register, or an uncertificated securities register, maintained in accordance with this Act is sufficient proof of the facts recorded in it, in the absence of evidence to the contrary.

(5) Unless all the shares of a company rank equally for all purposes, the company's shares, or each class of shares, and any other securities, must be distinguished by an appropriate numbering system.

**61. Shareholders meetings.**-(1) The board of a company, or any other person specified in the company's Memorandum of Incorporation or rules, may call a shareholders meeting at any time.

(2) Subject to section 60, a company must hold a shareholders meeting-

(a) at any time that the board is required by this Act or the Memorandum of Incorporation to refer a matter to shareholders for decision;

(b) whenever required in terms of section 70 (3) to fill a vacancy on the board; and

(c) when otherwise required-

(i) **in terms of subsection (3) or (7); or**

(ii) **by the company's Memorandum of Incorporation.**

**(3) Subject to** subsections (5) and (6), the board of a company, or any other person specified in the company's Memorandum of Incorporation or rules, must call a shareholders meeting if one or more written and signed demands for such a meeting are delivered to the company, and-

(a) each such demand describes the specific purpose for which the meeting is proposed; and

(b) in aggregate, demands for substantially the same purpose are made and signed by the holders, as of the earliest time specified in any of those demands, of at least 10% of the voting rights entitled to be exercised in relation to the matter proposed to be considered at the meeting.

[Para. (b) substituted by s. 39 of Act No. 3 of 2011.]

(4) A company's Memorandum of Incorporation may specify a lower percentage in substitution for that set out in subsection (3) (b).

(5) A company, or any shareholder of the company, may apply to a court for an order setting aside a demand made in terms of subsection (3) on the grounds that the demand is frivolous, calls for a meeting for no other purpose than to reconsider a matter that has already been decided by the shareholders, or is otherwise vexatious.

(6) At any time before the start of a shareholders meeting contemplated in subsection (3)-

(a) a shareholder who submitted a demand for that meeting may withdraw that demand; and

(b) the company must cancel the meeting if, as a result of one or more demands being withdrawn, the voting rights of any remaining shareholders continuing to demand the meeting, in aggregate, fall below the minimum percentage of voting rights required to call a meeting.

(7) A public company must convene an annual general meeting of its shareholders-

(a) initially, no more than 18 months after the company's date of incorporation; and

(b) thereafter, once in every calendar year, but no more than 15 months after the date of the previous annual general meeting, or within an extended time allowed by the Companies Tribunal, on good cause shown.

(8) A meeting convened in terms of subsection (7) must, at a minimum, provide for the following business to be transacted-

(a) presentation of-

(i) the directors' report;

(ii) audited financial statements for the immediately preceding financial year; and

(iii) an audit committee report;

(b) election of directors, to the extent required by this Act or the company's Memorandum of Incorporation;

(c) 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.

(9) Except to the extent that the Memorandum of Incorporation of a company provides otherwise-

(a) the board of the company may determine the location for any shareholders meeting of the company; and

(b) a shareholders meeting of the company may be held in the Republic or in any foreign country.

(10) Every shareholders meeting of a public company must be reasonably accessible within the Republic for electronic participation by shareholders in the manner contemplated in section 63 (2), irrespective of whether the meeting is held in the Republic or elsewhere.

(11) If a company is unable to convene a meeting as required in terms of this section because it has no directors, or because all of its directors are incapacitated-

(a) any other person authorised by the company's Memorandum of Incorporation may convene the meeting; or

(b) if no person has been authorised as contemplated in paragraph (a), the Companies Tribunal, on a request by any shareholder, may issue an administrative order for a shareholders meeting to be convened on a date, and subject to any terms, that the Tribunal considers appropriate in the circumstances.

(12) If a company fails to convene a meeting for any reason other than as contemplated in subsection (11)-

(a) at a time required in accordance with its Memorandum of Incorporation;

(b) when required by shareholders in terms of subsection (3); or

(c) within the time required by subsection (7),

a shareholder may apply to a court for an order requiring the company to convene a meeting on a date, and subject to any terms, that the court considers appropriate in the circumstances.

(13) The company must compensate a shareholder who applies to the Companies Tribunal in terms of subsection (11), or to a court in terms of subsection (12), respectively, for the costs of those proceedings.

(14) Any failure to hold a meeting as required by this section does not affect the existence of a company, or the validity of any action by the company.

**66. Board, directors and prescribed officers.**-(1) The business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise.

(2) The board of a company must comprise-

- (a) in the case of a private company, or a personal liability company, at least one director; or
- (b) 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 this Act or its Memorandum of Incorporation, to appoint an audit committee, or a social and ethics committee as contemplated in section 72 (4).

