

Department of Auditing
**LEGAL ASPECTS IN
ACCOUNTANCY**

MO001 for **AUE1601**



University of South Africa
Pretoria

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CONTENTS

	<i>Page</i>
INTRODUCTION TO THE MODULE	v
1 INTRODUCTION	v
2 CONNECTING ONLINE TO MODULE AUE1601	v
2.1 myLife e-mail	vi
2.2 How to register on myUnisa	vi
2.3 Getting started on myUnisa	vi
3 myUNISA TOOLS FOR AUE1601	viii
3.1 Assignments	viii
3.2 Announcements	viii
3.3 Official study material	x
3.4 Additional resources	xi
3.5 Prescribed books	xi
3.6 Learning units	xi
3.7 Frequently asked questions	xxi
3.8 Schedule	xxv
3.9 Discussion forums	xxvi
4 CLOSING REMARKS	xxvi
5 REFERENCE LIST	xxvi
PREFACE	xxvii
1. General overview	xxvii
2. Objective of this module	xxvii
3. Teaching strategy	xxviii
4. Legislation to be studied	xxxi
5. Study approach	xxxiv
6. Conclusion	xxxv
Topic 1: Interpretation, purpose, application and formation of a company	1
Topic 2: Records required by companies	15
Topic 3: Shareholders and shares	23
Topic 4: Directors	41
Topic 5: Enhanced accountability and transparency	63

Topic 6:	Transactions	83
Topic 7:	Business rescue, compromise with creditors, winding-up and deregistration of companies	99
Topic 8:	Regulatory agencies, offences and penalties	111
Topic 9:	Schedules to the Companies Act and other legislation applicable to companies	119
	Bibliography	128



DEAR STUDENT

Welcome as an AUE1601 student in the Department of Auditing. We, as lecturers, are at your disposal and will gladly assist you in your studies. Be assured of our enthusiasm and willingness to support you with advice during your studies of this programme.

HINT

It is recommended that you first work through Tutorial Letter (TL) **AUE1601/101/3/2017**, before you continue reading this document, as TL **101/3/2017** contains important information about module AUE1601 as the module is online.

1. INTRODUCTION

Module AUE1601, **Legal aspects in accountancy**, focuses on company law. This module does not stand alone. It is an integral part of various degrees offered by Unisa.

HINT

The study material for this course consists of:

- Prescribed textbooks
- Tutorial letters
- MO001/3/2017

2. CONNECTING ONLINE TO MODULE AUE1601

Computers and the internet are becoming more and more essential in the workplace, in life and in education. In distance learning at Unisa, the myUnisa online tools play a huge role in your study experience, because you do not attend face-to-face lectures. The internet is simply the fastest, most effective and efficient way to do that.

Why all the fuss about going online? Well, it just saves so much time. You can submit assignments or get results at the click of a button, rather than waiting for the post. By embracing computers, and by encouraging our students to use the internet, we are preparing them for the demands of the digital age. Yes, systems do go down and internet connections are lost from time to time. But for the most part, the internet is very reliable. So you can submit those assignments with confidence and check that they have been received.

Source: Unisa. 2015 *Study @ Unisa: Connect, Plan and Study*. Pretoria: University of South Africa.


2.1 myLife e-mail

Registered Unisa students all get a free myLife e-mail account. Important AUE1601 announcements and notices are sent exclusively to this account. So, it is important that you check it regularly to receive important communiqué from your lecturer.

2.2 How to register on myUnisa

Once you have registered and have your myUnisa login details, you will have access to the **AUE1601-17-S1** (as a first semester student) or **AUE1601-17-S2** (as a second semester student) module sites.

Unisa's online student portal is your most important study tool for this module; it is your AUE1601 lifeline. You can start at the main Unisa website, <http://www.unisa.ac.za>, and then click on myUnisa. This will take you to the myUnisa website.

HINT
<ul style="list-style-type: none"> To go to the myUnisa website directly, go to https://my.unisa.ac.za: 

When you are on the myUnisa website,

- click on the **Claim Unisa Login** at the left-hand side of the screen.


You will then be prompted to give your student number to claim your initial myUnisa and myLife login details. Should you experience any difficulties registering your myUnisa account, consult the *Study @ Unisa* brochure for more information.

2.3 Getting started on myUnisa

Because this is an online module, you need to use the myUnisa online platform to study and complete the learning activities for this course. You need to visit the AUE1601 web pages on myUnisa frequently.

- To access the web page for your module, **AUE1601-17-S1** or **AUE1601-17-S2**, go to the myUnisa website: <https://my.unisa.ac.za>.
- Enter your **student number** and **password**, and then click on **Login**:

student no / user id: password:

- Remember to check in the **More sites** tab,  if you cannot find the module code in the orange blocks. Then, click on module site **AUE1601-17-S1** or **AUE1601-17-S2**.

The first page you will see when opening any site, is the **Home** page. You can use various navigation options to navigate the AUE1601 module site. These options are displayed on the left-hand side of the screen.

- Click on the specific navigation option, and it will open the page containing the information you are looking for.

The following AUE1601 **Welcome Message** is displayed on the **Home** page:

Welcome to AUE1601

Lecturers for this module:

Ms AM du Preez
dpreeam@unisa.ac.za
012 429 3383

Ms S Malan
malans@unisa.ac.za
012 429 4846

Important: Please note that lecturers cannot assist with queries of an administrative nature. Please direct any such queries to CAEnquiries-Undergraduate@unisa.ac.za or dial 012 429 2982.

This course deals mainly with the Companies Act, as well as its practical application. Please note that the module is quite challenging, and that you should start early in the semester, in order to cover all the relevant study material.

Your MO (study guide) should be your first point of reference when studying for this module. The MO (study guide) will also refer you to certain sections of the Companies Act or Companies Regulations, which are the prescribed textbooks for this module.

Remember that you are not required to study the complete Companies Act and Companies Regulations, or its exact wording or section numbers. You are only required to demonstrate knowledge of the theory and your ability to apply it to scenarios, as in the questions provided in your MO (study guide) and especially those in your assignments.

Please read the information provided in the tutorial letters carefully, as this information is essential for you to pass this module. Most queries received during the course of the semester relates to matters already discussed in your tutorial letters.

You will receive notices before assignments are due, and before the examination.

Regards
Ms S Malan
Ms AM du Preez

3. myUNISA TOOLS FOR AUE1601

The purpose of myUnisa is to support your learning, more specifically in the online environment. If you make a habit of checking your module webpage regularly, you can take full advantage of the features explained in this section.

3.1 Assignments

It is recommended that you submit your assignment online via the **Assignments** tool. This tool allows you to submit assignments and monitor your assessment results.

To start the process, click on the **Assignments** tool.

HINT
<ul style="list-style-type: none"> • Use a file format that can be uploaded onto <i>myUnisa</i>. These formats are listed in the “Specify the type of file” drop-down list on the submission screen. A PDF file is the preferred option (formatting and layout is retained). • When you click “Continue”, your assignment will be uploaded onto the Unisa network. This may take several minutes depending on the size of your assignment and the speed of your internet connection. • Once the assignment is received, its details will be displayed on your screen for final checking. You can either go “Back” and make corrections or click on “Submit assignment” to submit it.

The following table contains important information about the due dates for the AUE1601 assignments:

SEMESTER 1 (2017)	SEMESTER 2 (2017)
Assignment 01: 14 March 2017	Assignment 01: 21 August 2017
Assignment 02: 3 April 2017	Assignment 02: 11 September 2017

3.2 Announcements

Your lecturer may use the **Announcements** option to inform you about important discussions, reminders or other course-related issues. When a lecturer puts an announcement on the website, you may also receive an e-mail reminding you to check the website. In addition, the most recent announcements will be displayed on the home page.

- To view all the announcements, click on the **Announcements** option.

The following announcements will be posted by your lecturer throughout the semester:

ANNOUNCEMENT (S1 = Semester 1) (S2 = Semester 2)	MESSAGE
<p>Announcement 1</p> <p>Welcome and getting started</p> <p><u>Preliminary dates:</u></p> <p>S1: 18 January 2017 S2: 14 July 2017</p>	<p>Welcome to AUE1601. We are happy to announce that this module will be presented online in 2017. This means that you can download study material and assignments to print them for yourself. You should have received a <i>Getting Started</i> tutorial letter (TL101/3/2017) explaining what is expected of you as an online student. If you have not received this letter, you can go to Official Study Material and you should find the PDF file. But for now, we would like you to first go to the Discussion Forums link on the left-hand side of your screen and access General Subject Related Discussions: General Discussions.</p> <p>In this topic, you can correspond with your fellow class members on any issues regarding this course. Use the Your Message box to add your message to the list. If you want to start a totally new topic of discussion, use the Add New Topic link, which you will find in the Topics List.</p> <p>We are looking forward to meeting you online!</p>
<p>Announcement 2</p> <p>Frequently asked questions</p> <p><u>Preliminary dates:</u></p> <p>S1: 18 January 2017 S2: 14 July 2017</p>	<p>Be sure to visit the FAQ tab (on the left-hand side of page). The questions contain very useful information.</p>
<p>Announcement 3</p> <p>Participate in Discussion Forums</p> <p><u>Preliminary dates:</u></p> <p>S1: 19 January 2017 S2: 15 July 2017</p>	<p>We strongly encourage all AUE1601 students to participate in the Discussion Forums by posting questions, answers, comments and examples. Remember that online learning is informal and there is no formal or specific sequence in which the questions should be posted.</p> <p>Please use the Discussion Forums as a platform for more interactive learning during your preparations for the exam.</p>
<p>Announcement 4</p> <p>Study Schedule</p> <p><u>Preliminary dates:</u></p> <p>S1: 20 January 2017 S2: 17 July 2017</p>	<p>We suggest that you prepare a study schedule for yourself to plan your studies for the semester. This module is extensive and you need to start early and work diligently throughout the semester.</p>

ANNOUNCEMENT (S1 = Semester 1) (S2 = Semester 2)	MESSAGE
<p>Announcement 5</p> <p>Preparing your Assignments</p> <p><u>Preliminary dates:</u></p> <p>S1: 10 February 2017 S2: 08 August 2017</p>	<p>It is important that you prepare your assignments thoroughly and submit them before the closing dates. Remember both assignments will be assessed and will contribute 20% towards your year mark.</p>
<p>Announcement 6</p> <p>Assignment 1</p> <p><u>Preliminary dates:</u></p> <p>S1: 15 March 2017 S2: 22 August 2017</p>	<p>You are reminded that Assignment 01 is due on 14 March 2017 (S1) and 21 August 2017 (S2). Group work will not be marked. <i>Read the University's policy on Copyright Infringement and Plagiarism</i></p>
<p>Announcement 7</p> <p>Assignment 2</p> <p><u>Preliminary dates:</u></p> <p>S1: 04 April 2017 S2: 12 September 2017</p>	<p>You are reminded that Assignment 02 is due on 3 April 2017 (S1) and 11 September 2017 (S2). Group work will not be marked. <i>Read the University's policy on Copyright Infringement and Plagiarism</i></p>
<p>Announcement 8</p> <p>Revision</p> <p><u>Preliminary dates:</u></p> <p>S1: 08 May 2017 S2: 02 October 2017</p>	<p>We trust that you are all studying hard and that you are on track with your preparations for the upcoming exam. Remember that you have to study the learning units in its entirety.</p> <p>You are reminded to participate in the discussion forum in preparation for examination.</p>

3.3 Official study material

You will find PDF files of your tutorial letters and previous examination papers, if available, under the **Official Study Material** option.

- To view or download the available files, click on the **Official Study Material** option.

The following study materials are available:

<p>STUDY MATERIAL</p>	<ul style="list-style-type: none"> • Tutorial Letter 101 for AUE1601 (<i>Getting Started</i> document) • Tutorial Letter 201 for AUE1601 (Released after Assignment 01 due date) • Tutorial Letter 202 for AUE1601 (Released after Assignment 02 due date) • Tutorial Letter 102 for AUE1601 • Tutorial Letter 103 for AUE1601
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PREVIOUS EXAMINATION PAPERS	<ul style="list-style-type: none"> • Examination Question Paper October/November 2016 • Examination Question Paper May/June 2016 • Examination Question Paper October/November 2015 • Examination Question Paper May/June 2015
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3.4 Additional resources

The **Additional Resources** option allows you to access different types of resources relevant to your studies. These additional resources will support your learning, and new resources might be uploaded during the semester.

The following additional resources are available and may be printed:


ADDITIONAL RESOURCES	<ul style="list-style-type: none"> • Module Online AUE1601/001/3/2017 (this document) • Revision slides • Examination technique
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3.5 Prescribed books

You should look in the **Prescribed Books** option to see if there are any prescribed books, recommended texts or e-reserves for this module.

3.6 Learning units

Valuable information about the structure of the course is added under **LEARNING UNITS**. This option is the one that you will use most often. Here you will find content, supporting the learning outcomes. The **LEARNING UNITS** option also provides information on learning activities, assessments and links to other valuable resources. To view and print the online study guide, click on the **LEARNING UNITS** option.

The learning units may be printed by clicking on the print icon, .

	HOW THIS COURSE IS ORGANISED
PURPOSE OF MODULE ONLINE AUE1601	The purpose of this module is to enable learners to gain insight into aspects of the Companies Act 71 of 2008, the Companies Regulations, 2011, and limited aspects of the Close Corporations Act 69 of 1984 that are all of importance for companies, their directors, accountants, auditors, the company secretary and other parties. The learning outcome for this module is that students should be able to comprehend and apply the different topics prescribed in this module. As mentioned above, the focus of this module will be specifically on the Companies Act and its Regulations.

