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## **The importance of the Companies Act and the impact of proposed amendments**



***The first Companies Act was implemented in 1926 and was based on the Transvaal Companies Act which was written in line with the British Companies Act 1908. Since then it has been amended twice and today we are using the Companies Act of 2008 (“the Act”).***

The importance of the Act is to provide for the incorporation, registration, management and capitalisation of profits in every company.

**What is the aim of the Companies Act?**

The Companies Act aims, amongst others, to specify the relationship between all parties involved in the company, i.e. shareholders, members and directors as stakeholders. The Act also assists with legal rectification for investors and third parties and rescuing of companies that are experiencing financial difficulties. In short, according to section 7(b)(iii) of the Act, its main aim is to encourage transparency and high standards of corporate governance. For this reason, the public is granted the right to comment on the proposed draft of the Companies Amendment Bill (“the Amendment Bill”).

The Amendment Bill was first published for public comment on 21 September 2018. However, it has been significantly revised as a result of public engagement on this draft. On 1 October 2021, the Amendment Bill was published for public commentary for a second time. The purpose of the amendments is to address any uncertainties and close some of the loopholes in the Act.

One of several amendments to the Act proposed in the Amendment Bill is an amendment to section 16. Section 16 of the Act deals with the amendment of the memorandum of incorporation (“Mol”) of a company; it can either be amended or be replaced in totality.

The proposed amendment is aimed specifically at section 16(9) and is intended to clarify the effective date of an amendment to a company’s Mol.

## **When is the amendment of the Mol effective?**

Section 16 of the Act currently provides that an amendment to the Mol of a company takes effect on the date and at the time when the notice of amendment is filed with the Companies and Intellectual Property Commission (“CIPC”), or on a date specified in the notice of amendment. The question that often arises is what is meant by “filed”.

Once the CIPC responds with a written acknowledgement of receipt of the submission, filing takes place in the conventional way.

The word “file” as per the Act is defined as delivering a document to the Commission in the manner and form, if any, prescribed for that document.

The reason for the possible confusion as to when “filing” is effective is that section 1 of the Act provides that delivery to the CIPC only occurs when the CIPC issues a receipt, whereas the Companies Regulations, 2011, states as per **Table CR3** below.

| NATURE OF PERSON TO WHOM THE DOCUMENT IS TO BE DELIVERED | METHOD OF DELIVERY                                                                                                                                                                          | DATE AND TIME OF DEEMED DELIVERY                                                                                                                                                                                                |
|----------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| THE COMMISSION                                           | If the document is a prescribed form, by entering the required information in an electronic representation of that form on the internet website maintained by the Commission, if any; or    | On the date and at the time recorded by the Commission's computer system, as verified by fax reply to the sender of the information.                                                                                            |
|                                                          | By transmitting the document as a separate file attached to an electronic mail message addressed to the Commission; or                                                                      | On the date and at the time recorded by the Commission's computer system, unless, within 1 business day after that date, the Commission advises the sender that the file is unreadable.                                         |
|                                                          | By sending a computer disk containing the document in electronic form, by registered post addressed to the Commission; or                                                                   | On the date and at the time of delivery of the registered post to the Commission, as recorded by the post office, unless, within 1 business day after that date, the Commission advises the sender that the disk is unreadable. |
|                                                          | By handing the document, or a computer disk containing the document in electronic form, to the Commission or a responsible employee who is apparently in charge of the Commission's office. | On the date and at the time noted in a receipt issued by the Commission unless the document is on a computer disk, and, within 1 business day after that date, the Commission advises the sender that the disk is unreadable.   |

## **Review period can also have a substantial influence on the effective date of the amendment of the Mol.**

The Act currently states that the CIPC can take anywhere between 5 and 15 business days to process an amendment after sending written confirmation to the target company. This can change depending on the workload and how promptly the CIPC can process the application.

Taking the above into consideration, the CIPC will exercise some measure of discretion during this review period. The CIPC will review the amendment and ensure that it complies with the Act. Should the CIPC not issue any response, accepting or rejecting the amendment, before the review period expires, the amendment will be deemed to take effect on the expiry date of the review period, which is currently within 15 business days.

Should the CIPC reject or query the amendment, there is no clarity as to whether this affects the review date as it does not make provision for dealing with the aforementioned. In this case, the parties would still have to address the CIPC's rejection and queries. However, the amendment would still be deemed valid.

One of the proposals which was made to the Department of Trade, Industry and Competition, is that in the event of the CIPC processing the amendment before the expiry of the 10 business days, the earlier date should be deemed the filing date, with no need to wait for the review period to expire.

## Conclusion

If the proposed amendment to section 16(9) of the Act contained in the Amendment Bill become law, parties will still not have any certainty regarding the effective date for the amendments to Mols because the amendment does not affect the date of filing but is rather aimed at the review time after submission to the CIPC and the reduction thereof. The section should instead refer to the date of filing or delivery, as these terms are defined in the Act. The Amendment Bill should have been more specific with regard to what date the amendment takes effect instead of focusing on the reduction of the review period.

Taking the similar provisions of the Closed Corporations Act 69 of 1984 into account, our recommendation would be that the effective date of the amendment should be contained in the Mol itself. If the Mol is filed with the CIPC within 60 days of the date stipulated, it becomes effective on the aforementioned date.

*SERR Synergy assists businesses to comply with the new Companies Act and amended Closed Corporations Act by bringing all relevant company documents in line with the new Companies Act.* The Companies Act regulates the access to information of a company by stakeholders which needs to be aligned with other information protection measures such as *PAIA, POPI* and *Consumer Law Compliance*.

In the next blog in this series, we will be looking at the proposed amendment to section 56 of the Act.

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