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# CORPORATE & COMMERCIAL ALERT

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CLIFFE DEKKER HOFMEYR

At the time of writing, only certain provisions of POPI have come into force.

## POPI Regulations – An Overview

The Protection of Personal Information Act No 4 of 2013 (POPI) has a number of lofty and noble objectives. For example, it is intended to promote the protection of personal information processed by public and private bodies (and to introduce certain conditions so as to establish minimum requirements for the processing of personal information). It also provides for the establishment of an "Information Regulator", mandated to exercise certain powers and to perform certain duties and functions in terms of POPI and the Promotion of Access to Information Act, 2000 (PAIA).

At the time of writing, only certain provisions of POPI have come into force (such as those mandating the establishment of the Information Regulator contained in Chapter 5). However, the primary provisions dealing with personal information and direct marketing are not yet operative.

In December 2018, the Information Regulator published regulations as contemplated in section 112(2) of POPI (the Regulations). These concern:

- (1) certain prescribed forms;
- (2) the responsibilities of what are referred to as "Information Officers", in addition to those responsibilities contained in the Act;
- (3) investigation, conciliation, and settlement of complaints; and
- (4) the process to be followed should a

public or private body wish to apply to the Information Regulator for the issuing of a "code of conduct". The Regulations are not yet operative. Presumably they will be proclaimed to be effective when the remainder of POPI is brought into force and effect.

Below is a brief overview of the Regulations.

### Prescribed forms relating to the Information Regulator

The regulations prescribe certain forms to be completed, among other things, in relation to the following matters:

1. Where a "data subject" (defined in POPI as the person to whom the personal information relates) wishes to object to the processing of personal information.
2. Where a data subject wishes to request a correction be made to their personal information, or the deletion or destruction of their personal information.
3. The submission of a complaint by a data subject to the Information Regulator.
4. The request by a holder of personal information for the data subject's consent to process their personal information for direct marketing.

The prescribed forms accompany the regulations and provide a first step towards the practical enforcement of provisions of POPI when ultimately enacted.

## POPI Regulations – An Overview...continued

The Regulations provide further information in respect of the Regulator's powers and duties as regards pre-investigation, conciliation, and settlement of complaints.

### Information Officers

The regulations also set out the responsibilities of so-called "Information Officers". In terms of Section 56 of POPI, read with Section 17 of PAIA, public and private bodies are required to appoint Information Officers. An Information Officer is responsible for ensuring compliance with POPI and PAIA. In addition to encouraging compliance with POPI and PAIA, Information Officers are required to:

1. develop, implement, monitor and maintain a compliance framework;
2. undertake a personal information impact assessment to ensure that adequate measures and standards exist;
3. develop, monitor and maintaining an access to information manual (i.e. a PAIA manual);
4. develop internal measures and systems to process requests for information or access; and
5. conduct internal awareness sessions.

### Investigation, conciliation, and settlement of complaints

The Regulations also provide further information in respect of the Regulator's powers and duties as regards pre-investigation, conciliation, and settlement of complaints. This is, however, primarily in respect of the prescribed forms required to be completed by the Regulator in respect of the necessary notifications to be made to the relevant parties.

The notifications include the following:

- As regards pre-investigation proceedings, if the Regulator intends to investigate any matter, the Regulator must notify the parties prior to conducting the investigation.
- During the course of an investigation, the Regulator must keep the complainant, the data subject (if not the complainant) and the responsible party informed of the developments of the investigation.
- If during the investigation of a complaint, the Regulator decides to act as a conciliator and convene a conciliation meeting, the Regulator must inform the data subject and responsible party implicated on the compliant form.
- If it appears from a compliant, any written reply to the complaint, or during a conciliation meeting that it may be possible to secure a settlement between the parties, the Regulator may confer with the parties as required, and may hold a settlement meeting.

### Industry codes of conduct

Section 5 of the Regulations provides that a "private or public body which is sufficiently representative of any class of bodies, or of any industry, profession or vocation" may apply to the Information Regulator for the issuing of a "code of conduct" as contemplated in Section 61(1)(b) of POPI. In terms

## POPI Regulations – An Overview...continued

The publication of the Regulations is a first step toward empowering the Information Regulator (and Information Officers) to discharge their functions under POPI and PAIA.

of Section 60 read with Section 61 of POPI, the legislature has seemingly contemplated that the Information Regulator may issue codes of conduct that are binding on a specified class of persons (or class of information), and must:

- (1) incorporate all the conditions for the lawful processing of information; and
- (2) prescribe how the conditions for the lawful processing of information are to be applied or complied with, given the sector in which the class of persons operate.

