



Companies and Intellectual
Property Commission

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MOI AMENDMENTS & COMPANY SHARES

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MEMORANDUM OF INCORPORATION (MOI)

Memorandum of Incorporation is defined in the Companies Act, 71 of 2008 as the document, that sets out rights, duties and responsibilities of shareholders, directors and others within and in relation to a company, (corporate governance) and other matters as contemplated in section 15, and by which-

- a) the company was incorporated under this Act, as contemplated in section 13;
- b) a pre-existing company that was structured and governed before the later of the-
 - i. effective date (1 May 2011) or
 - ii. date it was converted to a company in terms of Schedule 2; or
- c) a domesticated company is structured and governed.

AMENDMENTS TO THE MOI

The following constitutes amendments to the MOI and must be filed with the CIPC to ensure up to date data on our records:

1. Adoption of a whole new MOI;
2. Amendments of certain sections of the MOI – i.e removal of audit requirement in private companies;
3. Name change of a company;
4. Main business amendment – not required in terms of profit companies, but may be filed. NPC's must have a main business indicated (Schedule 1, Item 1);
5. Authorized share amendments – increase, decrease, creation conversion or re-classification;
6. Company type change – NPC may not convert to a profit company, other type changes are allowed;
7. Ring-fencing of the MOI (RF) – section 15(2) of the Act – impose a higher standard, greater restriction, or similar onerous requirement.

Example – directors are only allowed to contract with a third party (on behalf of the company) to the monetary value of R300 000. (RF)

MOI'S CONTINUED

Alterations of the MOI – section 17(1) of the Act – at any time a correction of a patent error may be filed by an authorized person – COR15.3

Translation(s) of the MOI – section 17(3) - may be filed with the CIPC for record purposes in any of the official South African languages – COR15.4. Afrikaans version of MOI is seen as a translation and must be filed under cover of a COR15.4.

Consolidations of the MOI – section 17(5) – at any time after a company has filed its MOI and subsequently filed one or more alterations or amendments the company may file a consolidated version of it (COR15.5) or the CIPC may require a company to file a consolidated version (COR15.6).

The latest version of a company's Memorandum of Incorporation that has been endorsed by the CIPC prevails in the case of any conflict between it (MOI) and any other purported version of the MOI of a company – authenticity – CIPC endorsed.

CAPITALIZATION OF PROFIT COMPANIES

Several sections of the Companies Act, 2008 is devoted to company shares, registers, shareholders, etc. With the inception of the new Act (2011) certain areas of shares (such as the issue thereof, premium accounts, share buybacks and more) is not relevant to the CIPC any longer, and requires no filing (or registration) thereof with the CIPC.

However, companies should be cognizant of the fact that even though filing with the CIPC is not necessary, the Act may still require the proper passing of special resolutions, etc.

Herewith a few facts as determined by the Companies Act, surrounding shares:

- ❖ A share issued by a company is movable property (section 35(1)) and can be attached by a court of law, transferred, etc. Important to note is that the CIPC is not the holders of the rights attached to shares, and no warrant of execution or attachment in terms of company shares (and member's interest for that matter) can be served on and /or executed by the CIPC;
- ❖ Companies Act, 2008 removed the differentiation between shares with a par value or with no par value, therefore as from 1 May 2011 only authorized shares with no par value can be created (section 35(2));
- ❖ A company may not issue shares to itself (section 35(3));

CAPITALIZATION OF PROFIT COMPANIES

- ❖ An authorized share of a company has no rights attached to it, until it has been issued (section 35(4)).

This does not mean that the MOI cannot contain the rights and privileges associated with the authorized shares of the company, it only means that these rights and privileges as indicated in the MOI will only be attached to the individual share once it is issued.

CIPC online e-services platform provides for an automated share amendment service. Shares can be created and / or amended in terms of the Companies Act requirements electronically. The online service does not provide for the lodgment of an MOI (confirming the share amendment), which a lot of third parties raised a concern about. However, as discussed earlier in the webinar, shares may be amended without adopting (or lodging) a whole new MOI, and thus companies may proceed to tend to several amendments (shares, name changes, etc) and only then lodge a consolidated MOI that combines and confirm all the changes made.

SHARE CAPITAL

- A company's MOI must set out the different classes of shares and the number of shares for each class AND the MOI must set out – (section 36(1))
 - ❖ a distinguishing designation for each class of shares; and
 - ❖ the preferences, rights, limitations, etc attached to each class

A company cannot have the same class of shares with different values.