	HOW THIS COURSE IS ORGANISED
Learning units	<p>Titles of learning units</p> <p>1.1 Interpretation, purpose, application and formation of a company (sections 1–6 and 8)</p> <p>1.1.1 Related and interrelated persons, and control (sec 2) and subsidiary relationships (sec 3)</p> <p>1.1.2 Solvency and liquidity test (sec 4)</p> <p>1.1.3 Categories of companies (sec 8 and 10 – also refer to Regulations 26 and 27)</p>
Learning units	<p>1.2 Incorporation and legal status of companies</p> <p>1.2.1 Memorandum of Incorporation (MOI) (sec 11, 13, 15–16, 19–20 – also refer to Regulation 15)</p> <p>1.2.2 Pre-incorporation contracts (sec 21 – also refer to Regulation 35)</p> <p>1.2.3 Reckless trading (sec 22)</p> <p>2.1 Company records</p> <p>2.1.1 Form and standards of company records (sec 24), financial year of a company (sec 27) and accounting records (sec 28) – also refer to Regulations 25(3)–(6) and 26(1) (b) & (c)</p> <p>2.1.2 Record keeping and financial statements (sec 29–30 – also refer to Regulation 26–29(1)–(10))</p> <p>3.1 Capitalisation of profit companies (sec 35–43 and 46–48)</p> <p>3.1.1 Legal nature of company shares and requirement to have shareholders (sec 35) – also refer to Regulation 31(3) and (5)</p> <p>3.1.2 Authorisation for shares (sec 36)</p> <p>3.1.3 Preferences, rights, limitations and other share terms (sec 37)</p> <p>3.1.4 Issuing shares (sec 38)</p> <p>3.1.5 Subscription of shares (sec 39)</p> <p>3.1.6 Distributions to be authorised by the board (sec 46)</p> <p>3.1.7 Capitalisation shares (sec 47)</p> <p>3.1.8 Company or subsidiary acquiring company shares (sec 48)</p>

	HOW THIS COURSE IS ORGANISED
Learning units	<p>3.2 Securities registration and transfer</p> <p>3.2.1 Securities registration and transfer (sec 49–56) – also refer to Regulation 32</p> <p>3.3 Governance of companies</p> <p>3.3.1 Shareholders and voting rights (sec 57)</p> <p>3.3.2 Proxies, quorums, notice of meetings and conducting of meetings (sec 58–64)</p> <p>3.3.3 Shareholders’ resolutions (sec 65)</p> <p>3.4 Public offerings of company securities</p> <p>3.4.1 Public offerings of company securities (sec 95–97 and 99–111)</p> <p>4.1 The board, directors and prescribed officers, election, ineligibility and disqualification, and vacancies</p> <p>4.1.1 The board, directors and prescribed officers (sec 66) – also refer to Regulation 38</p> <p>4.1.2 Election and removal of directors (sec 67–71)</p> <p>4.2 Board committees, meetings and directors acting other than at meetings</p> <p>4.2.1 Board committees (sec 72) – also refer to Regulation 43(1)</p> <p>4.2.2 Board meetings/directors’ meetings (sec 73)</p> <p>4.2.3 Directors acting other than at board meetings (sec 74)</p> <p>4.3 Directors’ personal financial interests</p> <p>4.3.1 Directors’ personal financial interests (sec 75)</p> <p>4.4 Standards of directors’ conduct, liability of directors and prescribed officers, indemnification and directors’ insurance</p> <p>4.4.1 Standards of directors’ conduct (sec 76)</p> <p>4.4.2 Liability of directors and prescribed officers (sec 77)</p> <p>4.4.3 Indemnification and directors’ insurance (sec 78)</p>

	HOW THIS COURSE IS ORGANISED
Learning units	<p>5.1 Application of and general requirements regarding enhanced accountability and transparency</p> <p>5.1.1 Registration of secretaries and auditors (sec 84 & 85) – also refer to Regulations 26 to 28</p> <p>5.2 The company secretary, including the mandatory appointment of the company secretary, juristic person or partnership as company secretary, and the duties, resignation or removal of a company secretary</p> <p>5.2.1 Company secretary (sec 86–89)</p> <p>5.3 Auditors, including the appointment, resignation, rotation, and rights and restricted functions of auditors</p> <p>5.3.1 Auditors (sec 90–93)</p> <p>5.4 Audit committees</p> <p>5.4.1 Audit committees (sec 94) – also refer to Regulation 42</p> <p>6.1 Financial assistance for subscription of securities</p> <p>6.1.1 Financial assistance for subscription of securities (sec 44)</p> <p>6.2 Loans or other financial assistance to directors</p> <p>6.2.1 Loans or other financial assistance to directors (sec 45)</p> <p>6.3 Proposals to dispose of all or the greater part of assets or undertaking</p> <p>6.3.1 Proposals to dispose of all or the greater part of assets or undertaking (sec 112 & 115)</p> <p>7.1 Winding up of solvent companies and deregistration of companies</p> <p>7.1.1 Winding up of solvent companies (sec 79)</p> <p>7.1.2 Voluntary winding up of solvent company (sec 80)</p> <p>7.1.3 Winding up of solvent companies by court order (sec 81)</p> <p>7.1.4 Dissolution of companies and removal from register (sec 82–83)</p> <p>7.2 Business rescue</p> <p>7.2.1 Business rescue (sec 128–155)</p>

	HOW THIS COURSE IS ORGANISED
	<p>7.3 Protection for whistle-blowers, application to declare a director delinquent or under probation, relief from oppressive or prejudicial conduct or from abuse of the separate juristic personality of the company, complaints to the Commission or Panel, powers to support investigations and inspections, and companies' tribunal adjudication procedures</p> <p>7.3.1 Protection for whistle-blowers (sec 159)</p> <p>7.3.2 Application to declare a director delinquent or under probation (sec 162)</p> <p>7.3.3 Relief from oppressive or prejudicial conduct or from abuse of separate juristic personality of the company (sec 163)</p> <p>7.3.4 Complaints to the Commission or Panel (sec 168–184)</p> <p>8.1 Regulatory agencies and their functions</p> <p>8.1.1 Regulatory agencies and their functions (sec 185–204)</p> <p>8.2 Breach of confidence, false statements, reckless conduct and non-compliance, hindering administration of the Act and penalties</p> <p>8.2.1 Breach of confidence, false statements, reckless conduct and non-compliance, hindering administration of the Act and penalties (sec 213–216)</p> <p>8.3 Civil actions and the limited time for initiating complaints</p> <p>8.3.1 Civil actions (sec 218)</p> <p>8.3.2 Limited time for initiating complaints (sec 219)</p> <p>8.3.3 Relief from oppressive or prejudicial conduct or from abuse of the separate juristic personality of the company (sec 163)</p> <p>8.3.4 Complaints to the Commission or Panel (sec 168–184)</p> <p>9.1 Schedules to the Companies Act</p> <p>9.1.1 Schedule 2: Conversion of close corporations to companies, clauses 1 and 2</p> <p>9.1.2 Schedule 3: Amendments of laws, specifically relating to the Close Corporations Act</p> <p>9.1.3 Schedule 5: Transitional arrangements</p> <p>9.2 Close Corporations Act</p> <p>9.2.1 Close Corporations Act</p> <p>9.3 Other legislation</p> <p>9.3.1 Other legislation</p>

	HOW THIS COURSE IS ORGANISED
Learning outcomes	<p>1.1 Interpretation</p> <ul style="list-style-type: none"> • Give advice, discuss concerns and apply the interpretation of the Companies Act concerning related and interrelated persons, and control, subsidiary relationships, the solvency and liquidity test, anti-voidance, and categories of companies. <p>1.2 Incorporation and legal status of companies</p> <ul style="list-style-type: none"> • Give advice, discuss concerns and apply the criteria for names, the right to incorporate and register a company, and the Memorandum of Incorporation. • Give advice on the legal status of companies, the validity of company actions, pre-incorporation contracts and reckless trading prohibited. <p>2.1 Company records</p> <p>Give advice, discuss concerns, and apply the requirements of the Act regarding</p> <ul style="list-style-type: none"> • the form and standards of company records • record keeping and financial statements <p>3.1 Capitalisation of profit companies (sec 35, 36, 37, 38, 39, 40, 41, 42, 43, 46, 47 and 48)</p> <p>Give advice, discuss concerns and apply the requirements of the Act regarding the:</p> <ul style="list-style-type: none"> • capitalisation of profit companies, including the legal nature of company shares and the requirement to have shareholders • authorisation of shares • distributions • capitalisation shares • the company or subsidiary acquiring company shares <p>3.2 Securities registration and transfer (sec 49–56)</p> <ul style="list-style-type: none"> • Give advice, discuss concerns and apply the requirements of the Act regarding securities registration and transfer. <p>3.3 Governance of Companies (sec 57–65)</p> <ul style="list-style-type: none"> • Give advice, discuss concerns and apply the requirements of the Act regarding the governance of companies, including requirements for shareholder meetings such as notices, quorums and voting rights. <p>3.4 Public offerings of company securities (sec 95, 96, 97, 99, and 100–111)</p> <ul style="list-style-type: none"> • Acquire basic knowledge and understanding of the requirements for public offerings of company securities in terms of the Act.

	HOW THIS COURSE IS ORGANISED
Learning outcomes	<p>4.1 The board, directors and prescribed officers, election, ineligibility and disqualification, and vacancies</p> <ul style="list-style-type: none"> • Give advice, discuss concerns and apply the requirements for directors' appointment and removal, and vacancies. <p>4.2 Board committees, meetings and directors acting other than at meetings</p> <ul style="list-style-type: none"> • Give advice, discuss concerns and apply the requirements for board committees and their meetings. <p>4.3 Directors' personal financial interests</p> <ul style="list-style-type: none"> • Give advice, discuss concerns and apply the requirements for directors' personal financial interests. <p>4.4 Standards of directors' conduct, liability of directors and prescribed officers, indemnification and directors' insurance</p> <p>Give advice, discuss concerns and apply the requirements for:</p> <ul style="list-style-type: none"> • standards of directors' conduct • the liability of directors and prescribed officers • indemnification and directors' insurance <p>5.1 Application of and general requirements regarding enhanced accountability and transparency</p> <ul style="list-style-type: none"> • Give advice, discuss concerns and apply the requirements for the application of and general requirements regarding enhanced accountability and transparency, and vacancies. <p>5.2 The company secretary, including the mandatory appointment of the company secretary, juristic person or partnership as company secretary, and the duties, resignation or removal of a company secretary</p> <ul style="list-style-type: none"> • Give advice, discuss concerns and apply the requirements for the company secretary. <p>5.3 Auditors, including the appointment, resignation, rotation, and rights and restricted functions of auditors</p> <ul style="list-style-type: none"> • Give advice, discuss concerns and apply the requirements for auditors. <p>5.4 Audit committees</p> <ul style="list-style-type: none"> • Give advice, discuss concerns and apply the requirements for audit committees. <p>6.1 Financial assistance for subscription of securities</p> <ul style="list-style-type: none"> • Give advice, discuss concerns and apply the requirements regarding financial assistance for subscription of securities.

	HOW THIS COURSE IS ORGANISED
	<p>6.2 Loans or other financial assistance to directors</p> <ul style="list-style-type: none"> • Give advice, discuss concerns and apply the requirements regarding loans or other financial assistance to directors. <p>6.3 Proposals to dispose of all or greater part of assets or undertaking</p> <ul style="list-style-type: none"> • Give advice, discuss concerns and apply the requirements regarding proposals to dispose of all or greater part of assets or undertaking. <p>7.1 Winding up of solvent companies and deregistration of companies</p> <ul style="list-style-type: none"> • Give advice, discuss concerns and apply the requirements regarding the winding up of solvent companies and deregistration of companies. <p>7.2 Business rescue</p> <ul style="list-style-type: none"> • Give advice, discuss concerns and apply the requirements for business rescue. <p>7.3 Protection for whistle-blowers, application to declare a director delinquent or under probation, relief from oppressive or prejudicial conduct or from abuse of the separate juristic personality of the company, complaints to the Commission or Panel, powers to support investigations and inspections, and companies' tribunal adjudication procedures</p> <p>Gain basic knowledge of the requirements regarding:</p> <ul style="list-style-type: none"> • the protection for whistle-blowers • an application to declare a director delinquent or under probation • relief from oppressive or prejudicial conduct or from abuse of the separate juristic personality of the company • complaints to the Commission or Panel • powers to support investigations and inspections • company and tribunal adjudication procedures <p>8.1 Regulatory agencies and their functions</p> <ul style="list-style-type: none"> • Gain a basic understanding of the Companies Act's requirements for regulatory agencies. <p>8.2 Breach of confidence, false statements, reckless conduct and non-compliance, hindering administration of the Act and penalties</p> <ul style="list-style-type: none"> • Gain a basic understanding of the requirements regarding breach of confidence, false statements, reckless conduct and non-compliance, hindering administration of the Act and penalties.

	HOW THIS COURSE IS ORGANISED
	<p>8.3 Civil actions and limited time for initiating complaints</p> <ul style="list-style-type: none"> Gain a basic understanding of civil actions and limited time for initiating complaints. <p>9.1 Schedules to the Companies Act (Schedules 2, 3 & 5)</p> <ul style="list-style-type: none"> Give advice and apply the requirements included in certain Schedules to the Companies Act. <p>9.2 Close Corporations Act</p> <ul style="list-style-type: none"> Gain a basic awareness of the Close Corporations Act. <p>9.3 Other legislation</p> <ul style="list-style-type: none"> Gain a basic awareness of other legislation of relevance to an accountant.
READING MATERIAL	The study material for this module is contained in learning units preface 1 to 9, MO001/4/2017 and the tutorial letters that will be uploaded on myUnisa website during the semester.
COMMENTARIES ON ASSIGNMENTS (FEEDBACK)	<p>Commentary on the assignments will be loaded on myUnisa in follow-up Tutorial Letters 201 and 202. Please check your answers as soon as you receive this feedback.</p> <p>The assignments and the feedback on these assignments constitute an important part of your learning and should help you to be better prepared for the examination.</p>
ASSESSMENT PLAN	<p>The formative assessment consists of two assignments. These assignments will be administered in accordance with a blended mode of online learning and will collectively contribute 20% towards the final mark.</p> <p>A compulsory summative assessment in the form of a venue-based examination will constitute 80% of the final mark.</p>

	HOW THIS COURSE IS ORGANISED
EXAMINATIONS	<p>Please note that a semester mark system applies. Assignment 01 will contribute 25% to your semester mark and Assignment 02 will contribute 75% to your semester mark.</p> <p>The semester mark will carry a weight of 20% and the examination mark a weight of 80% towards calculating the final mark.</p> <p>NOTE: To pass a module, the final mark must at least be 50%.</p> <p><u>Formal venue-based examination</u></p> <p>AUE1601 is a semester module. If you are registered for the first semester, this means you will be writing exams in May/June 2017 and the supplementary examination will be written in October/November 2017. If you are registered for the second semester, you will write the examination in October/November 2017 and the supplementary examination will be in May/June 2018.</p> <p>The format of the question paper will consist of essay-type questions. The total of the paper will be 100 marks. Please note that there are no multiple-choice questions in the examination. The examination is not an open-book exam.</p>
RULES OF ENGAGEMENT	<p>To be successful in this module, especially because it is an online module, you need to adhere to some basic principles. We call these the <i>Rules of Engagement</i>:</p> <ul style="list-style-type: none"> • Participate: We need to see that you are online, so you need to do the activities – write something in the online Discussion Forums (even if it is not perfect), try the activities, explore the website. • Sharing is important: A big part of this module involves interactive learning. So, share what you want to share and help us to learn from each other. • Do not be afraid to try: When you are participating online, we do not care about being 'perfect'. • Of course, we expect you to use good academic language – even in your e-mails and online discussions. This is NOT an SMS or Mxit or Facebook ... Be formal and remember that you are speaking with your lecturers, teaching assistants and classmates in your group. • Be open to other opinions: We do not all have to agree on everything in this world. In fact, it is important that we learn how to work with, how to deal with and how to live with people who we do not always agree with. • Be polite: Be careful not to insult other people accidentally by what you say online. For example, readers will think you are being rude if you type EVERYTHING IN CAPITAL LETTERS or BOLD!

	HOW THIS COURSE IS ORGANISED
RULES OF ENGAGEMENT	<p>Remember the power of language – this is the whole point of this module! If you are worried that you do not know the rules for online politeness, you can visit the website on netiquette here http://www.albion.com/netiquette/index.html</p> <ul style="list-style-type: none"> • Ask for help: Do not be afraid to ask questions if you do not understand something. You can ask your online classmates in your group and you can ask your lecturer if you have problems with anything in the course.

3.7 Frequently asked questions

Frequently asked questions that relate to the content of the course as well as the scope of the examination, have been added. You will find the frequently asked questions under **FAQs**. These are grouped in various categories ranging from assessment matters to technical issues. If you have any queries about the module, start by consulting the **FAQs**. Should you not find an answer to your question, you are most welcome to contact us.