[Para. (b) substituted by s. 44 (a) of Act No. 3 of 2011.]

(3) A company's Memorandum of Incorporation may specify a higher number in substitution for the minimum number of directors required by subsection (2).

(4) A company's Memorandum of Incorporation-

(a) may provide for-

- (i)
- (ii)

(iii) the direct appointment and removal of one or more directors by any person who is named in, or determined in terms of, the Memorandum of Incorporation;

a person to be an *ex officio* director of the company as a consequence of that person holding some other office, title, designation or similar status, subject to subsection (5) (a); or

the appointment or election of one or more persons as alternate directors of the company; and

(b) in the case of a profit company other than a state-owned company, must provide for the election by shareholders of at least 50% of the directors, and 50% of any alternate directors.

(5) A person contemplated in subsection (4) (a) (ii)-

(a) may not serve or continue to serve as an *ex officio* director of a company, despite holding the relevant office, title, designation or similar status, if that person is or becomes ineligible or disqualified in terms of section 69; and

(b) who holds office or acts in the capacity of an *ex officio* director of a company has all the-

(i) powers and functions of any other director of the company, except to the extent that the company's Memorandum of Incorporation restricts the powers, functions or duties of an *ex officio* director; and

(ii) duties, and is subject to all of the liabilities, of any other director of the company.

(6) The election or appointment of a person as a director is a nullity if, at the time of the election or appointment, that person is ineligible or disqualified in terms of section 69.

(7) A person becomes entitled to serve as a director of a company when that person-

(a) has been appointed or elected 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, subject to subsection (5) (a); and

(b) has delivered to the company a written consent to serve as its director.

[Sub-s. (7) amended by s. 44 (b) of Act No. 3 of 2011.]

(8) Except to the extent that the Memorandum of Incorporation of a company provides otherwise, the company may pay remuneration to its directors for their service as directors, subject to subsection (9).

(9) Remuneration contemplated in subsection (8) may be paid only in accordance with a special resolution approved by the shareholders within the previous two years.

(10) The Minister may make regulations designating any specific function or functions within a company to constitute a prescribed office for the purposes of this Act.

(11) Any failure by a company at any time to have the minimum number of directors required by this Act or the company's Memorandum of Incorporation, does not limit or negate the authority of the board, or invalidate anything done by the board or the company.

(12) Save as otherwise provided elsewhere in this Act or in the company's Memorandum of Incorporation, any particular director may be appointed to more than one committee of the company, and when calculating the minimum number of directors required for a company in terms of subsections (2) and (3), any such director who has been appointed to more than one committee must be counted only once.

[Sub-s. (12) inserted by s. 44 (c) of Act No. 3 of 2011.]

**69. Ineligibility and disqualification of persons to be director or prescribed officer.-(1) In this section, "director" includes an alternate director, and-**

(a) a prescribed officer; or

(b) a person who is a member of a committee of a board of a company, or of the audit committee of a company, irrespective of whether or not the person is also a member of the company's board.

(2) A person who is ineligible or disqualified, as set out in this section, must not-

(a) be appointed or elected as a director of a company, or consent to being appointed or elected as a director; or

(b) act as a director of a company.

(3) A company must not knowingly permit an ineligible or disqualified person to serve or act as a director.

(4) 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).

[Sub-s. (4) substituted by s. 46 (a) of Act No. 3 of 2011.]

(5) A person who has been placed under probation by a court in terms of section 162, or in terms of section 47 of the Close Corporations Act, 1984 (Act No. 69 of 1984), must not serve as a director except to the extent permitted by the order of probation.

(6) In addition to the provisions of this section, the Memorandum of Incorporation of a company may impose-

(a) additional grounds of ineligibility or disqualification of directors; or

(b) minimum qualifications to be met by directors of that company.

(7) A person is ineligible to be a director of a company if the person-

(a) is a juristic person;

(b) is an unemancipated minor, or is under a similar legal disability; or

(c) does not satisfy any qualification set out in the company's Memorandum of Incorporation.