Example: 1000 ordinary par value shares of R1 each
1000 ordinary no par value shares

1000 – number of shares

Ordinary – class

Par / no par – base line value

R1 / none – rand value

The above represents the exact same class of shares (with no distinguishing factor) with different values.

SHARE CAPITAL

In order to ensure compliance with the Companies Act (section 36) a company must add a distinguishing designation to each of its classes to allow for the CIPC, shareholders and potential investors to be able to differentiate between the different classes of shares and the rights, etc attached thereto.

Example: 1000 ordinary par value shares of R1 each
1000 ordinary Class A no par value shares

Although both classes are “ordinary”, the above designation “Class A” distinguishes the ordinary class with no par value shares, from the ordinary class that has existing par value shares.

A lot of authorized share applications are rejected, due to the use of the word “common” to describe a class of ordinary shares. There is no such thing as “common” shares and is not reflected in the Companies Act anywhere. Reference to “common” shares was made on the standard COR15.1A and COR15.1B forms, which was an error by the legislature and was corrected in 2012, notices of which was published in the Government Gazette.

SHARE CAPITAL CONTINUED...

A company may, by special resolution authorise the alteration of its share capital in one of the following ways:

- Increase its share capital by authorizing new classes of shares or, increase existing no par value shares;
- Decrease or cancel classes of shares;
- Subdivide its shares, or part of them into shares of smaller amount than is fixed by the MOI (in essence an increase in shares)
- Convert all of its ordinary or preference share capital consisting of shares having a par value into stated capital constituted by shares of no par value;
- Cancel unissued shares of par value and reduce the authorised share capital by the amount of the shares cancelled;
- Convert any of its shares, whether issued or not, into shares of another class (reclassification)

A company's MOI may also provide for unclassified shares, - shares where the associated preference, rights and limitations of that class of share have not been specified.

CONVERSION OF SHARES AND REGULATION 31 OF THE COMPANIES ACT REGULATIONS

The Companies Act, 2008 provides for pre-existing companies to retain its par value share classes. However no new classes of par value shares may be created, except for banks (exception). A pre-existing company may in terms of Reg 31(3)(b) convert that class or classes of authorized share/s having nominal value or par value shares to shares having no nominal or no par value shares.

- Reg 31(7) authorizes the board of the company to effect a conversion at any time by an amendment of the company's MOI, on condition that the amendment must not be done primarily to evade tax legislation (capital gains tax) and be approved by special resolution of the holders of the particular class of shares as well as the company's shareholders.
- The board must present a detailed report on the nature and effect of the amendment (Reg 31(7)(a-d)).
- The report must be circulated to the shareholders prior to the meeting and a copy thereof must also be submitted to SARS – Reg 31(8)(b).
- Although the Act provides for independent submission of the report with the CIPC, practically CIPC requires the report to be filed with the application to convert par value to no par value shares.

TRANSITIONAL ARRANGEMENTS (SCHEDULE 5)

With the incorporation of the Companies Act, 2008 transitional arrangements were necessary to ease existing companies into the legislative changes. 2 Items of Schedule 5 is relevant and applicable to our discussion on MOI's and Shares.

- Item 4 – Memorandum of Incorporation:
- ✓ Every pre-existing company is deemed to have amended its MOI to reflect that it is a private-, personal liability-, public-, or non-profit company in accordance with the Companies Act of 2008;
- ✓ Limited by guarantee companies were done away with in terms of the new Act and were given 20 business days to become a profit company. All companies that did not elect to do so were converted to NPC's;
- ✓ Legislatively companies were given 2 years to adopt and file with the CIPC updated MOI's (in substitution of its Memo and Articles) to bring it in line with the current Companies Act;
- ✓ Companies that did not do so, and there exists a conflict between their Memo's and Articles and this Act, the Act prevails.

TRANSITIONAL ARRANGEMENTS (SCHEDULE 5)

- Item 6 – Par value of shares, treasury shares, capital accounts and share certificates:
- ✓ The creation of new or increase of existing classes of par value shares does not apply to Banks as defined in the Banks Act, 1993 and thus only banks may create new classes of par value shares;
- ✓ Holders of par value shares (pre-existing companies) were and are allowed to retain such par value shares with the exact same rights and preferences attached as per the Companies Act of 1973;
- ✓ Companies should have amended its share certificates, but a failure of any share certificate to satisfy the requirements of section 51(1-4) – content of certificates – is not a contravention of the Act and does not invalidate the certificate.
- ✓ CIPC holds no record of shareholders or shareholding information and share certificates must be dealt with by companies internally.



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QUESTIONS?



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THANK YOU

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