

# CORPORATE & COMMERCIAL ALERT

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INCORPORATING  
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## IN THIS ISSUE

### Ongoing compliance checklist for private companies

Registering a new private company, or acquiring an existing one, is usually accompanied by a level of excitement for the new business venture being pursued. To ensure that it develops and operates without a technical glitch, it is useful to consider the ongoing compliance requirements under the Companies Act 71 of 2008 (Companies Act) for private companies, which are set out below.



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## Ongoing compliance checklist for private companies

Registering a new private company, or acquiring an existing one, is usually accompanied by a level of excitement for the new business venture being pursued. To ensure that it develops and operates without a technical glitch, it is useful to consider the ongoing compliance requirements under the Companies Act 71 of 2008 (Companies Act) for private companies, which are set out below.

The Companies and Intellectual Property Commission (CIPC) regulates compliance with the Companies Act, and failure to comply may result in compliance notices being issued, fines being imposed, or the company being de-registered. It is therefore best to keep this checklist handy to avoid any unintended consequences.

No.	Requirement	When	Process	Failure to comply	Source
1	Maintenance and keeping of company records	As soon as practicably possible and at all times while the company is in business.	The company should keep a record of all company documents, including its constitutional documents, a securities register, a record of its directors and shareholders, and copies of all accounting records required by the Companies Act.	The CIPC may issue a compliance notice in terms of section 171 of the Companies Act, which will remain in force until it is set aside, or a certificate of compliance is issued.  Failure to comply with the notice, and continued non-compliance with the provisions of the Companies Act, will entitle the CIPC to either apply to a court of competent jurisdiction for the imposition of an administrative fine or refer the matter to the National Prosecuting Authority for prosecution.	Section 24 of the Companies Act
2	Filing annual returns	An annual return is a statutory return required in terms of the Companies Act, to be filed with the CIPC on an annual basis within a prescribed time period (i.e. 30 business days after the anniversary date of the incorporation of the company).	Filed electronically with the CIPC using the company's customer code, or in such other manner as the CIPC may prescribe.	The purpose of the lodgement of a company's annual returns is to confirm, on an annual basis, whether that company is in fact still in business and/or trading, or if it will be in business in the near future. Therefore, if annual returns are not filed within the prescribed time period, the assumption is that the company is inactive and, as such, the CIPC will begin the de-registration process to remove the company from its active records.	Section 33 of the Companies Act

## Ongoing compliance checklist for private companies CONTINUED

No.	Requirement	When	Process	Failure to comply	Source
3	Preparing annual financial statements	Each year, a company must prepare annual financial statements within six months of the end of its financial year, or a shorter period determined by the company.	Although private companies generally do not have to appoint an auditor (except in certain circumstances contemplated under the Companies Act or if their memorandum of incorporation (MOI) requires it), they may choose to do so. Such private companies must file a copy of their latest approved audited financial statements on the date that they file their annual return with the CIPC.	Consequences as per 1.	Section 30 of the Companies Act
4	Appoint an auditor or have its annual financial statements independently reviewed	<p>A private company is not required to have its annual financial statements audited unless (i) it is a requirement in terms of the MOI or (ii) where a company's public interest score is 350 points or more and it has had its statements prepared by an independent party, (iii) where it is 100 or more and its financial statements were internally compiled, and (iv) instances where in the ordinary course of business the company holds assets in a fiduciary capacity for persons who are not related to the company to the value of R5 million or more at any time.</p> <p>A private company is not required to have its annual financial statements independently reviewed unless (i) the company's MOI provides for it; (ii) the company's public interest score for the particular financial year was at least 100, by a registered auditor, or a member in good standing of a professional body that has been accredited in terms of section 33 of the Auditing Professions Act 26 of 2005 (Auditing Act); or (iii) a company has a public interest score for the particular financial year of less than 100, by a registered auditor, or a member in good standing of a professional body that has been accredited in terms of section 33 of the Auditing Act.</p>	In the form prescribed by the Companies Act.	Consequences as per 1.	<p>Regulations 26(2), 28 and 29(4) of the Companies Regulation, 2011</p> <p>Section 30(2)(b)(ii) (bb) of the Companies Act</p>

## Ongoing compliance checklist for private companies CONTINUED

No.	Requirement	When	Process	Failure to comply	Source
5	Minimum directors of a company	At incorporation.	The company must appoint at least one director to the board of directors.	In the event that the company does not comply with the minimum number of required directors, the board of directors must call a shareholders' meeting within 40 business days after the company has been incorporated, for the purpose of electing sufficient directors to fill all the vacancies on the board. However, a failure by a company to have the required minimum number of directors does not limit or negate the board's authority or invalidate any previous acts by the company.	Sections 66(2)(a) and Sections 66(2)(a) and 67(2) of the Companies Act
6	Mandatory corporate bodies – audit committee and social and ethics committee		<p>Social and ethics committee – not applicable to private companies, unless the private company meets certain thresholds as prescribed by the Minister of Trade and Industry from time to time, having regard to its annual turnover, workforce size or the nature of activities of the company or whether the company has in any two of the previous five years, scored above 500 points in its public interest score.</p> <p>Audit committee – not applicable to private companies unless its MOI requires it as contemplated under sections 34(2) and 84(1)(c)(ii) of the Companies Act. If the MOI or the Companies Act require an auditor to be appointed, it will also be necessary to appoint an audit committee.</p>	Consequences as per 1.	Section 86 of the Companies Act

## Ongoing compliance checklist for private companies CONTINUED

No.	Requirement	When	Process	Failure to comply	Source
7	Company secretary	A company secretary must be appointed (i) if the requirement to appoint a company secretary applies to that company when it is incorporated (i.e. at incorporation); or (ii) within 40 business days after the date on which the requirement first applies to the company.	<p>The appointment of a company secretary is only mandatory for public companies and state-owned entities and not for private companies. In some instances, the appointment of a company secretary will be mandatory if specifically set out in the company's MOI.</p> <p>The company secretary will be appointed by either (i) the directors of the company; or (ii) an ordinary resolution of the shareholders of the company.</p>	In the event that the company does not comply with the minimum number of required directors, the board of directors must call a shareholders' meeting within 40 business days after the company has been incorporated, for the purpose of electing sufficient directors to fill all the vacancies on the board. However, a failure by a company to have the required minimum number of directors does not limit or negate the board's authority or invalidate any previous acts by the company.	Sections 66(2)(a) and Sections 66(2)(a) and 67(2) of the Companies Act

The checklist set out above only provides a cursory glance at the compliance requirements affecting private companies. It is recommended that private companies engage and retain professional advisers to *"take care of the paperwork"*.

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**BBBEE STATUS:** LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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