(8) A person is disqualified to be a director of a company if-

(a) a court has prohibited that person to be a director, or declared the person to be delinquent in terms of section 162, or in terms of section 47 of the Close Corporations Act, 1984 (Act No. 69 of 1984); or

(b) subject to subsections (9) to (12), the person-

(i) is an unrehabilitated insolvent;

(ii) is prohibited in terms of any public regulation to be a director of the company;

(iii) has been removed from an office of trust, on the grounds of misconduct involving dishonesty; or

(iv) has been convicted, in the Republic or elsewhere, and imprisoned without the option of a fine, or fined more than the prescribed amount, for theft, fraud, forgery, perjury or an offence-

(aa) involving fraud, misrepresentation or dishonesty;

(bb) in connection with the promotion, formation or management of a company, or in connection with any act contemplated in subsection (2) or (5); or

(cc) under this Act, the Insolvency Act, 1936 (Act No. 24 of 1936), the Close Corporations Act, 1984, the Competition Act, the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001), the Financial Markets Act, 2012, or Chapter 2 of the Prevention and Combating of Corruption Activities Act, 2004 (Act No. 12 of 2004).

[Sub-item (cc) substituted by s. 111 of Act No. 19 of 2012.]

(9) A disqualification in terms of subsection (8) (b) (iii) or (iv) ends at the later of-

(a) five years after the date of removal from office, or the completion of the sentence imposed for the relevant offence, as the case may be; or

(b) at the end of one or more extensions, as determined by a court from time to time, on application by the Commission in terms of subsection (10).

(10) At any time before the expiry of a person's disqualification in terms of subsection (8) (b) (iii) or (iv)-

(a) the Commission may apply to a court for an extension contemplated in subsection (9) (b); and

(b) the court may extend the disqualification for no more than five years at a time, if the court is satisfied that an extension is necessary to protect the public, having regard to the conduct of the disqualified person up to the time of the application.

(11) A court may exempt a person from the application of any provision of subsection (8) (b).

(11A) The Commission must, upon-

(a) the issue of a sequestration order;

(b) the issue of an order for the removal of a person from any office of trust on the grounds of misconduct involving dishonesty; or

(c) a conviction for an offence referred in subsection (8) (b) (iv),

send a copy of the relevant order or particulars of the conviction, as the case may be, to the Commission. [Sub-s. (11A) inserted by s. 46 (b) of Act No. 3 of 2011.]

(11B) The Registrar of the Court must notify each company which has as a director to whom the order or conviction relates, of the order or conviction.

[Sub-s. (11B) inserted by s. 46 (b) of Act No. 3 of 2011.]

(12) . . . . .

[Sub-s. (12) deleted by s. 46 (c) of Act No. 3 of 2011.]

(13) The Commission must establish and maintain in the prescribed manner a public register of persons who are disqualified from serving as a director, or who are subject to an order of probation as a director, in terms of an order of a court pursuant to this Act or any other law.

**70. Vacancies on board.**-(1) Subject to subsection (2), a person ceases to be a director, and a vacancy arises on the board of a company-

(a) when the person's term of office as director expires, in the case of a company whose Memorandum of Incorporation provides for fixed terms, as contemplated in section 68 (1); or

(b) in any case, if the person-

(i) resigns or dies;

(ii) in the case of an *ex officio* director, ceases to hold the office, title, designation or similar status that entitled the person to be an *ex officio* director;

(iii) becomes incapacitated to the extent that the person is unable to perform the functions of a director, and is unlikely to regain that capacity within a reasonable time, subject to section 71 (3);

(iv) is declared delinquent by a court, or placed on probation under conditions that are inconsistent with continuing to be a director of the company, in terms of section 162;

(v) becomes ineligible or disqualified in terms of section 69, subject to section 71 (3); or

(vi) is removed-

(aa) by resolution of the shareholders in terms of section 71 (1);

(bb) by resolution of the board in terms of section 71 (3); or

(cc) by order of the court in terms of section 71 (5) or (6).

(2) If, in terms of section 71 (3), the board of a company has removed a director, a vacancy on the board does not arise until the later of-

(a) the expiry of the time for filing an application for review in terms of section 71 (5); or

(b) the granting of an order by the court on such an application,

but the director is suspended from office during that time.

(3) If a vacancy arises on the board, other than as a result of an *ex officio* director ceasing to hold that office, it must be filled by-

(a) a new appointment, if the director was appointed as contemplated in section 66 (4) (a) (i); or

(b) subject to subsection (4), by a new election conducted-

(i) at the next annual general meeting of the company, if the company is required to hold such a meeting; or

(ii) in any other case, within six months after the vacancy arose-

(aa) at a shareholders meeting called for the purpose of electing the director; or

(bb) by a poll of the persons entitled to exercise voting rights in an election of the director, as contemplated in section 60 (3).

(4) If, as a result of a vacancy arising on the board of a company there are no remaining directors of a company, any holder of voting rights entitled to be exercised in the election of a director may convene a meeting for the purpose of such an election.