The publication of the Regulations is a first step toward empowering the Information Regulator (and Information Officers) to discharge their functions under POPI and PAIA. As noted, they are yet to come into force and effect. In the interim, public and private bodies would be well advised to consider how they could best comply, among other things, by providing for the appointment of Information Officers, and possibly even considering how best to formulate codes of conduct which may be proposed to the Information Regulator, as opposed to waiting for the Information Regulator to impose them.

*Justine Krige*



## Rules of the game: Keep the consumer protection act in mind when facilitating promotional competitions

If your business is considering undertaking a promotional competition it is important to keep in mind that the provisions of section 36 of the Consumer Protection Act 68 of 2008 (CPA) read with regulation 11 of the Consumer Protection Act Regulations GNR.293 of 1 April 2011 (CPA Regulations) apply and will need to be complied with.

Promotional competitions are often used by businesses as a mechanism for market products or services to customers. South Africans are inundated with television and radio advertisements of this nature. If your business is considering undertaking a promotional competition it is important to keep in mind that the provisions of section 36 of the Consumer Protection Act 68 of 2008 (CPA) read with regulation 11 of the Consumer Protection Act Regulations GNR.293 of 1 April 2011 (CPA Regulations) apply and will need to be complied with.

Section 36(1)(d) of the CPA defines a 'promotional competition' as any competition, game, scheme, arrangement, system, plan or device for distributing prizes by lot or chance if:

- (i) *it is conducted in the ordinary course of business for the purpose of promoting a producer, distributor, supplier, or association of any such persons, or the sale of any goods or services; and*
- (ii) *any prize offered exceeds the threshold prescribed in terms of subsection (11), irrespective of whether a participant is required to demonstrate any skill or ability before being awarded a prize."*

In addition to the definition of a 'promotional competition', Section 36 further defines a prize to include, *inter alia*, a reward, gift, free good or service, price reduction or concession and enhancement of quantity or quality of goods or services.

### Who is classified as a promoter?

The term 'promoter' is defined widely in Section 36(1)(c) of the CPA, and includes not only a person who directly or indirectly promotes, sponsors, organises or conducts a promotional competition, but a person for whose benefit such competition is promoted, sponsored, organised or conducted. Therefore, even if a business outsources the facilitation of its promotional activities to a third party, it will still be considered a promoter for the purposes of the CPA.

### Promoters Obligations

The CPA sets the following parameters when running promotional competitions:

#### Consideration

Section 36(3)(a) of the CPA stipulates that other than the reasonable cost of posting and otherwise transmitting an entry form or device a promoter must not require a participant to pay consideration to partake in the competition. Section 36(4) goes on to explain that a promoter is regarded as having received consideration in two instances. Firstly, if a participant has to pay for access to the competition or for a device by which a person may participate in the competition. Secondly, if participation requires the purchase of any goods or services, and the price charged for such goods and services is more than the price ordinarily charged for similar goods or services without the opportunity of partaking in the promotional competition.

## Rules of the game: Keep the consumer protection act in mind when facilitating promotional competitions...continued

Section 36(7) to (9) of the CPA makes it clear that, *inter alia*, the right to participate in a promotional competition is fully vested in a participant immediately upon them complying with the conditions required by the specific competition.

Regulation 11(1) of the CPA Regulations leaves no room for discretion by confirming that for the purposes of section 36(3)(a) the reasonable cost of electronically transmitting an entry shall not exceed R1.50 (one rand and 50 cents) and that such cost includes the total cost of all subsequent communication to the consumer.

### Competition Rules

A promoter is required to:

1. prepare competition rules before the beginning of the competition;
2. make the competition rules available to the National Consumer Commission and to any participant on request and without cost; and
3. retain a copy of the competition rules for the prescribed period after the end of the competition.

### Requirements on Prize Winner

In terms of regulation 11(3) of the CPA Regulations any provision in the rules requiring the prize winner to permit the use of their image in marketing material, participate in any marketing activity, or be present when the draw is taking place or the winners are announced, without affording the prize winner the opportunity to decline an invitation or informing such prize winner of the right to decline the invitation, is void.