- To access the frequently asked questions, click on the **FAQs** tool.

The following frequently asked questions are listed:

CATEGORY	FAQS: QUESTIONS AND ANSWERS
Category: Practical information	<p>Question: How do I contact my lecturer?</p> <p>Answer:</p> <p>Ms AM du Preez: AUE1601@unisa.ac.za or 012 429 3383</p> <p>Ms S Malan: AUE1601@unisa.ac.za or 012 429 4846</p>
Category: Companies Act	<p>Question: Do I need to quote section numbers?</p> <p>Answer: No, you only need to understand the requirements of the specific sections.</p>
Category: Practical information	<p>Question: How can I find answers for the activities?</p> <p>Answer:</p> <p>Your study guide is a valuable reference resource, because you can refer to it to perform the activities included in the learning units. This means that you must use the study guide to find answers for the activities.</p>

CATEGORY	FAQS: QUESTIONS AND ANSWERS
<p>Category: Practical information</p>	<p>The following approach might assist you to find answers to the questions:</p> <ul style="list-style-type: none"> • While you are reading and analysing the text in the learning units, look for the main points by highlighting or underlining them. You can also make notes in the margin of a printed guide. Perform the activities only after you have thoroughly studied the content of the study guide. When looking for an answer, review the preceding sections by noting only the main points, or picking out words in capital letters, bold or underlined. This will assist you to find the relevant paragraphs that address the question. <p>Should this skimming technique not be successful, scan more thoroughly through the content for important information.</p> <ul style="list-style-type: none"> • Should you still be unable to find answers to the activities and self-evaluation questions, it is recommended that you break the learning units into smaller parts that are easy to understand. You will do this by summarising each learning unit in your own words. <p>Here you have to remember to separate main ideas from supporting information. Try to find keywords, as the keywords will help you to recall an entire idea.</p> <p>You can also draw a mind map to summarise the content. A mind map is your easiest method of summarising. With a mind map, you follow the same procedures as for any other summary, but the mind map resembles a diagram.</p>
<p>Category: Examination</p>	<p>Question: Do you provide any general examination tips?</p> <p>Answer:</p> <p>We would like to draw your attention to your preparation for the examinations and we offer the following tips:</p> <p>Read and understand the instructions</p> <ul style="list-style-type: none"> • ALWAYS read the instructions carefully. Many students do not take the time to do this and then discover that they answered questions incorrectly. <p>Preview the exam and plan your time accordingly</p> <ul style="list-style-type: none"> • Note the number of questions and how many marks each is worth. Quickly reading over the questions will assist in activating your memory. Decide which questions will be easier to do and which ones will take longer and budget your time accordingly. Allocate time to review the exam and make corrections. If you think of something while you are previewing the exam, write it down immediately.

CATEGORY	FAQS: QUESTIONS AND ANSWERS
	<p>Tackle each question systematically</p> <ul style="list-style-type: none"> • Read each question carefully and underline key words. Is it a one-part or two-part question? What are you being asked to do? Identify what you have and what you need. Decide how you plan to get to the answer and make a few notes on the steps you will take. This will provide you with some guidelines – and the person marking the exam with an idea of how you attempted the question. This will also assist you with finding and correcting mistakes. <p>Write something down for every question</p> <ul style="list-style-type: none"> • If all you can do is to provide a definition, then do so. Write down anything you know that is related to the question, especially if you do not know the answer. Do not leave a question unanswered. Try! <p>If you “draw a blank”</p> <ul style="list-style-type: none"> • First, do not panic and allow anxiety to take control of how you are going to do on the exam. Ask yourself, “What do I need to know to answer this question?” and start writing down your thoughts. Avoid negative self-talk – focus on the task instead of on yourself. <p>Review and make corrections</p> <ul style="list-style-type: none"> • Take the time to go over the exam and check your answers. Do not change anything unless you are 100% sure it is correct. <p>Stay until the end</p> <p>Do not leave until the exam invigilators throw you out! Sometimes, it takes a little more time for information in your memory to “surface”, so use all the time you are given.</p>
<p>Category: Assignments</p>	<p>Question: Are there any assignments in the module?</p> <p>Answer:</p> <p>You are required to submit the compulsory assignments for the module AUE1601, namely Assignments 01 and 02. Admission to the examination will be obtained by submitting either Assignment 01 or Assignment 02 and the admission will not depend on the marks you obtain for it. Please ensure that Assignment 01 and/or Assignment 02 reaches the University on or before the due date. Although you will be admitted to the examination through the submission of either Assignment 01 or Assignment 02, your marks for both Assignments 01 and 02 will be used to determine your semester mark.</p>

CATEGORY	FAQS: QUESTIONS AND ANSWERS
<p>Category: Examination</p>	<p>Question: When does the exam take place?</p> <p>Answer:</p> <p>AUE1601 is a semester module. If you are registered for the first semester, this means you will be writing exams in May/June 2017 and the supplementary examination will be written in October/November 2017. If you are registered for the second semester, you will write the examination in October/November 2017 and the supplementary examination will be in May/June 2018.</p>
<p>Category: Course content</p>	<p>Question: Where do I obtain my course material?</p> <p>Answer:</p> <p>Go to Official Study Material and you should find PDF files for your tutorial letters and your study guide. Any other documents provided by your lecturer will be available in the Additional Resources option. Prescribed textbooks must be purchased.</p>
<p>Category: Discussion classes</p>	<p>Question: Will there be discussion classes this semester?</p> <p>Answer:</p> <p>There will not be any discussion classes for this module.</p>
<p>Category: Past exam papers</p>	<p>Question: Do the lecturers supply memorandums of past exam papers?</p> <p>Answer:</p> <p>It is departmental policy that we do not supply past exam memorandums. If you experience difficulty with a question you may contact one of your lecturers to assist.</p>
<p>Category: Examinations</p>	<p>Question: Are we permitted to take textbooks into the examination venue?</p> <p>Answer:</p> <p>The exam is not an open book exam and you are not allowed to bring any study material into the examination venue.</p>
<p>Category: Assignments</p>	<p>Question: Do you mark the entire Assignment 2?</p> <p>Answer:</p> <p><i>Only selected questions will be marked</i></p> <p>It is very important that you make sure that you answer all sections of the assignment as you do not know which sections we are going to choose to mark.</p>

CATEGORY	FAQS: QUESTIONS AND ANSWERS
<p>Category: Tutorial letters</p>	<p>What information do the tutorial letters contain?</p> <p>Answer:</p> <p>The tutorial letters contain important information about the scheme of work, resources and assignments for this module. We urge you to read them carefully and to keep them at hand when working through the study material, preparing the assignments, preparing for the examination and addressing questions to your lecturers.</p> <p>More specifically, in Tutorial Letter AUE1601/101/3/2017, you will find the assignments and assessment criteria, as well as instructions on the preparation and submission of the assignments. This tutorial letter also provides all the information you need with regard to the study material, other resources and how to obtain it.</p> <p>Tutorial Letter AUE1601/201/1/2017 (1st semester) and AUE1601/201/2/2017 (2nd semester) contain feedback on Assignment 01. Tutorial Letter AUE1601/202/1/2017 (1st semester) and AUE1601/202/2/2017 (2nd semester) contain feedback on Assignment 02 and a solution to the self-evaluation assessment.</p> <p>Tutorial Letter AUE1601/102/3/2017 contains additional questions that you must attempt and AUE1601/103/3/2017 provides the solutions to these questions.</p> <p>Right from the start, we would like to point out that you must read all the tutorial letters you receive during the semester, as they always contain important and, sometimes, urgent information.</p> <p>Please make sure that you work through the tutorial letters before you embark on any work in the study guide or assessment tasks.</p>
<p>Category: Administrative matters</p>	<p>Question: Who can I contact to assist with administrative issues?</p> <p>Answer:</p> <p>There is a Student Information Hub that will be able to assist you with your queries:</p> <p>Contact e-mail: CASequiries-Undergraduate@unisa.ac.za</p> <p>Contact telephone number: 012 429 2982/4416/2233</p>

3.8 Schedule

The **Schedule** option will show you what your official assignment and examination dates are. This option displays the dates of the compulsory assignments and examinations.

To access the information on scheduled events, click on the date in the calendar (which will be highlighted and underlined if activities are scheduled for that day), or click on the **Schedule** option in the navigation bar, which gives you the option to view the calendar by week, month or year.

- To view or print the important dates, click on the **Schedule** option.

3.9 Discussion forums

The **Discussion Forums** option is used mainly for interactive discussions and activities relating to the various topics and themes associated with the field of protection services. The forums and topics are created to assist and support you in mastering the learning outcomes. Participating in the discussions will also help you to be better prepared for the assignments.

The module site contains a variety of discussion forums. There are forums where you can meet and chat with your fellow students. The lecturer may include other topics and forums for you.

- To take part in the online discussions, click on the **Discussions Forums** option.

Your lecturer will create the following discussion forums during the semester:

Assignment 1

Assignment 2

Topics 1–9

Exam preparation discussion

4. CLOSING REMARKS

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Do not hesitate to contact us, your lecturers, if you experience any difficulties with any aspects of the module. You can contact us either via e-mail, telephone or the **Discussions** option. Our contact details are available on the home page of the module site. Remember, help is just a click away.

We wish you a fascinating and satisfying journey through the learning material and trust that you will complete the module successfully.

Best regards

THE AUE1601 TEAM:

MS AM DU PREEZ

MS S MALAN

5. REFERENCE LIST

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Unisa. 2015 *Study @ Unisa:Connect, Plan and Study*. Pretoria: University of South Africa.



PREFACE

1. GENERAL OVERVIEW

This auditing module deals with the legal aspects of accounting. The study guide should be used as your first point of reference for each topic covered in this module. Read each topic carefully. Various activities have been included under each topic. Here you need to pause and review what you have learned.

The focus of the module is on company law, and students are required to develop the ability to interpret the law that regulates companies. This is a new challenge that can initially make learning difficult, but once you understand what a company is and how company law fits in, it will be easier.

A company is a form of a business organisation. After a company has been formally registered, it becomes a separate legal entity or a so-called “legal person”. A company exists separately from the person/s who formed it and it can buy and sell inventory; own property; and perform other business transactions similar to those of other types of business organisations. Company law deals with the formation and continuing regulation of companies. You should also note that as with a company, a close corporation is a business organisation which is a separate legal entity, and even though the focus of this module is on the Companies Act, certain aspects are also applicable to close corporations. This will be pointed out to you.

The Companies Act consists of various chapters and sections (225 in total) that regulate the formation and all the responsibilities of companies, their directors, secretaries, et cetera. The Companies Act deals with the formation of a company, accountability and transparency, fundamental transactions, share capital, and business rescue, to name but a few aspects. The Regulations to the Companies Act serve the purpose of explaining the applications of the Companies Act and providing more information, where necessary.

2. OBJECTIVE OF THIS MODULE

The aim of this module is to enable students to gain insight into aspects of the Companies Act 71 of 2008, the Companies Regulations, 2011 and limited aspects of the Close Corporations Act 69 of 1984 that are all of importance to companies, their directors, accountants, auditors, the company secretary, and other parties. The learning outcome for this module is that students should be able to comprehend and apply the different topics prescribed in this module. As mentioned above, the focus of this module will be specifically on the Companies Act and its Regulations.

It is important for accountants/auditors to have sound knowledge of laws and regulations that govern the profession as well as of their clients; otherwise, they may not be able to perform their duties properly.

You do not have to study all of the sections of the Companies Act, as your studies will be limited to the specific sections of the Companies Act as indicated in table 1. You will also have to study certain Schedules and Regulations to the Act, which relate to the sections of the Companies Act on which you will be examined.

3. TEACHING STRATEGY

The focus of our teaching role is on *facilitating* your learning experiences towards achieving specific assessment criteria. Furthermore, for each of the topics that comprise this module, these learning experiences are designed with the aim of enabling you to master the learning content at a predetermined competence level.

3.1 Study material

The teaching strategy we have adopted to enable you to complete this module involves utilising all the elements of the study package in an integrated manner.

The study material for mastering this module consists of:

- the prescribed **textbooks** (Companies Act 71 of 2008 and the Companies Regulations, 2011)
- the **study guide** in which study material is grouped into learning units on the basis of topics. (The study guide serves as a key to the study material you have to study in the prescribed textbook(s) and also contains activities that will enable you to test your individual learning progress.)
- **tutorial letters** which contain information to which we want to draw your attention
- **assignments**. (The assignments are contained in Tutorial Letter 101.)

When you commence this module, a relationship begins in which you and your lecturers interact primarily through the medium of study material contained in the study package. An important implication of this arrangement is that while your lecturers take responsibility for the appropriateness of the study material which we place at your disposal for this module, you have sole responsibility for ensuring that you use each component of the study package to the fullest possible degree.

3.2 Learning outcomes and levels of mastery

The learning outcomes we have formulated indicate what you should do to be able to complete each topic successfully. We have indicated these learning outcomes for each topic in this study guide. The learning outcomes are based on the different levels of mastery that you will have to achieve in this module. These levels vary from basic to intermediate. The learning objectives are ultimately reflected in the examination paper that you will have to pass in order to complete the module successfully. **The examination will consist of questions testing knowledge and comprehension (level 1) and application questions (level 2).** You should bear in mind that learning objectives merely indicate the highest level of mastery,

and that particular topics may be examined at a lower level of mastery. For examination purposes, a maximum of 70% of the paper will consist of application questions while the balance will consist of questions concentrating on knowledge and comprehension.

The various levels of mastery used to set range statements for learning outcomes and assessment criteria are defined as follows in the *Education requirements of the South African Institute of Chartered Accountants* (2010:13–14):

Level 1: Basic

At this level, the candidate has to acquire knowledge and understanding of the core/essence of the subject matter, including its significance, relevance, and defining attributes.

Consequently, the candidate should have knowledge and understanding

- of the purpose and objective of the subject matter,
- of the underlying principles/practices/legislation/requirements (hereafter called “content”),
- of how the content relates to the discipline as a whole and to other disciplines (that is, how it “fits in”),
- at a broad conceptual level.

At this level, knowledge and understanding of detail, including procedural or numerical aspects specific to the subject matter, are not required.

At this level, candidates should have gained such an extent and depth of knowledge and understanding that they are able to recognise issues when encountered and to seek further depth of knowledge and understanding.

Level 2: Intermediate

At this level, the candidate has to acquire detailed knowledge and understanding of the central ideas and issues contained in the subject matter.

Consequently, the candidate should have knowledge and understanding of

- those aspects of the content, which are central to the subject matter, in order to achieve a sound conceptual understanding; and
- detail, including procedural and numerical aspects specific to the subject matter, where appropriate.

Knowledge and understanding of complexities and unusual/exceptional aspects are not required, however.

At this level, candidates should have gained sound knowledge and understanding of the substance of the subject matter. In this way, they would be able to deal with issues and solve problems central to the topic. Moreover, sound conceptual knowledge will enable them to explore and understand complexities further, if necessary. This level of knowledge and understanding is required for level 1 (basic).