(5) A person contemplated in subsection (4) may apply to a court for relief, and the court may grant a supervisory order relating to a meeting convened in terms of that paragraph if the court is satisfied that such an order is required to prevent the oppression, or preserve the rights, of any shareholder.

(6) Every company must file a notice within 10 business days after a person becomes or ceases to be a director of the company.

**71. Removal of directors.**-(1) Despite anything to the contrary in a company's Memorandum of Incorporation or rules, or any agreement between a company and a director, or between any shareholders and a director, 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, subject to subsection (2).

(2) Before the shareholders of a company may consider a resolution contemplated in subsection (1)-

(a) 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, irrespective of whether or not the director is a shareholder of the company; and

(b) the director 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 a vote.

(3) If a company has more than two directors, and a shareholder or director has alleged that a director of the company-

(a) has become-

(i) ineligible or disqualified in terms of section 69, other than on the grounds contemplated in section 69 (8) (a); or

(ii) 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; or

(b) has neglected, or been derelict in the performance of, the functions of director,

the board, other than the director concerned, must determine the matter by resolution, and may remove a director whom it has determined to be ineligible or disqualified, incapacitated, or negligent or derelict, as the case may be.

(4) Before the board of a company may consider a resolution contemplated in subsection (3), the director concerned must be given-

(a) notice of the meeting, including a copy of the proposed resolution and a statement setting out reasons for the resolution, with sufficient specificity to reasonably permit the director to prepare and present a response; and

(b) a reasonable opportunity to make a presentation, in person or through a representative, to the meeting before the resolution is put to a vote.

(5) If, in terms of subsection (3), the board of a company has determined that a director is ineligible or disqualified, incapacitated, or has been negligent or derelict, as the case may be, the director concerned, or a person who appointed that director as contemplated in section 66 (4) (a) (i), if applicable, may apply within 20 business days to a court to review the determination of the board.

(6) If, in terms of subsection (3), the board of a company has determined that a director is not ineligible or disqualified, incapacitated, or has not been negligent or derelict, as the case may be-

(a) any director who voted otherwise on the resolution, or any holder of voting rights entitled to be exercised in the election of that director, may apply to a court to review the determination of the board; and

(b) the court, on application in terms of paragraph (a), may-

(i) confirm the determination of the board; or

(ii) remove the director from office, if the court is satisfied that the director is ineligible or disqualified, incapacitated or has been negligent or derelict.

(7) An applicant in terms of subsection (6) must compensate the company, and any other party, for costs incurred in relation to the application, unless the court reverses the decision of the board.

(8) If a company has fewer than three directors-

(a) subsection (3) does not apply to the company;

(b) in any circumstances contemplated in subsection (3), any director or shareholder of the company may apply to the Companies Tribunal, to make a determination contemplated in that subsection; and

(c) subsections (4), (5) and (6), each read with the changes required by the context, apply to the determination of the matter by the Companies Tribunal.

(9) Nothing in this section deprives a person removed from office as a director in terms of this section of any right that person may have at common law or otherwise to apply to a court for damages or other compensation for-

(a) loss of office as a director; or

(b) loss of any other office as a consequence of being removed as a director.

(10) This section is in addition to the right of a person, in terms of section 162, to apply to a court for an order declaring a director delinquent, or placing a director on probation.

**86. Mandatory appointment of company secretary.**-(1) A public company or state-owned company must appoint a company secretary.

[Sub-s. (1) substituted by s. 54 (a) of Act No. 3 of 2011.]

(2) Every company secretary, irrespective of whether the appointment is made as required by subsection (1) or in terms of a requirement in a company's Memorandum of Incorporation, as contemplated in section 34 (2) and 84 (1) (c) (ii), must-

(a) have the requisite knowledge of, or experience in, relevant laws; and

(b) be a permanent resident of the Republic, and remain so while serving in that capacity.

[Sub-s. (2) substituted by s. 54 (a) of Act No. 3 of 2011.]

(3) The first company secretary of a public company or state-owned company may be appointed by-

(a) the incorporators of the company; or

(b) within 40 business days after the incorporation of the company, by either-

(i) the directors of the company; or

(ii) an ordinary resolution of the holders of the company's securities.

(3A) The first company secretary of a company that is required only in terms of its Memorandum of Incorporation to appoint a company secretary as contemplated in sections 34 (2) and 84 (1) (c) (ii), must be appointed-

(a) in accordance with subsection (3), if the requirement to appoint a company secretary applies to that company when it is incorporated; or

(b) within 40 business days after the date on which the requirement first applies to the company, by either-

- (i) the directors of the company; or
- (ii) an ordinary resolution of the holders of the company's securities.

