COMPLIANCE FOCUS: THE MEMORANDUM OF INCORPORATION UNDER THE
NEW COMPANIES ACT 71 OF 2008
(Notice no. 10 of 2016)

One of the most important changes brought about by the Companies Act 2008 ("the Act") is the creation of a new founding document for companies, called a Memorandum of Incorporation (the "MOI"), which combines the current memorandum of association and articles of association of a company into one document. The MOI specifies the rights, duties and responsibilities of shareholders, directors and others within and in relation to a company and other related matters.

The Act provides that:

- the MOI may include matters not addressed in the Act and alterations of alterable provisions;
- the MOI must be consistent with the Act and is void to the extent that it contravenes or is inconsistent with the Act; and
- any provision of a shareholders’ agreement that is inconsistent with the Act or the MOI is void to the extent of the inconsistency.

The Act has allowed companies to file a notice of amendment of its current founding documents to bring it in harmony with the Act by no later than the 30th of April 2013 to avoid certain automatic consequences. Companies had the following options during the above period:

- in the event of a conflict between the pre-existing company’s founding documents, being its memorandum and articles of association (or ‘MOI’ as it is called under the Act) and the Act, the existing MOI will prevail, except to the extent that Schedule 5 in the Act provides otherwise; and
- in the event of a conflict between a shareholders’ agreement and the pre-existing company’s existing MOI or the Act, the shareholders’ agreement prevails.

There are many wide exceptions to this rule as stated in Schedule 5 and these exceptions have immediate effect (i.e. they will override the MOI and shareholders’ agreement, even during the above period), which includes provisions regulating:

- conversion from par value shares to no par value shares;
- the approvals required for any distribution, financial assistance, insider share issues, or options;
- the duties, conduct and liability of directors;
- meetings of shareholders and directors and the adoption of resolutions;
- fundamental transactions and regulation by the Takeover Regulation Panel; and
- Business rescue.
Should a company fail to amend its founding documents in line with the Act, the result will be that, after the 30th April 2013, those provisions of its founding documents which are not compliant are overridden by the Act and its shareholders' agreement will be void to the extent of any inconsistency. It is therefore important for all companies to conduct a review of its current founding documents and shareholders’ agreements in order to establish the extent of the inconsistencies between them and the Act in order to bring it in line with the Act at the soonest. Failing to do so could result in some of the companies’ actions/decisions being questionable for not having been implemented legally. Depending on the nature of the non-compliance, there may be severe consequences for the company.

By adopting a new MOI, a company may be able to preserve most of its previous internal and administrative procedures by adjusting the flexible provisions of the Act to suit its particular needs. Last but not least, once a company's new MOI has been adopted, it may be wise to conclude a supplement to the existing shareholders’ agreement to record in writing those provisions of the shareholders’ agreement which will no longer apply due to them being in conflict with the MOI and/or the Act and/or which are no longer applicable under the new dispensation.

What happens if you do nothing until after the two years?
All decisions taken by the company before the effective date will be binding provisions and those provisions will continue to have force and effect for two years after the effective date. After the two year period, those provisions will only be binding to the extent that they are consistent with the Act. If you decide to change your MOI after this two years, then the normal fee for lodging an amended MOI will be charged, as well as a fee for the registration of the special resolution.

This CIPC Compliance Focus is issued to create awareness and education amongst industry and concerned parties.

ADV. RORY VOLLER

ACTING COMMISSIONER

CIPC

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