3.3 Meaning of words

Throughout this module, we communicate learning outcomes and self-assessment criteria phrased in terms of what you should be able to do. This process involves the use of action words, which are typically verbs or phrases containing verbs, describing what the student is expected to do in the learning activity. It is our objective to ensure that the words we use to indicate a requirement clearly state what you have to do, and you should also ensure that you clearly understand the requirements that are conveyed by the range of words that we will use in the study material for this module.

We list below (in alphabetical order) examples of some of the action words that you will come across in this module, together with their meanings for the purposes of this module.

Advise	Give advice; express an opinion as an expert
Apply	Make use of in a practical sense; use where relevant or appropriate
Calculate	Ascertain by mathematical procedure/exact reckoning
Compare	Examine in order to observe resemblances, relationships and differences
Complete	Finish/add what is required
Define	State precisely the meaning/scope/total character of; make clear (especially the outline of); give a concise description of the distinguishing features of
Describe	Give clearly the distinguishing details or essential characteristics of
Determine	Decide; come to a conclusion/make a decision include reasoning
Discuss	Examine/consider the opposing arguments
Draft	Prepare a preliminary version of
Examine	Investigate carefully/in detail
Explain	Set out the meaning of something; clarify the meaning, provide supporting evidence; argue the truth of something
Identify	Establish by consideration, select, recognise
Illustrate	Explain, clarify by means of an example to illustrate the nature, meaning and importance of something (see explain)
Interpret	Convey/explain/set out in detail the nature/meaning/significance of
List	Record/itemise names or things belonging to a class
Mention/Name/State	Specify by name; cite names, characteristics, items, elements or facts
Motivate	Cite facts/reasons as support for a viewpoint or argument and conclude
Organise	Arrange in an orderly structure/sequence; place into classes/groups according to certain criteria

Prepare	Make ready/complete; make something ready on the basis of previous study
Record	Put in writing; set down for reference and retention
Summarise	Give a condensed version of; state the key aspects of
Tabulate	Arrange/organise in table form

4. LEGISLATION TO BE STUDIED

You should study the Companies Act and the Companies Regulations from the original source and focus on all the important sections.

Flag all the important sections indicated in tables 1 and 2 of the preface in your copy of the Companies Act and in the Companies Regulations. In this way, you will find the sections easily when studying.

You should bear in mind the following:

In the examination, you will have to apply your knowledge to the questions asked. You will have to identify and resolve the key issues relating to the Companies Act.

The majority of the marks will be awarded for the application of knowledge. However, to build a logical argument in any question, it is necessary to start with basic theory and definitions. The theory and definitions should therefore be used as building blocks to formulate an answer applied to a given scenario.

4.1 Companies Act 71 of 2008

4.1.1 Introduction

A programme of corporate law reform has been underway for several years. The Companies Act no. 61 was first promulgated in 1973. However, since that time, the economic, social and political landscape of South Africa has changed in many ways. In view of this, the need arose for updated legislation – which resulted in the new Companies Act, 2008, amended in 2011.

As you will note, some sections are explained in detail by means of diagrams or examples. Your approach, however, should be first to study all the relevant sections directly from the source (the Companies Act 71 of 2008).

If you want your dreams to come true, don't oversleep.

(Woody Allen)

4.1.2 Sections of the Companies Act

Table 1 includes all the examinable sections of the Companies Act. It also shows how each topic in the study guide links to the various sections of the Companies Act. The knowledge level refers to the levels of mastery explained in section 3.2 of the preface.

Table 1: Sections to be studied

Topic	Company Act Section number	Description	Knowledge level
	–	General overview of the module	Level 2
1	1	Relevant definitions	Level 2
1	2–6	Interpretation	Level 2
1	8,10	Categories of companies	Level 2
1	11, 13, 15–16 and 19–22	Incorporation and legal status of companies	Level 2
2	24 and 27–30	Company records	Level 2
3	35–43 and 46–48	Capitalisation of profit companies	Level 2
3	49–56	Securities registration and transfer	Level 1
3	57–65	Governance of companies	Level 2
3	95–97 and 99–111	Public offerings of company securities	Level 1
4	66–78	Directors	Level 2
5	84–85	Application and general requirements regarding enhanced accountability and transparency	Level 2
5	86–89	Company secretary	Level 2
5	90–93	Auditors	Level 2
5	94	Audit committees	Level 2
6	44–45, 112 and 115	Transactions	Level 2
7	79–83, 128–155, 159, 162, 163 and 168–184	Business rescue, compromise with creditors, winding up, and deregistration of companies	Level 2
8	185–204	Regulatory agencies	Level 2
8	213–216, 218 and 219	Offences, penalties and miscellaneous matters	Level 2
9	–	Schedules 2, 3 and 5 to the Companies Act, Close Corporations Act (general overview) and other legislation applicable to companies	Level 2

4.2 Companies Regulations of 2011

4.2.1 Introduction

The Companies Regulations (Regulations) follows directly after the Companies Act in the prescribed textbook.

We do not expect you to study specific form names or numbers as indicated in the various Regulations. Form names such as **Notice of Incorporation** [sec 13(2) or 14(1)] or **Notice of Amendment** [sec 16(1) and 36(4)] referred to in the Companies Act **are important**. However, specific form names and numbers, for example, for the Notice of Incorporation (Form CoR 14.1) or for the Notice of Amendment (Form CoR 15.2), referred to in the respective **Regulations** (for example, 14 and 15), are **not important for your studies**.

Quite a number of the Regulations contain the same information stated in related sections of the Companies Act, but then these Regulations also refer to the specific form to be submitted. That is why our list of Regulations to be studied below in table 2, does not include all these Regulations.

You will notice that in many instances, the related section number in the Companies Act is stated directly after the heading of the particular Regulation, for example, “**15. Memorandum of Incorporation**” and below that, the words “**see sec 13(1) and sec 16**”. This should assist you in linking the specific Regulation to the related sections of the Act.

4.2.2 Sections of the Companies Regulations

Table 2 includes all the examinable sections of the Companies Regulations. It also indicates how the relevant examinable Regulations are related to the specific sections in the Companies Act. The knowledge level refers to the levels of mastery explained in section 3.2 of the preface.

Table 2: Regulations to be studied

Topic	Companies Act Section number	Regulation number
1	8	26 & 27
1	13(1) & 16	15
1	21	35
2	27 & 28	25(3)–(6)
2	28(1)(b)	26(1)(b) & (c)
2	29(4)	27
2	30(2) & (7)	28
2	30(2) & (7)	29(1)–(10)
3	35	31(3) & (5)
3	50	32
4	66(10)	38
4	72(4)	43(1)
5	84 & 85	26, 27 & 28
5	94(5)	42

5. STUDY APPROACH

The following are some important aspects that you should bear in mind when approaching your studies in auditing, and also some useful hints and aids that will help you to improve your learning experience.

5.1 Time required for academic studies in this module

The study material for this module has been developed on the basis of the assumption that you will have a total period of 15 weeks available to study this module. You will need to use the final three weeks prior to the examination for revision and preparation for the exam.

You ought to be able to devote a minimum of eight hours per week to your studies for this module. The following breakdown of the estimated time required to work through the different topics contained in the study material, including the completion of assignment work, is provided. It should be helpful to make use of this when drawing up your personal study schedule for your Auditing studies. Please remember this is **only a guideline**, you may find certain topics more difficult and thus require more hours.

Topic		Number of study hours required
Preface	General overview	4
1	Interpretation, purpose, application and formation of a company	10
2	Company records	10
3	Shareholders and shares	12
4	Directors	12
5	Enhanced accountability and transparency	8
6	Transactions	8
7	Business rescue, compromise with creditors, winding up and deregistration of companies	8
8	Regulatory agencies, offences and penalties	4
9	Schedules to the Companies Act and other legislation applicable to companies	4
	Completion of assignments	16
	Revision and final examination preparation	24
	Total time	120 hours

5.2 Proposed guidance for solving problems

Please note that it is your responsibility as a student to study the Companies Act and stay up to date with important aspects contained therein. We will emphasise some of the important aspects in this study guide.

We suggest that you approach questions as follows:

- Identify all transactions/events referred to in the scenario
- Determine which requirements of the relevant acts relate to each transaction/event.

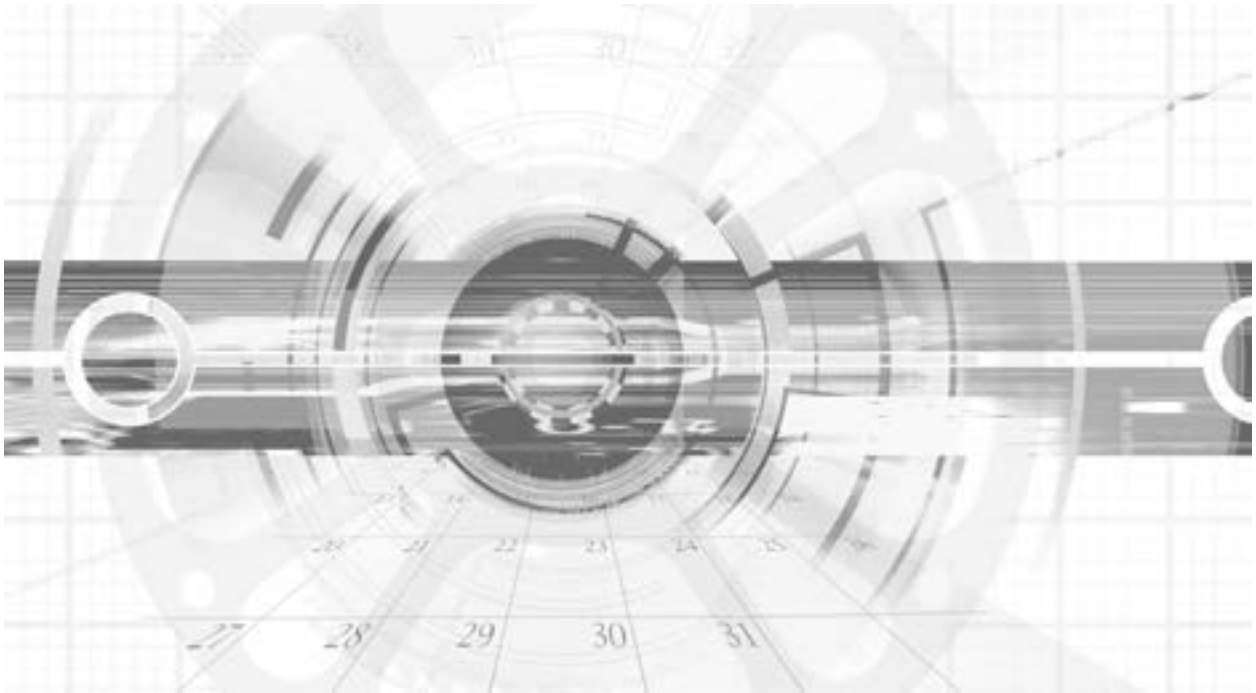
These requirements may include, for example:

- powers of the entity (Memorandum of Incorporation; sections of the Companies Act)
 - specific authorisation required (for example, special resolution; ordinary resolution)
 - special preconditions (liquidity and solvency)
- Reproduce the theory applicable to each transaction/event.
 - Apply the theory to the facts given in the question.
 - Conclude on the legality of each transaction/event.
 - Make recommendations or discuss alternatives (if required by the question).

6. CONCLUSION

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We trust that you will find your studies both rewarding and enjoyable. The effort that you put into this module will provide you with a solid basis for the rest of your studies in the Auditing field.



TOPIC 1

Interpretation, purpose, application and formation of a company

TOPIC OVERVIEW

The aim of this topic is to explain and apply the requirements regarding the interpretation of certain words and concepts used in the Companies Act, as well as those applying to the incorporation and legal status of companies.

Topic 1 is divided into the following learning units:

Learning unit	Title
1.1	Interpretation, purpose, application and formation of a company (sections 1–6 and 8)
1.1.1	Related and interrelated persons, and control (sec 2) and subsidiary relationships (sec 3)
1.1.2	Solvency and liquidity test (sec 4)
1.1.3	Categories of companies (sec 8 and 10 – also refer to Regulations 26 and 27)
1.2	Incorporation and legal status of companies
1.2.1	Memorandum of Incorporation (MOI) (sec 11, 13, 15–16, 19–20; also refer to Regulation 15)
1.2.2	Pre-incorporation contracts (sec 21 – also refer to Regulation 35)
1.2.3	Reckless trading (sec 22)

Section 1 of the Companies Act (herein later referred to as the Act) includes the definitions relevant to the Act and is therefore very important to every person who has to read and apply the Companies Act. (**Note:** *Whenever you are unfamiliar with a term used in the Act, you should refer back to section 1 for its definition.*) Specific definitions are also provided in sections 2 to 5 of the Companies Act. These definitions are important for the application of the different sections of the Act.

For example, in section 4 of the Companies Act, the solvency and liquidity test is explained. Section 46 of the Act to be studied later, which deals with distributions, provides that a company may not make a distribution unless it reasonably appears that the company will satisfy the solvency test. If you did not study the definition in section 4, you will not know how the test is done and what is taken into account.

TEXTUAL AMENDMENTS AND ADDITIONS

Before proceeding with the study of this topic, please refer to Tutorial Letter 102 for this module to acquaint yourself with any textual amendments and additions that may have been indicated.

LEARNING OUTCOMES

Learning unit	On completion of this topic you should be able to:	Level
1.1 Interpretation	<ul style="list-style-type: none"> Give advice, discuss concerns, and apply the interpretation of the Companies Act concerning related and interrelated persons, and control, subsidiary relationships, the solvency and liquidity test, anti-avoidance, and categories of companies. 	2
1.2 Incorporation and legal status of companies	<ul style="list-style-type: none"> Give advice, discuss concerns and apply the criteria for names, the right to incorporate and register a company, and the Memorandum of Incorporation. Give advice on the legal status of companies, the validity of company actions, pre-incorporation contracts, and reckless trading prohibited. 	2



LEARNING UNIT 1.1

Interpretation, purpose, application and formation of a company

INTRODUCTION

In this learning unit, the definitions of related and interrelated persons and control, subsidiary relationships, the solvency and liquidity test, and the different categories of companies will be discussed. The application of these definitions will also be explained by means of activities that you should attempt to complete.