[Sub-s. (3A) inserted by s. 54 (b) of Act No. 3 of 2011.]

(4) Within 60 business days after a vacancy arises in the office of company secretary, the board must fill the vacancy by appointing a person whom the directors consider to have the requisite knowledge and experience.

**90. Appointment of auditor.**-(1) Upon its incorporation, and each year at its annual general meeting, a public company or state-owned company must appoint an auditor.

(1A) A company referred to in section 84 (1) (c) (i), or a company that is required only in terms of its Memorandum of Incorporation to have its annual financial statements audited as contemplated in sections 34 (2) and 84 (1) (c) (ii), must appoint an auditor-

(a) in accordance with subsection (1), if the requirement to have its annual financial statements audited applies to that company when it is incorporated; or

(b) at the annual general meeting at which the requirement first applies to the company, and each annual general meeting thereafter.

[Sub-s. (1A) inserted by s. 55 of Act No. 3 of 2011.]

(2) To be appointed as an auditor of a company, whether as required by subsection (1) or as contemplated in section 34 (2), a person or firm-

(a) must be a registered auditor;

(b) in addition to the prohibition contemplated in section 84 (5), must not be-

(i). a director or prescribed officer of the company;

(ii). an employee or consultant of the company 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;

(iii). a director, officer or employee of a person appointed as company secretary in terms of Part B of this Chapter;

(iv). a person who, alone or with a partner or employees, habitually or regularly performs the duties of accountant or bookkeeper, or performs related secretarial work, for the company;

(v) a person who, at any time during the five financial years immediately preceding the date of appointment, was a person contemplated in any of subparagraphs (i) to (iv); or

(vi) a person related to a person contemplated in subparagraphs (i) to (v); and

(c) must be acceptable to the company's audit committee as being independent of the company, having regard to the matters enumerated in section 94 (8), in the case of a company that has appointed an audit committee, whether as required by section 94, or voluntarily as contemplated in section 34 (2).

(3) If a company appoints a firm as an auditor, the individual determined by that firm, in terms of section 44 (1) of the Auditing Profession Act, to be responsible for performing the functions of auditor must satisfy the requirements of subsection (2).

(4) If a company that is required to appoint an auditor does not do so when it registers the incorporation of the company, the directors of the company must appoint the first auditor of the company within 40 business days after the date of incorporation of the company.

(5) The first auditor of a company holds office until the conclusion of the first annual general meeting of the company.

(6) A retiring auditor may be automatically reappointed at an annual general meeting without any resolution being passed, unless-

(a) the retiring auditor is-

(i) no longer qualified for appointment;

(ii) no longer willing to accept the appointment, and has so notified the company; or

(iii) required to cease serving as auditor, in terms of section 92;

(b) an audit committee appointed by the company in terms of this Act objects to the reappointment; or

(c) the company has notice of an intended resolution to appoint some other person or persons in place of the retiring auditor.

(7) If an annual general meeting of a company does not appoint or reappoint an auditor the directors must fill the vacancy in the office in terms of the procedure contemplated in section 91 within 40 business days after the date of the meeting.

**92. Rotation of auditors.**-(1) The same individual may not serve as the auditor or designated auditor of a company for more than five consecutive financial years.

(2) If an individual has served as the auditor or designated auditor of a company for two or more consecutive financial years and then ceases to be the auditor or designated auditor, the individual may not be appointed again as the auditor or designated auditor of that company until after the expiry of at least two further financial years.

(3) If a company has appointed two or more persons as joint auditors, the company must manage the rotation required by this section in such a manner that all of the joint auditors do not relinquish office in the same year.

**94. Audit committees.**-(1) **This section-**

(a) applies concurrently with section 64 of the Banks Act, to any company that is subject to that section of that Act, but subsections (2), (3) and (4) of this section do not apply to the appointment of an audit committee by any such company; and

(b) does not apply to a company that has been granted an exemption in terms of section 64 (4) of the Banks Act.

(2) At each annual general meeting, a public company, state-owned company or other company that is required only by its Memorandum of Incorporation to have an audit committee as contemplated in sections 34 (2) and 84 (1) (c) (ii), must elect an audit committee comprising at least three members, unless-

- (a) the company is a subsidiary of another company that has an audit committee; and
- (b) the audit committee of that other company will perform the functions required under this section on behalf of that subsidiary company.

[Sub-s. (2) amended by s. 57 (a) of Act No. 3 of 2011.]

(3) The first members of the audit committee may be appointed by-

- (a) the incorporators of a company; or

- (b) by the board, within 40 business days after the incorporation of the company.