### Nature of the Offer

Section 36(5) of the CPA provides that an offer to participate in a promotional competition must:

1. clearly state the benefit of the competition to which the offer relates;
2. the steps required by a person to accept the offer or participate in the competition;
3. the basis on which the results of the competition will be determined;
4. the closing date of the competition;
5. the medium through which the results of the competition will be made known; and
6. any person from whom, any place where, and any date and time on which a person may obtain a copy of the competition rules and where a successful participant may receive a prize."

The above requirements may be satisfied directly on any medium through which a person may participate in the competition, on a document accompanying any such medium, or in an advertisement that is advertised during the time of the competition and which is clearly associated with the competition.

Section 36(7) to (9) of the CPA makes it

## Rules of the game: Keep the consumer protection act in mind when facilitating promotional competitions...*continued*

In accordance with section 36(11)(b) of the CPA, the Minister has prescribed a lengthy list of minimum standards for keeping records associated with the promotional competition.

clear that, *inter alia*, the right to participate in a promotional competition is fully vested in a participant immediately upon them complying with the conditions required by the specific competition. The right must not be made subject to any further conditions and must not be contingent upon the participant paying any consideration to the promoter for the prize.

### Who can't win?

A promoter must not award a prize in a competition to:

- (i) a winner if it is unlawful to supply those goods or services to that prize winner; or
- (ii) to any person who is a:

(aa) director, employee, agent or consultant to the promoter or any other person who directly or indirectly controls or is controlled by the promoter; or

(bb) a supplier of goods or services in connection with that competition.

### Oversight and records

In terms of regulation 11(5) of the CPA Regulations, the promoter must ensure that an independent accountant, registered auditor, attorney or advocate oversees and certifies the conducting of the competition and must report this through the promoter's internal audit reporting or other appropriate validation or verification procedures.

In accordance with section 36(11)(b) of

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## Rules of the game: Keep the consumer protection act in mind when facilitating promotional competitions...*continued*

We implore all businesses to keep the legislative requirements set out herein front of mind when conducting any competitions of this nature.

the CPA, the Minister has prescribed a lengthy list of minimum standards for keeping records associated with the promotional competition. In terms of regulation 11(6) of the CPA Regulations the person who conducts a promotional competition must, for a period of at least 3 years, retain, *inter alia*:

1. a list of all instances when the promotional competition was marketed, including details on the dates, the medium used and places where the marketing took place;
2. an acknowledgment of receipt of the prize signed by the prize winner, or legal guardian where applicable, and his or her identity number, and the date of receipt of the prize, or where this is not possible, proof by the promoter that the prize was sent by post or other electronic means to the winner using his or her provided details;
3. declarations by the persons conducting the promotional competition made under oath or affirmation that the prize winners were, to their best knowledge, not directors, members, partners,

employees, agents or consultants of or any other person who directly or indirectly controls or is controlled by the promoter or marketing service providers in respect of the promotional competition, or the spouses, life partners, business partners or immediate family members;

4. the basis on which the prize winners were determined; and
5. a summary describing the proceedings undertaken to determine the winners, including the names of the persons participating in determining the prize winners, the date and place where that determination took place and whether those proceedings were open to the general public.

The CPA casts a wide net in how it regulates promotional competitions. We implore all businesses to keep the above set of legislative requirements front of mind when conducting any competitions of this nature.

*Kendall Keanly and Natasha Dusabe*

## Social and ethics committees – what subsidiaries should know about exemption

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The SEC is tasked with monitoring *inter alia* the company's standing in terms of social and economic development, good corporate citizenship, environmental and health and safety matters, consumer relationships and labour and employment matters.

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**Subsidiaries in terms of the Companies Act that would ordinarily be obliged to appoint a social and ethics committee, need not apply for an exemption from the Companies Tribunal if the exemption in Regulation 43(2)(a) of the Companies Act applies to them, since their exemption is outright.**

Regulation 43(1) of the Regulations to the Companies Act 71 of 2008 (Companies Act) (Regulations) prescribes the categories of companies required to appoint a social and ethics committee (SEC) as follows:

- every state-owned company;
- every listed public company; and
- any other company that has in any two of the previous five years scored above 500 "public interest score points" in terms of Regulation 26(2).

A private company will score a high number of "public interest score points" based on a substantial number of employees and/or a substantial number of individuals that directly or indirectly have a beneficial interest in any of its issued securities and/or if its third party liabilities exceed multiples of R1 million at the end of a financial year and/or if its turnover exceeds multiples of R1 million during a financial year.