1.1.1 RELATED AND INTERRELATED PERSONS, AND CONTROL (SEC 2) AND SUBSIDIARY RELATIONSHIPS (SEC 3)



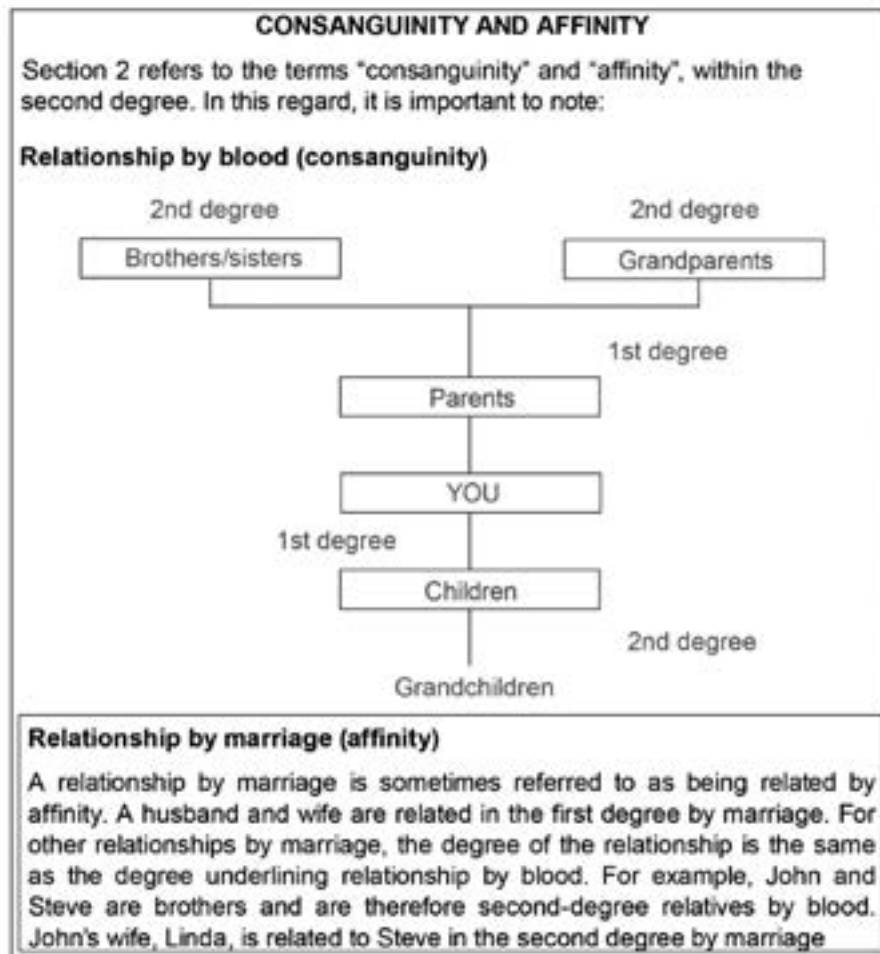
STUDY

Study sections 2 and 3 of the Companies Act. Familiarise yourself with related-party relationships between individual persons and with subsidiary relationships (relationships between companies).

Section 2 and section 3 of the Companies Act deal with related and interrelated persons and with control and subsidiary relationships. These two sections are very important since a number of other sections in the Companies Act refer to related persons and subsidiary relationships (for example, sec 45 that regulates loans or other financial assistance to directors). Later, we will deal in greater detail with section 45, which not only provides [in subsection 45(2)] that a company may assist its directors financially, but also refers to financial assistance provided to “a related person”. Understanding the concept of “related persons” is therefore necessary to interpret the requirements of a section such as section 45 of the Act.

The following mind map in diagram 1.1.1 below will assist you in your studies. It explains two concepts that are dealt with in section 2 of the Act. These are “consanguinity”, which means “blood relationship”, generally speaking, and “affinity”, which is a relationship that exists due to a valid marriage. In terms of the Act, a person is related to another if such a person is related to the other person, within the second degree of “consanguinity” or “affinity”.

DIAGRAM 1.1.1: Consanguinity and affinity



Your brothers, sisters, grandparents and grandchildren are thus related to you in the second degree of consanguinity (second degree of blood relationship). In other words, there is at least one other generation between you and a person related to you in the second degree. The persons who are related to you in the first degree of consanguinity are your children or your parents.

ACTIVITY 1

After you have studied section 2 and section 3, you should try to answer the following questions to test your knowledge. This will help you identify the specific relationships in a given scenario.

Please indicate whether the following persons are related to each other, by answering Yes or No. Give reasons for your answers.

- (a) **Don and Sandra:** Don and Sandra have been married for several years and they live in Cape Town. Because Don works in Johannesburg from Monday to Friday, he lives in a separate apartment in Melville during those days. Are Don and Sandra related to each other? Give a reason for your answer.
- (b) **Lynette and Master Locks (Pty) Ltd:** Lynette owned 100% of the shares in Master Locks (Pty) Ltd before she recently transferred all her shares in Master Locks (Pty) Ltd to her adopted son, Peter. Are Lynette and

- the company, Master Locks (Pty) Ltd related to each other? Give a reason for your answer.
- (c) **Anglo Ltd and Naidoo Cash & Carry (Pty) Ltd:** Johnny and his brother Kumar both own 50% shares in a company called Naidoo Cash & Carry (Pty) Ltd. Kumar recently purchased R5 000 worth of shares in Anglo Ltd, a company listed on the JSE Limited. Kumar does not control Anglo Ltd directly or indirectly. Are the two companies, Anglo Ltd and Naidoo Cash & Carry (Pty) Ltd, related to each other? Give a reason for your answer.
- (d) **Blue Hills (Pty) Ltd and Wollongong (Pty) Ltd:** Blue Hills (Pty) Ltd appointed Mr Patrice Lumumba and Mr Eugene Wollongong as the directors of Wollongong (Pty) Ltd. Mr Lumumba and Mr Wollongong control the majority of the votes at board meetings. Are the two companies, Blue Hills (Pty) Ltd and Wollongong (Pty) Ltd, related to each other?
- (e) **Sonny and Cher:** Sonny and Cher are not married, but they have been living together for several years with their two children. Are Sonny and Cher related to each other?

FEEDBACK ON ACTIVITY 1

Reference: Section 2 of the Companies Act

- (a) Yes – They are married. It is irrelevant that they are not permanently living together **[sec 2(1)(a)]**.
- (b) Yes – Peter directly controls Master Locks (Pty) Ltd and Peter is related to Lynette in the first degree of consanguinity **[sec 2((1)(a–b))]**. Thus, Lynette is related to Master Locks (Pty) Ltd. (Note: It does not matter that Peter is adopted; in terms of the law, his relationship with his mother is exactly the same, whether he was adopted or not.)
- (c) No – Although Kumar is a shareholder of both entities, he does not have control over Anglo Ltd **[sec 2(1)(c)]**. Therefore, Anglo Ltd and Naidoo Cash & Carry (Pty) Ltd are not related persons in terms of being controlled by the same person.
- (d) Yes – Blue Hills (Pty) Ltd has **indirect** control over Wollongong (Pty) Ltd **[sec 2(1)(c)]**.
- (e) Yes – Sonny and Cher are living together in a relationship similar to marriage **[sec 2(1)(a)]**. (This is a more difficult concept to remember!)

1.1.2 SOLVENCY AND LIQUIDITY TEST (SEC 4)



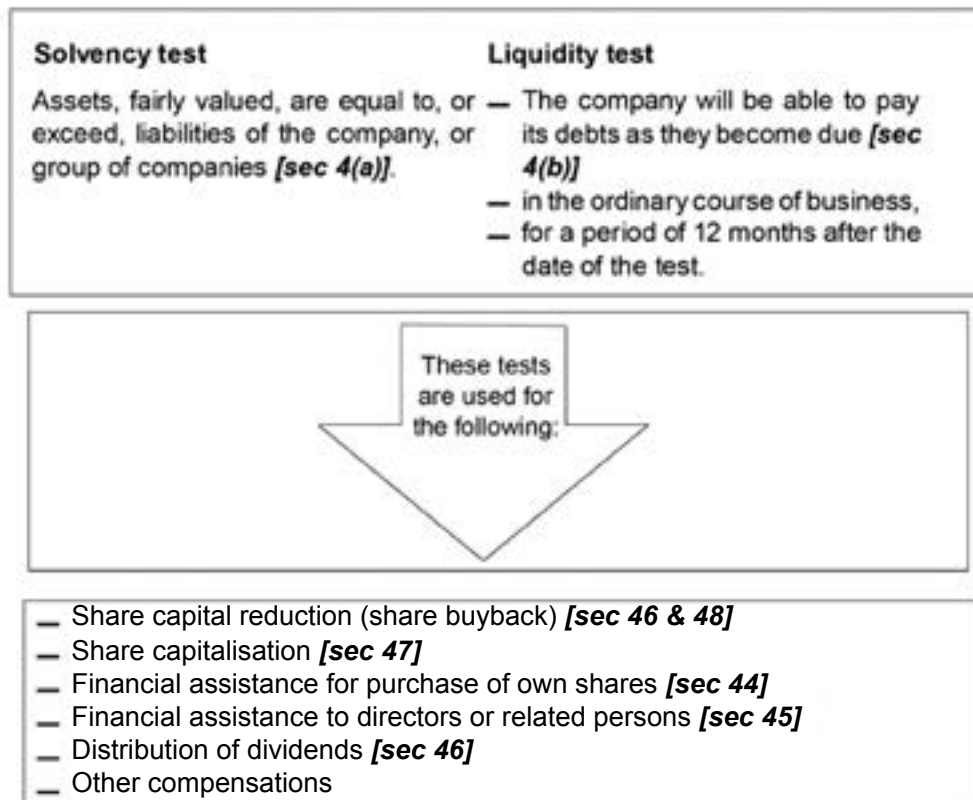
STUDY

Study section 4 of the Companies Act.

You will see from the mind map/diagram below that, in terms of various sections of the Companies Act, the solvency and liquidity test must be applied to particular transactions. Conducting the solvency and liquidity test forms part of the requirements for that transaction to be valid, and it must be proved before resolutions can be passed.

Diagram 1.1.2 below will assist you in your studies.

DIAGRAM 1.1.2: Solvency and liquidity tests



1.1.3 CATEGORIES OF COMPANIES (SEC 8 AND 10 – ALSO REFER TO REGULATIONS 26 AND 27)



STUDY

Study sections 8 and 10 of the Companies Act as well as Regulations 26 and 27.

The Act provides for two categories of companies, namely non-profit and for-profit (or profit) companies. You must know the different type of companies, as each of them has different characteristics, and different requirements may apply to each of them in terms of the Act.

Diagram 1.1.3 below will assist you in your studies.

DIAGRAM 1.1.3: Categories of companies

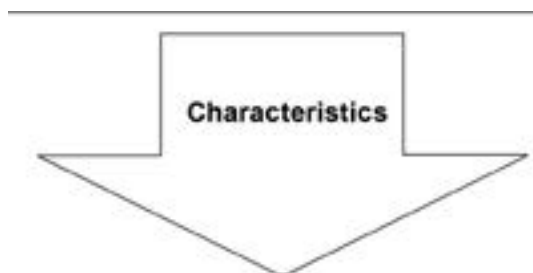
Non-profit companies (sec 10)

- They are formed for a public benefit purpose.
- Except for reasonable compensation for services rendered, the income and property of these companies are not distributable to incorporators/members/directors/officers.
- They apply their assets and income to advance their objectives.
- They have a minimum of three incorporators.
- They have a minimum of three directors.

Note: An example of a non-profit company is the SPCA (Society for the Prevention of Cruelty to Animals). This company exists for the benefit of the public, and it applies its income and assets to advance its goals, for instance, animal protection.

Profit companies [sec 8(2)]

- State-owned companies
- Public companies
- Private companies
- Personal liability companies



State-owned companies [sec 1]	Public companies	Private companies [sec 8(2)(b)]	Personal liability companies [sec 8(2)(c)]
<ul style="list-style-type: none"> - a state-owned enterprise - a company owned by a municipality 	<ul style="list-style-type: none"> - unrestricted transferability of shares - offers to public permissible - minimum of one incorporator - minimum of three directors (for governance purposes) 	<ul style="list-style-type: none"> - less disclosure and transparency requirements than those for public companies - transferability of securities restricted - minimum of one incorporator - minimum of one director 	<ul style="list-style-type: none"> - meets criteria of private company - the Memorandum of Incorporation states that it is a personal liability company.

In order to understand the diagrams above fully, look up the **definitions** of the following terms in section 1 of the Companies Act: “incorporator”; “**Memorandum of Incorporation**”; and “securities”.

ACTIVITY 2

Answer the following question on the characteristics of a private and public company:

Distinguish between a public and a private company in respect of the following:

- 3.1 name (2)
- 3.2 number of directors (2)
- 3.3 offer of shares to the public (2)
- 3.4 company secretary (2)
- 3.5 audit committees (2)

FEEDBACK ON ACTIVITY 2

Reference: Section 4 of the Companies Act

- 3.1 A private company must include the words “proprietary” and “limited” or the abbreviation of the words in its name, that is, (Pty) Ltd. (1)
A public company must not include the word “proprietary” or its abbreviation, but must include only “limited” or its abbreviation in its name. (1)
- 3.2 A private company must have a minimum of one director. No maximum is stipulated in the Act. (1)
A public company must have a minimum of three directors. No maximum is stipulated. However, the company’s Memorandum of Incorporation (MOI) may stipulate a higher number. (1)
- 3.3 A private company may not offer its shares for sale to the public under any circumstances and the transferability of its shares is restricted. (1)
A public company may offer its shares to the public under the conditions stipulated in the Act and in terms of its Memorandum of Incorporation (MOI). (1)
- 3.4 A private company is not required to have a company secretary but may appoint one. (1)
A public company must appoint a company secretary. (1)
- 3.5 A private company is not required to appoint an audit committee unless its Memorandum of Incorporation (MOI) indicates that the company elects to. (1)
A public company must appoint an audit committee annually. (1)

SUMMARY

In this learning unit, we explained and applied the interpretation of the Act, including definitions, related and interrelated persons and control, subsidiary relationships, the solvency and liquidity test, anti-avoidance, and categories of companies.

After having worked through the learning unit and the references to the prescribed study material determine if you are able to:

Give advice, discuss concerns, and apply the interpretation of the Companies Act, including definitions, concerning related and interrelated persons and control, subsidiary relationships, the solvency and liquidity test, anti-avoidance, and categories of companies.



LEARNING UNIT 1.2

Incorporation and legal status of companies

1.2.1 MEMORANDUM OF INCORPORATION (MOI) (SEC 11, 13, 15–16, 19–20 – ALSO REFER TO REGULATION 15)



STUDY

Study sections 11, 13, 15, 16, 19 and 20 of the Companies Act as well as Regulation 15, which deals with the Memorandum of Incorporation (MOI) of a company.

The founding document of a company under the Companies Act is the MOI. It is important to know that sections 15 and 16 do not only deal with the MOI, but that they include rules of a company and shareholder agreements.

The Companies Act, 2008, provides that a company's MOI is subject to the Act and must be consistent with the provisions of the Act. To the extent that a provision of the MOI contravenes or is inconsistent with the Act, it is void [**sec 15(1)**].

However, the Companies Act recognises that not all its provisions are suitable for all companies and therefore, **section 15(2)** permits a company's **MOI** to

- include matters that are not dealt with in the Act
- alter the effect of any “alterable” provision (these are provisions that are allowed to be altered)
- impose on the company a higher standard, greater restriction, longer period, or any similarly more onerous requirement, than would otherwise apply to the company in terms of an unalterable provision of the Act
- contain any restrictive conditions applicable to the company or changes to any such conditions, in addition to the requirements for amendments of MOIs set out in section 16
- prohibit the amendment of any particular provision of the MOI, provided that the MOI does not include any provision that negates, restricts, limits, qualifies, extends or otherwise alters the substance or effect of an unalterable provision of the Act, except to the extent contemplated in the third bullet point above

An “alterable” provision is a provision of the Act “in which it is expressly contemplated that its effect on a particular company may be negated, restricted, limited, qualified, extended or otherwise altered in substance or effect by that company's MOI” (sec 1).