(4) Each member of an audit committee of a company must-

- (a) be a director of the company, who satisfies any applicable requirements prescribed in terms of subsection (5);

- (b) not be-

- (i) involved in the day-to-day management of the company's business or have been so involved at any time during the previous financial year;

- (ii) a prescribed officer, or full-time employee, of the company or another related or inter-related company, or have been such an officer or employee at any time during the previous three financial years; or

- (iii) a material supplier or customer of the company, such that a reasonable and informed third party would conclude in the circumstances that the integrity, impartiality or objectivity of that director is compromised by that relationship; and

- (c) not be related to any person who falls within any of the criteria set out in paragraph (b).

(5) The Minister may prescribe minimum qualification requirements for members of an audit committee as necessary to ensure that any such committee, taken as a whole, comprises persons with adequate relevant knowledge and experience to equip the committee to perform its functions.

(6) The board of a company contemplated in section 84 (1) must appoint a person to fill any vacancy on the audit committee within 40 business days after the vacancy arises.

(7) An audit committee of a company has the following duties-

- (a) to nominate, for appointment as auditor of the company under section 90, a registered auditor who, in the opinion of the audit committee, is independent of the company;

- (b) to determine the fees to be paid to the auditor and the auditor's terms of engagement;

- (c) to ensure that the appointment of the auditor complies with the provisions of this Act and any other legislation relating to the appointment of auditors;

- (d) to determine, subject to the provisions of this Chapter, the nature and extent of any non-audit services that the auditor may provide to the company, or that the auditor must not provide to the company, or a related company;

- (e) to pre-approve any proposed agreement with the auditor for the provision of non-audit services to the company;

- (f) to prepare a report, to be included in the annual financial statements for that financial year-

- (i) describing how the audit committee carried out its functions;
  - (ii) stating whether the audit committee is satisfied that the auditor was independent of the company; and
  - (iii) commenting in any way the committee considers appropriate on the financial statements, the accounting practices and the internal financial control of the company;
  - (g) to receive and deal appropriately with any concerns or complaints, whether from within or outside the company, or on its own initiative, relating to-
    - (i) the accounting practices and internal audit of the company;
    - (ii) the content or auditing of the company's financial statements;
    - (iii) the internal financial controls of the company; or
    - (iv) any related matter;
  - (h) to make submissions to the board on any matter concerning the company's accounting policies, financial control, records and reporting; and
  - (i) to perform such other oversight functions as may be determined by the board. [Para. (i) substituted by s. 57 (b) of Act No. 3 of 2011.]
- (8) In considering whether, for the purposes of this Part, a registered auditor is independent of a company, the audit committee of that company must-
- (a) ascertain that the auditor does not receive any direct or indirect remuneration or other benefit from the company, except-
    - (i) as auditor; or
    - (ii) for rendering other services to the company, to the extent permitted in terms of subsection (7) (d); [Sub-para. (ii) substituted by s. 57 (c) of Act No. 3 of 2011.]
  - (b) consider whether the auditor's independence may have been prejudiced-
    - (i) as a result of any previous appointment as auditor; or
    - (ii) having regard to the extent of any consultancy, advisory or other work undertaken by the auditor for the company; and
  - (c) consider compliance with other criteria relating to independence or conflict of interest as prescribed by the Independent Regulatory Board for Auditors established by the Auditing Profession Act, in relation to the company, and if the company is a member of a group of companies, any other company within that group.
- (9) Nothing in this section precludes the appointment by a company at its annual general meeting of an auditor other than one nominated by the audit committee, but if such an auditor is appointed, the appointment is valid only if the audit committee is satisfied that the proposed auditor is independent of the company.
- [Sub-s. (9) substituted by s. 57 (d) of Act No. 3 of 2011.]
- (10) Neither the appointment nor the duties of an audit committee reduce the functions and duties of the board or the directors of the company, except with respect to the appointment, fees and terms of engagement of the auditor.

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

#### **REGULATIONS IN TERMS OF THE COMPANIES ACT NO. 71 (2008) (AS AMENDED)**

**21. Registered office of company.**-*See s. 23*-A company or external company must notify the Commission of a change in its registered office by filing Form CoR 21.1 with the fee set out in Table CR 1, indicating the effective date of the change, which must be at least five business days after the date on which the notice is filed.

**43. Social and Ethics Committee.**-*See s. 72 (4) to (10)*-(1) This regulation applies to-

- (a) every state owned company;
- (b) every listed public company; and

(c) any other company that has in any two of the previous five years, scored above 500 points in terms of regulation 26 (2).

