



## PRACTICE NOTE 1 OF 2012

### IN TERMS OF

### REGULATION 4 OF THE COMPANIES REGULATIONS, 2011

#### POSITION OF PRE-EXISTING COMPANIES ON THE ADOPTION OF A NEW MEMORANDUM OF INCORPORATION (MOI) OR THE AMENDMENT OF AN EXISTING MOI UNDER THE COMPANIES ACT, 2008 (THE ACT)

1. A measure of uncertainty exists and different opinions are doing the rounds about the continued validity of the memoranda and articles of incorporation of companies that were incorporated or deemed to be incorporated under the repealed Companies Act (pre-existing companies).
2. The correct position is as follows:
  - 2.1 In terms of the definition of Memorandum” or “Memorandum of Incorporation” (Mol) in section 1 of the Companies Act, 2008, the memorandum and articles of incorporation of a pre-existing company is deemed to be its Mol for purposes of the said Act. No action is thus required by any pre-existing company to change its existing incorporation documents into a Mol.
  - 2.2 Item 4 (2) of the transitional provisions in Schedule 5 of the Act provides that for a period of two years after the Act has come into operation (i.e. from 1 May 2011), a pre-existing company may amend its Mol free of charge to bring it in harmony with the Act. Any provision in such a company’s Mol which is in conflict with the Act may thus be amended without payment of any prescribed fee within this first two years. These amendments could be amendments to specific articles of the Mol or it could entail the adoption of a new Mol under the Act. The option to amend must be exercised by the company and there is no obligation to make any such amendment.
  - 2.3 Item 4 (4) of Schedule 5 of the Act contains the rules of interpretation should there be a conflict between a provision of an existing Mol and the Act. During the period of two years after the Act has come into operation, if there is such a conflict, the provisions of the Mol will override the Act unless the said Schedule 5 itself provides otherwise. A careful study of the other transitional provisions in Schedule 5 is, therefore, essential for a full understanding of this provision. It follows that every pre-existing company must exercise an option to amend or not

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and that there is no obligation on any such company to make any amendment. It further follows that after the two year period, if no amendment was made to remove a conflicting provision, the provisions of the Act will apply and the conflicting provision in the Mol will no longer have any legal force or effect.

3. The transitional arrangements as described above will apply automatically in respect of the Mol's of all pre-existing companies and it is only in those cases where a particular company requires some other arrangement to apply to it that an amendment of the Mol will be necessary. Typical examples where companies may want to create another arrangement would be the following:
  - 3.1 The existing Mol of a private or non-profit company requires that the annual financial statements of the company must be audited after the end of each financial year. An audit may in terms of the Act no longer be a requirement for the particular private or non-profit company but the Mol still requires it to be done. In terms of item 4 (4) of Schedule 5 the requirement of the Mol prevails and the annual financial statements will have to be audited unless the Mol is amended before the financial year end to remove that requirement. Companies must note that if the Mol requires an audit this requirement becomes effective once the company reaches its financial year end and that an amendment to remove this requirement must be done prior to the requirement becoming effective at the end of the financial year.
  - 3.2 The existing Mol of a private or non-profit company requires the company to hold an annual general meeting after the end of its financial year. The Act no longer contains such a requirement for private or non-profit companies but the Mol still requires it to be held. In terms of the transitional provisions the Mol prevails and the company must hold the meeting or amend its Mol to remove the requirement.
4. From the above it is evident that it is NOT COMPULSORY for any company to adopt a new Mol nor will the CIPC convert any existing Mol into a new Mol after 31 April 2013, the date on which the two year period expires. Every company must decide for itself whether it wants to amend its existing Mol or adopt a new Mol and every company should realise that after 30 April 2013 its existing Mol will continue to be of force and effect but only to the extent that it is not in conflict with the Act.



**Mrs Astrid Ludin**  
**COMMISSIONER**  
9 May 2012