Some examples of alterable provisions are as follows:

- Annual financial statements – *“The annual financial statements must ... be... audited voluntarily if the company’s Memorandum of Incorporation, or a shareholders’ resolution, so requires or if the Company’s board has so determined ...”* [sec 30(2) (b)(ii)(aa)].
- Notice of shareholder meetings – *“A company’s Memorandum of Incorporation may provide for longer or shorter minimum notice periods than required by subsection (1)”* [sec 62(2)].
- Special resolutions – *“A company’s Memorandum of Incorporation may permit*
 - (a) *a lower percentage of voting rights to approve any special resolution; or*
 - (b) *one or more lower percentages of voting rights to approve special resolutions concerning one or more particular matters, respectively, provided that there must at all times be a margin of at least 10 percentage points between the highest established requirement for approval of an ordinary resolution on any matter, and the lowest established requirement for approval of a special resolution on any matter”* [sec 65(10)].

(Adapted from Webber & Wentzel 2011 – a list of alterable provisions as published on SAICA’s website.)

Section 15(3) provides that, unless the MOI states otherwise, the board of the company may make, amend or repeal any necessary or incidental rules relating to the governance of the company in respect of matters that are not addressed in the Act or in the MOI. The steps, which the board must follow in this regard, are set out. An example would be a company that does not need to be audited in terms of the Act, but which the board voluntarily decides must be audited.

The steps that must be followed in amending a MOI are included in section 16. Regulation 15 provides for the various forms (including a long and short form) to be completed when registering or amending the MOI.

1.2.2 PRE-INCORPORATION CONTRACTS (SEC 21 – ALSO REFER TO REGULATION 35)

Pre-incorporation contracts are exactly what they say they are: a contract entered into with, or by a company who is not yet incorporated. Naturally, parties would be hesitant to conclude a contract with a party not yet incorporated, but this section of the Companies Act makes it possible.



STUDY

Study section 21 of the Companies Act as well as Regulation 35. Familiarise yourself with the requirements of the Act in order to enter into a pre-incorporation contract legally.

ACTIVITY 1

You are an accountant and must advise Lionel Lester and Wendell Webb who have made an appointment to see you about a private company they want to form.

The company will operate from a factory, which they believe will be suitable for lease. The owner of the factory wants to tie up the lease as soon as possible.

Lester and Webb asked you the following question:

Is it possible for the proposed company to enter into the lease contract before the company is incorporated? (6)

(Adapted – Gower & Jackson 2010)

FEEDBACK ON ACTIVITY 1

Suggested solution

- (1) In terms of the Companies Act (sec 21), Lester or Webb **may** enter into an agreement in the name of, or on behalf of, the proposed company. (1)
- (2) Within **three months** after the date on which the company is incorporated, Lester and Webb, as the board of the company, must **ratify (confirm)** the contract. (1)
- (3) If they do **not actively ratify or reject** the contract, the contract **will be deemed to have been ratified**. (1)
- (4) If, for some reason, the company is **not incorporated**, then Lester and Webb will be jointly and severally **liable** for all liabilities, for example, the lease payments arising from the agreement. (1)
- (5) If the agreement **is ratified**, it is enforceable against the company and Lester and Webb's **liabilities** as individuals are **discharged**, that is, the contract and performance in respect thereof will be between the lessor and the company. (1)
- (6) The pre-incorporation contract **must be in writing**. (1)

1.2.3 RECKLESS TRADING (SEC 22)

This section also links to other sections of the Companies Act and it is rather important.

In terms of **section 22**, “a company must not carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose; or trade under insolvent circumstances”. Obviously, a fair amount of subjectivity is involved in determining whether the directors have been trading reckless, but the key will be to establish whether the directors have acted as reasonable persons.

A director may be liable to the company for any loss suffered by the company while trading under insolvent circumstances [**sec 77(3)**], and a director may also be liable to third parties who have had dealings with the company and suffered a loss.

The question here is whether a reasonable person would have acted in the same manner in a situation of factual insolvency. An example may illustrate this better:

- (a) If you assume that the company is factually insolvent, would it be reasonable for it to enter into a lease agreement for a very expensive fleet of company vehicles for its directors?

- (b) Alternatively, would it be reasonable for three or four directors to embark on an extensive overseas trip to visit trade fairs when one director could have taken the trip?
- (c) Would it be reasonable for the directors to vote in favour of large bonuses for themselves or substantial salary increases?
- (d) Would it be reasonable for the directors to continue incurring debt when there is, to the knowledge of the directors, no reasonable prospect of the creditors ever receiving payment for those debts?

All of the above will constitute reckless trading – thus, a breach of **section 22** would have taken place.

ACTIVITY 2

The following is an extract from Distillique Limited's annual financial statements as at 30 June 20Xx:

	20Xx
	R
ASSETS	
Total non-current assets	4 000 000
Total current assets	2 000 000
	6 000 000
LIABILITIES	
Total non-current liabilities	6 000 000
Total current liabilities	5 000 000
	11 000 000

REQUIRED

Marks

With reference to the extract from Distillique Limited's annual financial statements as at 30 June 20Xx, evaluate if Distillique Limited is trading recklessly in terms of the requirements of the Companies Act.

(6)

FEEDBACK ON ACTIVITY 2

Theory

According to section 22, a company may not carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose. (1)

If the Commission (Companies and Intellectual Properties Commission) has reasonable grounds to believe that a company is engaging in prohibited conduct as stated in the above paragraph, or is unable to pay its debts as they become due and payable in the normal course of business, the Commission may issue a notice to the company. The company will then have to give reasons why it should

be permitted to continue with its business or with its trade, as the case may be. (1)

Should the company fail to satisfy the Commission within 20 business days that it is not engaging in conduct prohibited by the first paragraph above or that it is able to pay its debts as they become due and payable in the normal course of business, the Commission may issue a compliance notice to the company requiring it to cease carrying on its business or trading, as the case may be. (1)

Application

In this instance, Distillique Limited will not be able to satisfy the Commission if it receives the notice indicated above, because of the following:

- Distillique Limited does not satisfy the solvency test, since after considering all reasonable foreseeable financial circumstances of the company, the assets (R6 000 000) of the company fairly valued, do not exceed the liabilities (R11 000 000) of the company fairly valued. (1½)
- Distillique Limited is not liquid, since the current liabilities (R5 000 000) exceed the current assets (R2 000 000). (1½)
- Distillique Limited is trading recklessly; it is therefore in contravention of the Companies Act. (1½)

Maximum marks (6)

SUMMARY

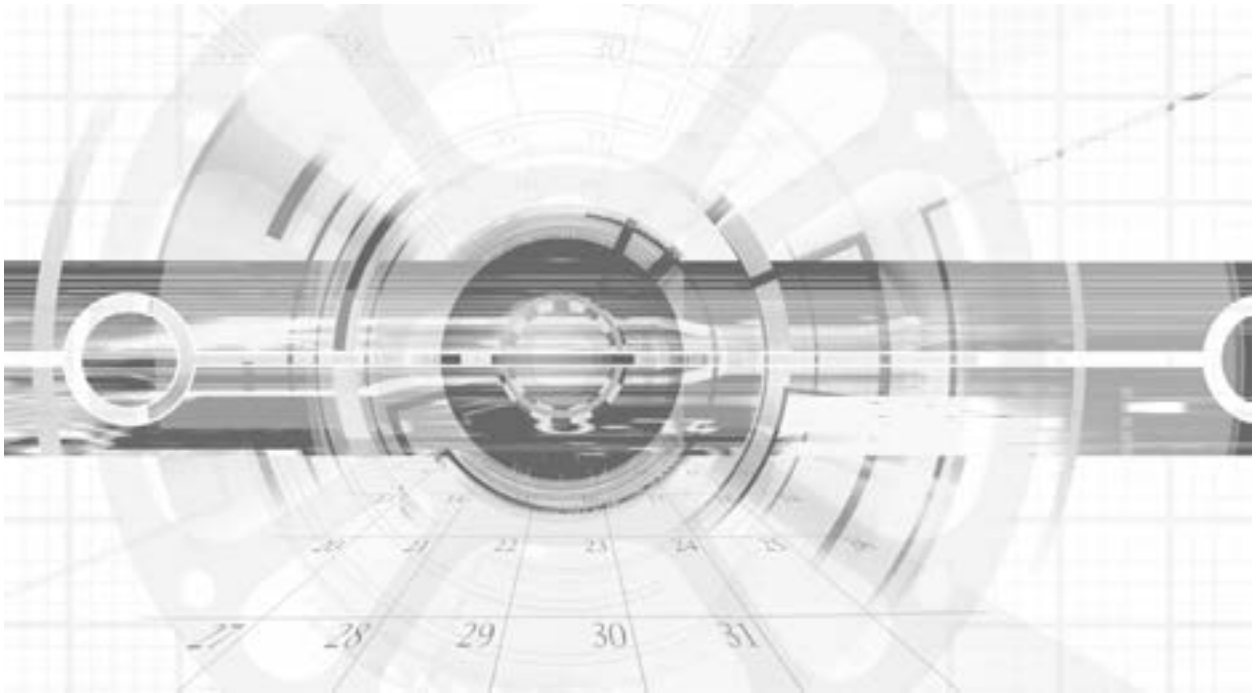
In this learning unit, we explained and applied the criteria for names, the right to incorporate and register a company, and the Memorandum of Incorporation. We also gave advice on the legal status of companies, the validity of company actions, pre-incorporation contracts, and reckless trading prohibited.

After having worked through the learning unit and the references to the prescribed study material, determine if you are able to:

- Give advice, discuss concerns, and apply the criteria for names, the right to incorporate and register a company, and the Memorandum of Incorporation.
- Give advice on the legal status of companies, the validity of company actions, pre-incorporation contracts, and reckless trading prohibited.

CONCLUSION

In this topic about the **interpretation, purpose, application and formation of a company**, we explained and applied the requirements in terms of the Companies Act and certain Companies Regulations regarding the interpretation of the Act as well as the incorporation and legal status of companies. In the following topic, we will discuss company records, which refer to all records that should be kept by a company.



TOPIC 2

Records required by companies

TOPIC OVERVIEW

This topic deals with the records that should be kept by companies. It also covers the requirements to compile financial statements, as well as to audit or independently review the financial statements.

We will also discuss the calculation of the public interest score in this topic, which is used in determining whether a company's financial statements should be audited or independently reviewed.

Topic 2 is dealt with in one learning unit:

Learning unit	Title
2.1	Company records for
2.1.1	Form and standards for company records (sec 24), financial year of a company (sec 27) and accounting records (sec 28) also refer to Regulations 25(3)–(6) and 26(1)(b) & (c)
2.1.2	Record keeping and financial statements (sec 29–30 also refer to Regulations 26–29(1)–(10))



LEARNING UNIT 2.1

Company records

INTRODUCTION

Company records refer to any documentation, accounting records or any other books or written documents that a company should keep. These include, for example, the Memorandum of Incorporation of a company. Company records are a very important source to the auditor/accountant, as they form the basis for the financial statements of a company.

2.1.1 FORM AND STANDARDS FOR COMPANY RECORDS (SEC 24), FINANCIAL YEAR OF A COMPANY (SEC 27) AND ACCOUNTING RECORDS (SEC 28) – ALSO REFER TO REGULATIONS 25(3)–(6) AND 26(1)(B) & (C)



STUDY

Study sections 24, 27 and 28 of the Companies Act as well as Regulations 25(3)–(6) and 26(1)(b) & (c). See if you can make a list of all the records that a company should keep.

All companies must keep accurate and complete accounting records, as well as all documents set out in **section 24** of the Act. These documents should be kept in written form for a minimum period of seven years.

Profit companies must also maintain a securities register and a register of its company secretary and auditors (if any).

2.1.2 RECORD KEEPING AND FINANCIAL STATEMENTS (SEC 29–30 ALSO REFER TO REGULATIONS 26–29(1)–(10))



STUDY

Study sections 29 and 30 of the Companies Act as well as Regulation 26 to 29(1)–(10).

Each year, a company must prepare annual financial statements within six months after year-end [**sec 30(1) to (7)**].

Financial statements provided to any person must (section 29 and Regulation 27)

- satisfy financial reporting standards;
- represent the state of business and affairs of the company fairly;
- explain the transactions and financial position of the company;
- indicate whether the statements have been audited/independently reviewed/neither;
- state the name and designation of the preparer of the statements; and
- not be incomplete, false or misleading.

To determine whether a company should be audited or independently reviewed, please refer to table 2.1.2 below.

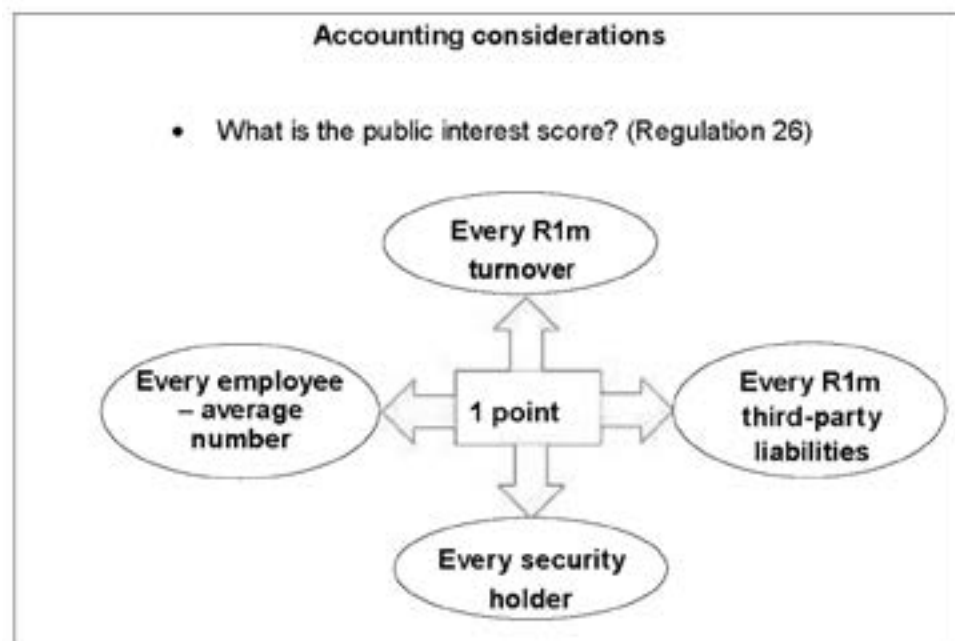
Table 2.1.2: Requirements to be audited or independently reviewed

	Category of company	Audit/Review
1	Public companies and state-owned companies	Audit (by a registered auditor)
2	Non-profit companies (incorporated by state)	Audit (by a registered auditor)
3	Profit companies non-profit companies and close corporations that hold assets in a fiduciary capacity, which exceed R5 million at any time in the financial year	Audit (by a registered auditor)
4	Other companies or close corporations with public interest scores of <ul style="list-style-type: none"> • 350 or higher; or • at least 100 but less than 350 and with financial statements that are internally compiled 	Audit (by a registered auditor)
5	Other companies with a public interest score of at least 100 but less than 350 and with financial statements not internally compiled (that is, compiled independently)	Review (by a registered auditor or chartered accountant (SA))
6	Other companies with a public interest score of less than 100	Review (by a registered auditor or chartered accountant (SA) or accounting officer)
7	Other companies where the directors of the company hold or have all of the beneficial interests in the securities issued by the company and close corporations, if not subject to a “public interest audit” as per categories 3 and 4 above [sec 30(23A)] .	No audit or review

8	<p>Other companies that fall within categories 5, 6 and 7 above can elect to have a voluntary audit as per</p> <ul style="list-style-type: none"> • MOI requirement • shareholders' resolution or • board resolution 	Audit (by a registered auditor)
---	---	---------------------------------

The public interest score (Regulation 26) is important for accounting considerations. Refer to diagram 2.1.2 below to understand what comprises the public interest score.