(2) A company to which this regulation applies must appoint a social and ethics committee unless-

(a) it is a subsidiary of another company that has a social and ethics committee, and the social and ethics committee of that other company will perform the functions required by this regulation on behalf of that subsidiary company; or

(b) it has been exempted by the Tribunal in accordance with section 72 (5) and (6).

(3) A board of a company that is required to have a social and ethics committee, and that-

(a) exists on the effective date, must appoint the first members of the committee within 12 months after-

(i) the effective date; or

(ii) the determination by the Tribunal of the company's application, if any, if the Tribunal has not granted the company an exemption;

(b) is incorporated on or after the effective date, must constitute a social and ethics committee and appoint its first members within one year after-

(i) its date of incorporation, in the case of a state owned company;

(ii) the date it first became a listed public company, in such a case; or

(iii) the date it first met the criteria set out in sub-regulation (1) (c), in any other case.

(4) A company's social and ethics 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.

(5) A social and ethics committee has the following functions-

(a) To monitor the company's activities, having regard to any relevant legislation, other legal requirements or prevailing codes of best practice, with regard to matters relating to-

(i) social and economic development, including the company's standing in terms of the goals and purposes of-

(aa) the 10 principles set out in the United Nations Global Compact Principles; and

(bb) the OECD recommendations regarding corruption;

(cc) the Employment Equity Act; and

(dd) the Broad-Based Black Economic Empowerment Act;

(ii) good corporate citizenship, including the company's-

(aa) promotion of equality, prevention of unfair discrimination, and reduction of corruption;

(bb) contribution to development of the communities in which its activities are predominantly conducted or within which its products or services are predominantly marketed; and

(cc) record of sponsorship, donations and charitable giving;

(iii) the environment, health and public safety, including the impact of the company's activities and of its products or services;

(iv) consumer relationships, including the company's advertising, public relations and compliance with consumer protection laws; and

(v) labour and employment, including-

(aa) the company's standing in terms of the International Labour Organization Protocol on decent work and working conditions; and

(bb) the company's employment relationships, and its contribution toward the educational development of its employees;

(b) to draw matters within its mandate to the attention of the Board as occasion requires; and

(c) to report, through one of its members, to the shareholders at the company's annual general meeting on the matters within its mandate.

### **Schedule 1**

PROVISIONS CONCERNING NON-PROFIT COMPANIES [Sch. 1 amended by s. 122 of Act No. 3 of 2011.]

**1. Objects and policies.-(1) The Memorandum of Incorporation of a non-profit company must-**

(a) set out at least one object of the company, and each such object must be either-

(i) a public benefit object; or

(ii) an object relating to one or more cultural or social activities, or communal or group interests; and

(b) be consistent with the principles set out in sub-items (2) to (9).

[Item. (b) amended by s. 122 (a) of Act No. 3 of 2011. (English only)]

(2) A non-profit company-

(a) must apply all of its assets and income, however derived, to advance its stated objects, as set out in its Memorandum of Incorporation; and

(b) subject to paragraph (a), may-

(i) acquire and hold securities issued by a profit company; or

(ii) directly or indirectly, alone or with any other person, carry on any business, trade or undertaking consistent with or ancillary to its stated objects.

(3) A non-profit company must not, directly or indirectly, pay any portion of its income or transfer any of its assets, regardless how the income or asset was derived, to any person who is or was an incorporator of the company, or who is a member or director, or person appointing a director, of the company, except-

(a) as reasonable-

(i) remuneration for goods delivered or services rendered to, or at the direction of, the company; or

(ii) payment of, or reimbursement for, expenses incurred to advance a stated object of the company;

(b) as a payment of an amount due and payable by the company in terms of a *bona fide* agreement between the company and that person or another;

(c) as a payment in respect of any rights of that person, to the extent that such rights are administered by the company in order to advance a stated object of the company; or

(d) in respect of any legal obligation binding on the company.

[Para. (3) amended by s. 122 (b) of Act No. 3 of 2011.]

(4) Despite any provision in any law or agreement to the contrary, upon the winding-up or dissolution of a non-profit company-

(a) no past or present member or director of that company, or person appointing a director of that company, is entitled to [Sch-2] any part of the net value of the company after its obligations and liabilities have been satisfied; and

(b) the entire net value of the company must be distributed to one or more non-profit companies, registered external non-profit companies carrying on activities within the Republic, voluntary associations or non-profit trusts-

(i) having objects similar to its main object; and

(ii) as determined-

(aa) in terms of the company's Memorandum of Incorporation;

(bb) by its members, if any, or its directors, at or immediately before the time of its dissolution; or

(cc) by the court, if the Memorandum of Incorporation, or the members or directors fail to make such a determination.