The SEC is, in terms of Regulation 43(5), tasked with monitoring *inter alia* the company's standing in terms of social and economic development, good corporate citizenship, environmental and health and safety matters, consumer relationships and labour and employment matters.

Companies that are required to appoint a SEC can rely on Regulation 43(2) of the Regulations to the Companies Act to obtain exemption from this obligation in one of two ways:

- Regulation 43(2)(a) provides that a company which is a subsidiary of another company which has a SEC that will perform the needed functions on behalf of the subsidiary, does not need to have a SEC; and
- Regulation 43(2)(b) provides that a company that has been exempted by the Companies Tribunal in accordance with section 72(5) of the Companies Act need not have a SEC either.

An exemption application in terms of section 72(5) of the Companies Act, will be granted if a company can satisfy the Companies Tribunal that it is required to have a formal mechanism that substantially performs the function of a SEC in terms of some other legislation, and that the company adheres to this legislation, or that it is not reasonably necessary in the public interest to require the company to have a SEC, having regard to the nature and extent of its activities.

## Social and ethics committees – what subsidiaries should know about exemption...*continued*

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There is some confusion about whether an application should be made to the Companies Tribunal before the exemption in terms of Regulation 43(2)(a) takes effect, or whether it is automatic, and no application is required.

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There is some confusion about whether an application should be made to the Companies Tribunal before the exemption in terms of Regulation 43(2)(a) takes effect, or whether it is automatic, and no application is required. As noted by the Companies Tribunal in 23 January 2017 ADT Kusela Proprietary Limited (CT002Jan2017) *“The words ‘automatically exempted’ may carry various meanings. It may mean that the Applicant is not required to bring this application to the Tribunal and that it is automatically exempted without having to prove that it is a subsidiary of another company, or that upon applying to the Tribunal, it will be automatically exempted.”*

In other decisions the Companies Tribunal has, however, made it clear that the exemption that applies to subsidiary companies in terms of Regulation 43(2)(a) is an automatic exemption for which no application to the Companies Tribunal is required. The Companies Tribunal has accordingly in certain instances refused to make orders when approached for exemption by subsidiaries, as the application was, at the outset, not needed. The Companies and Intellectual Property Commission also confirmed in its non-binding opinion dated 30 April 2012 (issued in terms of section 188(2)(b) of the Companies Act), that the Section 43(2)(a) exemption is an automatic statutory exemption and that it must be strictly interpreted.

On 26 February 2014 Main Street 167 (RF) Proprietary Limited (CT 004 Feb 2014), the Companies Tribunal stated “Regulation 43(2)(a) provides a company with an automatic exemption [...] Thus, in such a case no exemption application is required to be made to the Tribunal” and that “exemption is automatic and that in that event no application to the Tribunal ought to have been made since the Applicant is in fact a subsidiary”. This statement was echoed in 20 March 2014 Blue Titanium Conduit (RF) Limited (CT007/Jan/2014) wherein the Companies Tribunal stated, with reference to Regulation 43(2)(a), that “an application for exemption is [...] not necessary and the Tribunal is not required to make an order under these circumstances”.

Companies that are subsidiaries of another company that has a SEC that will perform the needed functions on behalf of the subsidiary should therefore note that exemption applications to the Companies Tribunal in terms of section 72(5) of the Companies Act are therefore unnecessary and could cause the Companies Tribunal to order the subsidiary to appoint a SEC if the Companies Tribunal rejects their exemption application in terms of Section 72(5) of the Companies Act which order will negatively impact the subsidiary.

## Social and ethics committees – what subsidiaries should know about exemption...*continued*

These companies should ensure that they qualify as “subsidiaries” as contemplated in Section 3 of the Companies Act.

These companies should, however, ensure that:

- they qualify as “subsidiaries” as contemplated in Section 3 of the Companies Act, i.e. that their holding company (1) is directly or indirectly able to exercise, or control the exercise of, a majority of the general voting rights associated with their issued securities, whether pursuant to a shareholder agreement or otherwise or (2) has the right to appoint or elect, or control the appointment or election of directors who control a majority of the votes at a meeting of the board; and
- the SEC of the holding company in fact performs all the duties and functions of a SEC as required in terms of Regulation 43(5) on its behalf and that the SEC also complies with Regulation 43(4) which requires that the SEC must comprise not less than three directors or prescribed officers of the company and 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.

*Elnalene Cornelius and Mieke Vlok*



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