DIAGRAM 2.1.2: Accounting considerations for the calculation of public interest score



In terms of diagram 2.1.2 above, a company is awarded one point for every:

- R1 million of turnover or part thereof;
- employee (based on the average number of employees employed during the year);
- security holder of the company (such as the company's shareholders); and
- R1 million or part thereof, owed to a third party (such as finance providers, banks and creditors).

All these points added will give the total public interest score of the company.

ACTIVITY 1

You are an accountant. Mr Joe Soap and Mr John Doe have made an appointment to see you about a private company they want to form.

The two of them will be the only shareholders and directors of the company, but it is expected that over time, a few new shareholders will be found as well as one or two additional directors appointed.

They want to know the following:

- (1) As the company did not require an auditor, is it necessary to produce annual financial statements? (1)
- (2) What company records must they keep and for how long do they have to keep these records? (8)

(Adapted – Gower & Jackson 2010)

FEEDBACK ON ACTIVITY 1

References: Sections 24, 28 and 30 of the Companies Act

- (1) Yes. The company must prepare annual financial statements (usually) within six months after the end of its financial year (**sec 30**). (1)
This is a specific requirement of the Companies Act, which has nothing to do with whether or not the annual financial statements are audited. (1)
- (2) With regard to company records, **sections 24 and 28** of the Companies Act state that the company must keep or maintain:
 - 2.1 accurate and complete accounting records in one of the official languages (1)
 - 2.2 a copy of the memorandum of incorporation (and any amendments, etc, thereto) (1)
 - 2.3 a record of its directors' details (1)
 - 2.4 copies of all
 - reports presented at an annual general meeting (for seven years)
 - annual financial statements (for seven years)
 - accounting records (for the current year and the seven years prior to the current year)
 - notices and minutes of all shareholders' meetings (for seven years)
 - copies of all communications to shareholders (for seven years)
 - minutes of all meetings and resolutions of directors' meetings (for seven years)
 - 2.5 a register of shareholders (security register) of the company (1)

Max (3)

Maximum of 8

ACTIVITY 2

Answer the following questions

- (1) What is a public interest score? (3)
- (2) State three matters that will be affected by a company's public interest score. (3)
- (3) Which of the following do **not** affect a company's public interest score?
 - location of the company
 - number of non-executive directors

- number of directors
 - turnover
 - assets held in trust by the company
 - number of years in operation (3)
- (4) Public companies, both listed and unlisted, must calculate their public interest score. True or false? (1)
- (5) The Memorandum of Incorporation can stipulate other criteria for calculating the public interest score. True or false? (1)
- (6) Calculate the public interest scores for Tech (Pty) Ltd and Master (Pty) Ltd:

	Tech (Pty) Ltd	Master (Pty) Ltd	
Turnover	R7.25m	R135.75m	
Directors	4	11	
Average employees for the year	62	201	
Amounts owed to third parties	R1.6m	R19.2m	
Individuals with direct or indirect interest in each company's shares	9	22	

(3)

- (7) What are the various thresholds (categories) set by the Regulations for public interest scores? (2)

FEEDBACK ON ACTIVITY 2

Solution to questions 1 to 7

- (1) (i) A public interest score is the sum of the points allocated to certain attributes applicable to all companies, for example, one point is allocated to every one million rand, or part thereof, of turnover.
- (ii) The public interest score is used as a gauge of the interest the public at large (society) has in the company.
- (iii) The company will be required to satisfy various conditions, dependent upon its public interest score, for example, a company with a score of at least 350 points will have to be audited externally.
- (2) (i) Whether the company is audited or reviewed and who must carry out the independent review.
- (ii) Which financial reporting standard the company must use to prepare its annual financial statements.
- (iii) The level of the financial rescue practitioner who would be engaged if the company needed financial rescue.
- (3) Location of the company, the number of directors (executive and non-executive), assets held in trust by the company and the number of years in operation do not affect the public interest score.
- (4) True. **All** companies must calculate their public interest score, regardless of whether they are public or private, listed companies.
- (5) False. Public interest score criteria are set in Regulation 26 of the Companies Act.
- (6) Calculation of the public interest scores:

	Tech (Pty) Ltd	Master (Pty) Ltd
	8	136
	N/A	N/A
	62	201
	2	20
	<u>9</u>	<u>22</u>
Total	81 points	379 points

- (7) Equal to or above 350 points.
 Equal to 100 or above, but less than 350 points.
 Below 100 points.

SUMMARY

In this learning unit, we explained and applied the requirements regarding the form and standards of company records, record keeping, and financial statements in terms of the Companies Act.

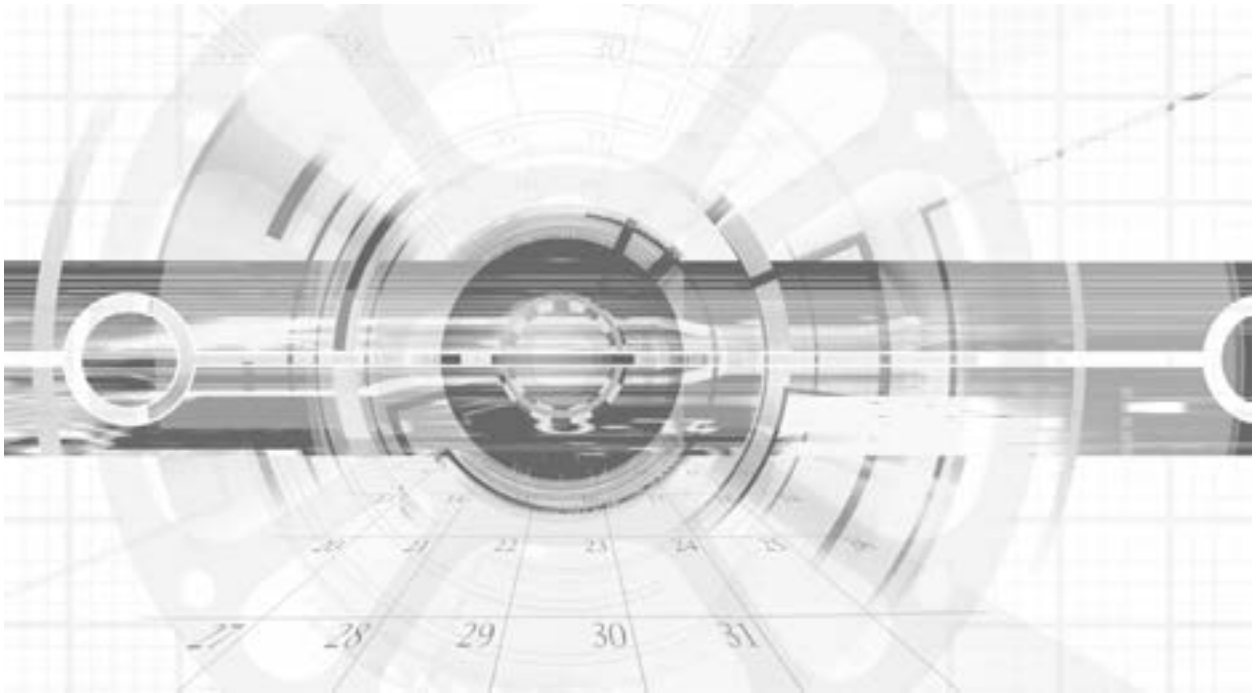
After having worked through the learning unit and the references to the prescribed study material, determine if you are able to:

Give advice, discuss concerns, and apply the requirements regarding company records including:

- The form and standards of company records.
- Record keeping and financial statements.

CONCLUSION

In this topic about **company records**, we explained and applied the requirements regarding company records (including accounting records and financial statements to company records) in terms of the Companies Act and certain Regulations. In the next topic we will be discussing shareholders, which are the owners of companies, as well as the shares issued by companies.



TOPIC 3

Shareholders and shares

TOPIC OVERVIEW

Companies cannot exist without shareholders or share capital. It is therefore important to take note of the requirements relating to shareholders and shares in the Act. The topic does not only deal with shareholders, but also includes the requirements for capitalisation of profit companies.

This topic deals with the authorisation to issue shares, preferences, rights, limitations, and other share terms, as well as the issuing of shares, shareholder approval for issuing shares (in certain instances), financial assistance for subscription of securities, loans or other financial assistance and distributions, to name only a few. It also includes securities registration and transfer, governance of companies and public offering of company securities. This topic is therefore one of the most important topics for your studies.

The terms mentioned above might seem very new and unfamiliar to you, but as you work through the topic, your perception will change. Remember to refer to section 1 of the Act for definitions of terms with which you are unfamiliar.

Topic 3 is divided into the following learning units:

Learn- ing unit	Title
3.1	Capitalisation of profit companies (sections 35–43 and 46–48)
3.1.1	Legal nature of company shares and requirement to have shareholders (sec 35) – also refer to Regulations 31(3) and (5)
3.1.2	Authorisation for shares (sec 36)
3.1.3	Preferences, rights, limitations and other share terms (sec 37)
3.1.4	Issuing shares (sec 38)
3.1.5	Subscription of shares (sec 39)
3.1.6	Distributions to be authorised by the board (sec 46)
3.1.7	Capitalisation shares (sec 47)
3.1.8	Company or subsidiary acquiring company shares (sec 48)
3.2	Securities registration and transfer
3.2.1	Securities registration and transfer (sec 49–56) – also refer to Regulation 32
3.3	Governance of companies
3.3.1	Shareholders and voting rights (sec 57)
3.3.2	Proxies, quorums, notice of meetings and conducting meetings (sec 58–64)
3.3.3	Shareholders' resolutions (sec 65)
3.4	Public offerings of company securities
3.4.1	Public offerings of company securities (sec 95–97 and 99–111)

TEXTUAL AMENDMENTS AND ADDITIONS

Before proceeding with the study of this topic, please refer to Tutorial Letter 102 for this module to acquaint yourself with any textual amendments and additions that may have been indicated.

LEARNING OUTCOMES

Learning unit	In this topic, we will focus on the following learning outcomes:	Level
3.1 Capitalisation of profit companies (sec 35, 36, 37, 38, 39, 40, 41, 42, 43, 46, 47 and 48)	<ul style="list-style-type: none"> • Give advice, discuss concerns, and apply the requirements of the Act regarding the: <ul style="list-style-type: none"> – capitalisation of profit companies, including – the legal nature of company shares and the – requirement to have shareholders – authorisation of shares – distributions – capitalisation shares – the company or subsidiary acquiring company shares 	2
3.2 Securities registration and transfer (sec 49–56)	<ul style="list-style-type: none"> • Give advice, discuss concerns and apply the requirements of the Act regarding securities registration and transfer. 	1
3.3 Governance of Companies (sec 57–65)	<ul style="list-style-type: none"> • Give advice, discuss concerns and apply the requirements of the Act regarding the governance of companies, including requirements for shareholder meetings such as notices, quorums and voting rights 	2
3.4 Public offerings of company securities (sec 95, 96, 97, 99, and 100–111)	<ul style="list-style-type: none"> • Acquire basic knowledge and understanding of the requirements for public offerings of company securities in terms of the Act 	2



LEARNING UNIT 3.1

Capitalisation of profit companies

INTRODUCTION

In terms of the Companies Act, a security is a share, debenture or other instrument, that is issued by a profit company. In this topic, we will specifically refer to shares. The learning unit deals with different aspects of shares, such as their legal nature, how they are issued, and the rights and limitations attached to them. **(Note:** Refer to section 1 of the Act for definitions of unfamiliar terms used in this learning unit.)

3.1.1 LEGAL NATURE OF COMPANY SHARES AND REQUIREMENT TO HAVE SHAREHOLDERS (SEC 35) – ALSO REFER TO REGULATIONS 31(3) AND (5)

What is a share? Shares are units into which company divides its profit. Each “owner” (shareholder) of the company holds a certain amount of shares, which may entitle him/her to the profit of the company. Holders of shares are referred to as shareholders.

Under the previous Companies Act, shares could have a so-called par value. The term “**par value**” referred to a nominal value that was assigned to a share. It is important to note that under the new Companies Act, companies **no** longer have par value shares. Refer to Regulation 31(3) and (5), in which authorised shares of par or nominal value are set out and where it is indicated what should be done where no shares have yet been issued before the effective date (1 May 2011). This Regulation also deals with cases where authorised shares of par or nominal value, have already been issued before the effective date.

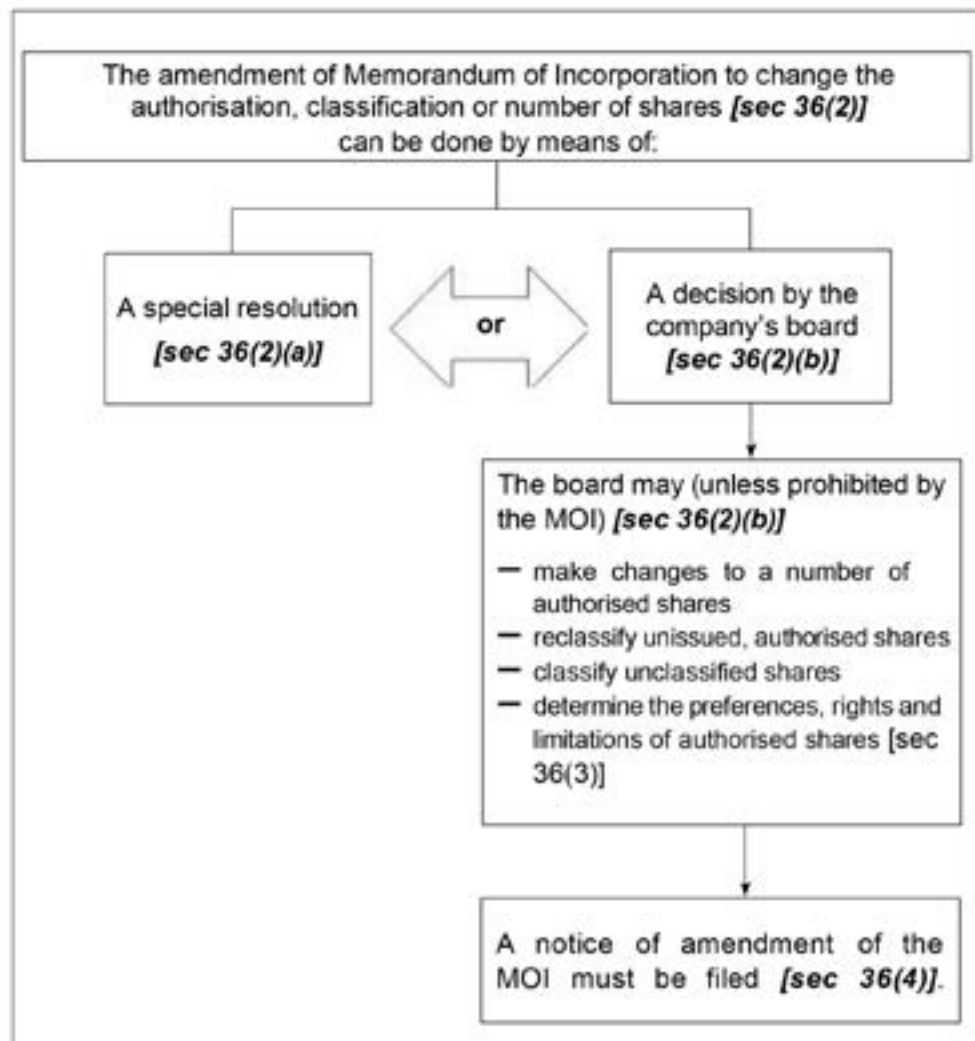
3.1.2 AUTHORISATION FOR SHARES (SEC 36)

In its Memorandum of Incorporation (MOI), a company must set out the different classes and number of shares that the company is authorised to issue. This is referred to as the authorised shares of a company. The MOI should describe the name of each different class of share in order to distinguish it from other classes of shares, as well as indicate the preferences, rights (such as voting rights) and limitations of these shares.