[Item. (b) amended by s. 122 (c) of Act No. 3 of 2011.]

(5) The Commission may apply to the court, on behalf of a non-profit company, for a determination contemplated in sub-item (4) (b) (ii) (cc) if the non-profit company has-

(a) no remaining members or directors; and

(b) failed to-

(i) make a determination contemplated in sub-item (4) (b) (ii) (bb); or

[Sub-item (i) amended by s. 122 (a) of Act No. 3 of 2011. (English only)]

(ii) apply to the court for such a determination.

[Para. (5) amended by s. 122 (a) of Act No. 3 of 2011. (English only)]

(6) Incorporation as a non-profit company in terms of this Act, or registration as an external non-profit company in terms of this Act, and compliance by either with the provisions of this Act does not necessarily qualify that non-profit company, or external non-profit company, for any particular status, category, classification or treatment in terms of the Income Tax Act, 1962 (Act No. 58 of 1962), or any other legislation, except to the extent that any such legislation provides otherwise.

(7) Each voting member of a non-profit company has at least one vote.

(8) The vote of each member of a non-profit company is of equal value to the vote of each other voting member on any matter to be determined by vote of the members, except to the extent that the company's Memorandum of Incorporation provides otherwise.

(9) If a non-profit company has members, the requirement in section 24 (4) to maintain a securities register must be read as requiring the company to maintain a membership register.

**2. Fundamental transactions.**-(1) A non-profit company may not-

(a) amalgamate or merge with, or convert to, a profit company; or

(b) dispose of any part of its assets, undertaking or business to a profit company, other than for fair value, except to the extent that such a disposition of an asset occurs in the ordinary course of the activities of the non-profit company.

(2) If a non-profit company has voting members, any proposal to-

(a) dispose of all or the greater party of its assets or undertaking; or

(b) amalgamate or merge with another non-profit company,

must be submitted to the voting members for approval, in a manner comparable to that required of profit companies in accordance with sections 112 and 113, respectively.

(3) Sections 115 and 116, read with the changes required by the context, apply with respect to the approval of a proposal contemplated in sub-item (2).

[Para. (3) amended by s. 122 (a) of Act No. 3 of 2011. (English only)]

**3. Incorporators of non-profit company.**-The incorporators of a non-profit company are its-

(a) first directors; and

(b) its first members, if its Memorandum of Incorporation provides for it to have members.

**4. Members.**-(1) A non-profit company is not required to have members, but its Memorandum of Incorporation may provide for it to do so.

(2) If the Memorandum of Incorporation of a non-profit company provides for the company to have members, it-

(a) must not restrict or regulate, or provide for any restriction or regulation of, that membership in any manner that amounts to unfair discrimination in terms of section 9 of the Constitution;

(b) must not presume the membership of any person, regard a person to be a member, or provide for the automatic or *ex officio* membership of any person, on any basis other than life-time membership awarded to a person-

(i) for service to the company or to the public benefit objects set out in the company's Memorandum of Incorporation; and

(ii) with that person's consent;

(c) may allow for membership to be held by juristic persons, including profit companies;

(d) may provide for no more than two classes of members, that is voting and non-voting members, respectively; and

(e) must set out-

(i) the qualifications for membership;

(ii) the process for applying for membership;

(iii) any initial or periodic cost of membership in any class;

(iv) the rights and obligations, if any, of membership in any class; and

(v) the grounds on which membership may, or will, be suspended or lost.

**5. Directors.**-(1) If a non-profit company has members, the Memorandum of Incorporation must-

(a)

[Sch-4]

(b)

set out the basis on which the members choose the directors of the company; and

if any directors are to be elected by the voting members, provide for the election each year of at least one-third of those elected directors.

(2) If a non-profit company has no members, the Memorandum of Incorporation must set out the basis on which directors are to be appointed by its board, or other persons.

(3) A non-profit company must not provide a loan to, secure a debt or obligation of, or otherwise provide direct or indirect financial assistance to, a director of the company or of a related or inter-related company, or to a person related to any such director.

(4) Sub-item (3) does not prohibit a transaction if it-

(a) is in the ordinary course of the company's business and for fair value;

- (b) constitutes an accountable advance to meet-
  - (i) legal expenses in relation to a matter concerning the company; or
  - (ii) anticipated expenses to be incurred by the person on behalf of the company;
- (c) is to defray the person's expenses for removal at the company's request; or
- (d) is in terms of an employee benefit scheme generally available to all employees or a specific class of employees. [Para. (4) amended by s. 122 (a) of Act No. 3 of 2011. (English only)]