It is important to note that an authorised share has no rights associated with it until the share has been issued. The person to whom the share is issued, becomes the holder of the share, and is called the **shareholder**. A company is not allowed to issue shares to itself.

Should a company want to change the classification, authorisation or number of shares, the MOI may be amended in terms of section 36. Refer to diagram 3.1.2 below in this regard.

DIAGRAM 3.1.2: Amendment of the Memorandum of Incorporation (MOI) regarding shares



STUDY

Study sections 35 and 36 of the Companies Act as well as Regulations 31(3) and (5).

ACTIVITY 1

Example: ABC (Pty) Ltd currently has 1 000 authorised ordinary shares. The director of ABC (Pty) Ltd, Mr Joe Soap, wants to convert 100 of these ordinary shares to preference shares. Explain to Mr Soap how the requirements of the Companies Act relate to this matter.

FEEDBACK ON ACTIVITY 1

Reference: Section 36 of the Companies Act

Answer: In terms of **section 36** of the Act, the Memorandum of Incorporation of ABC (Pty) Ltd may be amended to change the classification of these shares by means of a **special resolution**. (**Note:** A “resolution” is a decision. Learning unit 3.3 deals with resolutions.)

OR

In terms of **section 36** of the Act, the **board of the company** may decide to change the classification of these shares (unless stated otherwise in the Memorandum of Incorporation). The board must then file a notice of amendment of the Memorandum of Incorporation.

3.1.3 PREFERENCES, RIGHTS, LIMITATIONS AND OTHER SHARE TERMS (SEC 37)

In terms of section 37(2), every share, irrespective of its class, has associated with it one voting right, subject to the provisions of the Companies Act and the MOI. The MOI may determine the preferences, rights and limitations. This means that a voting right can be limited, but not excluded.

The “provisions of the Act” mentioned above are as follows:

- If there is only one class of shares, those shares must have voting rights in respect of all voting matters and must be entitled to the surplus at liquidation [sec 37(3)(b)].
- If there is more than one class of share, the MOI must provide that at least one class of share must have voting rights in respect of all matters on which can be voted. Further, a class of share (not necessarily the voting class) must be entitled to the surplus at liquidation (the monetary value that is available if the company should be liquidated) [sec 37(4)].
- Shares with limited voting rights will, irrespective of the provisions of the MOI, nevertheless have voting rights on any proposal to amend the rights associated with that share [sec 37(3)(a)].
- All the shares of a particular class must have the same preferences, rights, limitations and other terms [sec 37(1)].

What do rights mean? “Rights” refer to

- control rights – which relate to voting rights at meetings
- financial rights – which relate to the right to dividends and the right to any excess upon liquidation



STUDY

Study section 37 of the Companies Act.

ACTIVITY 2

Example: ABC (Pty) Ltd is in the process of liquidating. Mr Joe Soap, a shareholder of ABC (Pty) Ltd, wants to know if he will be equally entitled to the surplus net assets of the company upon its liquidation, distributed to all the other shareholders. ABC (Pty) Ltd has only one class of shares.

FEEDBACK ON ACTIVITY 2

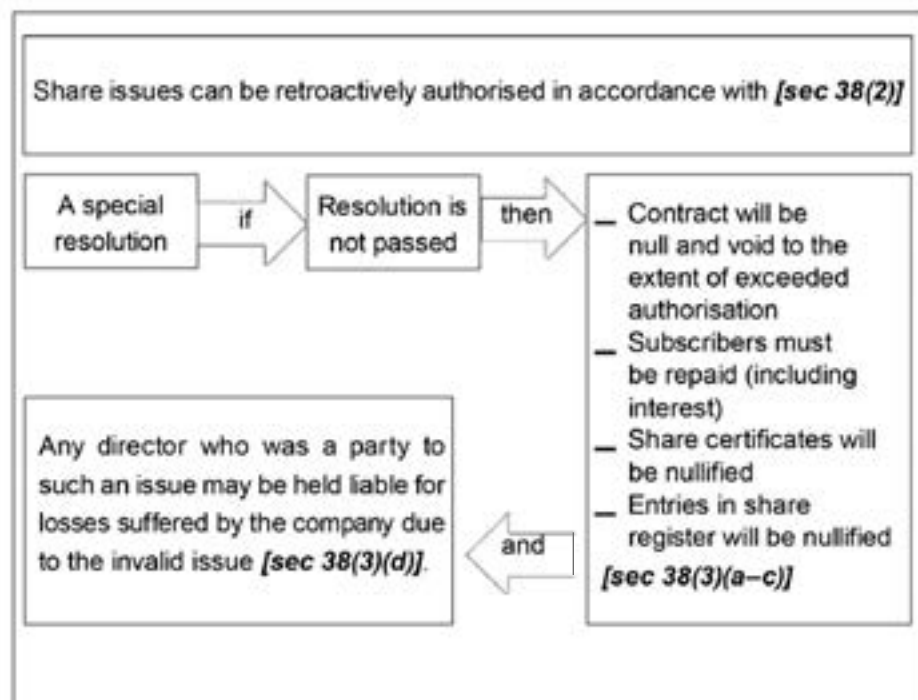
Answer: In terms of **section 37** of the Act, if a company has only **one class** of shares, all these shares will have **equal** preferences, rights and limitations.

3.1.4 ISSUING SHARES (SEC 38)

The board of directors has the power to issue shares in terms of section 38(1). However, such a share issue must be approved by a special resolution if the issue is to a director or prescribed officer (or a person related to or interrelated to the director, prescribed officer or the company), or to a future director or prescribed officer. (The requirements in section 38 and 40 do not apply in a business rescue scheme where the practitioner can issue shares and determine the consideration.)

The actions in diagram 3.1.4 can be taken if the board issues shares that either are not authorised (as per section 36), or exceed the number of authorised shares according to the Memorandum of Incorporation:

DIAGRAM 3.1.4: Retroactive authorisation of shares





STUDY

Study section 38 of the Companies Act.

3.1.5 SUBSCRIPTION OF SHARES (SEC 39 TO 43)

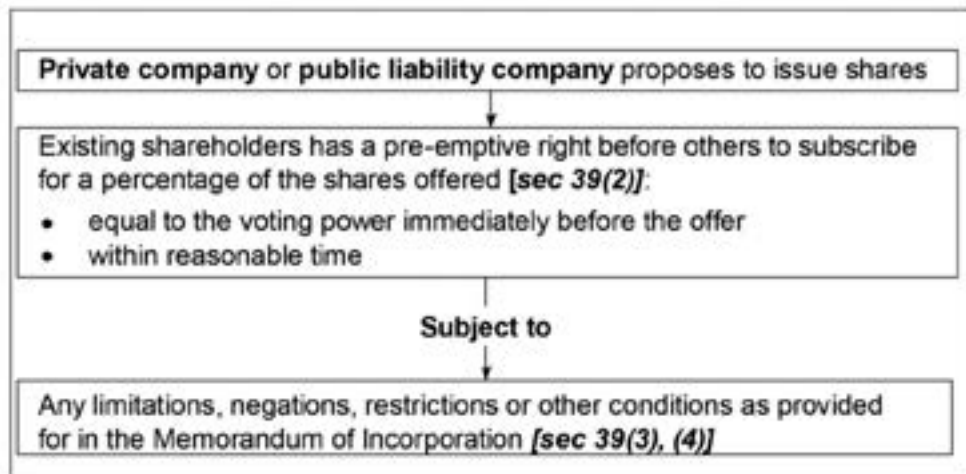
This section does **not apply to public or state-owned companies** (except if provided otherwise in the Memorandum of Incorporation) **[sec 39(1)(a)]**.

Except to the extent that the MOI of a private or personal liability company provides otherwise

- a shareholder may, in exercising the pre-emptive right, subscribe for fewer shares than he/she would be entitled to subscribe for
- shares not subscribed for by a shareholder within a reasonable time may be offered to other persons to the extent permitted by the MOI

Section 39 is explained in diagram 3.1.5 below.

DIAGRAM 3.1.5: Issuing of shares



Example: Macbeth has general voting rights relating to 35% of the shares in Hamlet (Pty) Ltd. Hamlet (Pty) Ltd plans to issue 1 000 shares. This would mean that Macbeth has a pre-emptive right to 35% of these shares, which are 350 shares.



STUDY

Section 39 to 43 of the Companies Act.

3.1.6 DISTRIBUTIONS TO BE AUTHORISED BY THE BOARD (SEC 46)

Study the definition of a distribution as described in sections 1 and 46 of the Companies Act. It is important to note that distributions include payments for share buy-back (where a company buys back its own shares) and the payment

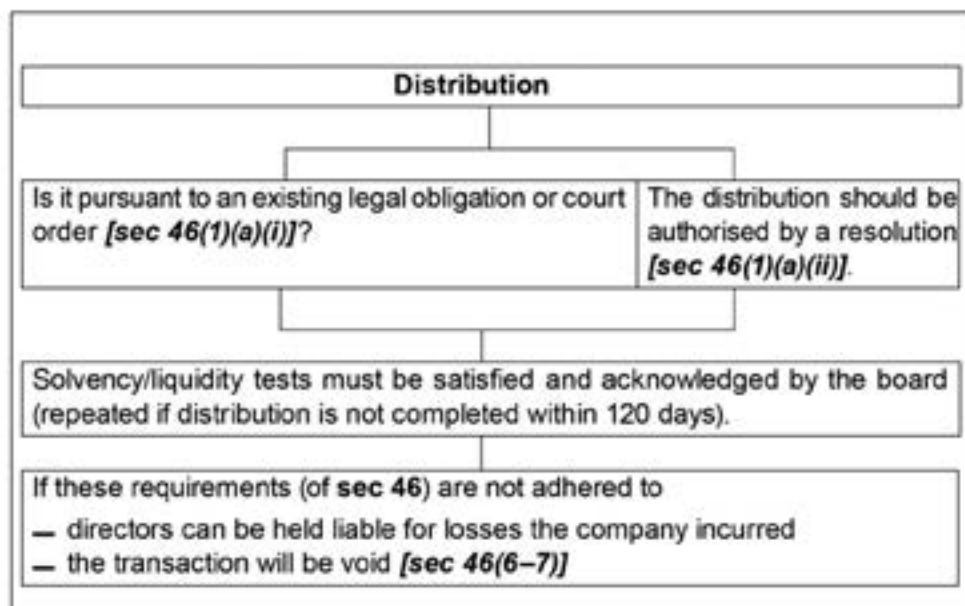
of dividends. A dividend is a portion of a company's earnings, which is distributed to its shareholders.

In terms of section 46(1)(a)(ii), all distributions must be authorised by a resolution of the board of directors. Shareholder approval is not required unless it is prescribed by the company's MOI.

In addition, it must reasonably appear that the company will satisfy the solvency and liquidity test immediately after the distribution. The board must acknowledge by resolution that it has applied the test and has reasonably concluded that the company will satisfy the test immediately after completing the distribution.

The directors responsible for an invalid distribution, in other words, those directors who, despite knowing that the requirements for a valid distribution were not satisfied, had nevertheless either voted for or had assented to the authorisation of the distribution, would be personally liable, jointly and severally, to restore to the company the amount of the unlawful distribution less the amount, if any, that is recovered by the company from the persons to whom the distribution was made. Creditors are not given a right to institute legal action against the directors for an unlawful distribution. The errant directors are liable to the company – not its creditors. See the summary in diagram 3.1.6 below.

DIAGRAM 3.1.6: Distribution



STUDY

Study section 46 of the Companies Act.

3.1.7 CAPITALISATION SHARES (SEC 47)



STUDY

Study section 47 of the Companies Act.

3.1.8 COMPANY OR SUBSIDIARY ACQUIRING COMPANY SHARES (SEC 48)

May a company buy back its own shares? (**Note:** This is not the same action as a company issuing shares to itself, which is prohibited.)

Yes, provided that the requirements of **section 46** (distributions) and those of **section 48 [sec 48(2)(a)]** are met.

The **board** may determine that the company should acquire a number of its own shares. However, the board decision must be approved by a **special resolution** of the shareholders of the company if the company is to buy-back any shares from a director or prescribed officer of the company, or a person related to a director or prescribed officer of the company.

May a subsidiary of a company buy the shares of that company?

Yes, provided that

- no more than 10%, in aggregate, of any class of shares is held by all the subsidiaries taken together
- voting rights attached to those shares may not be exercised **[sec 48(2)(b)]**



STUDY

Study section 46 and 48 of the Companies Act.

SUMMARY

In this learning unit, we explained and applied the requirements for the capitalisation of profit companies in terms of the Companies Act.

After having worked through the learning unit and the references to the prescribed study material, determine if you are able to:

- Give advice, discuss concerns, and apply the requirements of the Act regarding the capitalisation of profit companies, including the legal nature of company shares and the requirement to have shareholders, authorisation of shares, distributions, capitalisation shares, and the company or subsidiary acquiring company shares.



LEARNING UNIT 3.2

Securities registration and transfer

INTRODUCTION

This learning unit will give you an overview of the registration and transfer of securities.

3.2.1 SECURITIES REGISTRATION AND TRANSFER (SEC 49–56) – ALSO REFER TO REGULATION 32

Section 49 provides that securities must be evidenced by certificates, but they may also be without any certificates. Certificated means evidenced by a certificate, while uncertificated means that no certificates have been issued. **Section 50** provides that every company must establish a register of its issued securities in the prescribed form and maintain such register according to prescribed standards (refer to **Regulation 32** for the form and standards). **Section 51** stipulates the information that must be included in a certified security certificate and the information that must be entered in the security register when a transfer takes place. **Section 56** provides for a company's issued securities to be held and registered in the name of one person for the beneficial interest of another person.



STUDY

Study sections 49 to 56 of the Companies Act as well as Regulation 32.

SUMMARY

In this learning unit, we explained and applied the requirements for the registration and transfer of securities in terms of the Companies.

After having worked through the learning unit and the references to the prescribed study material, determine if you are able to:

- Give advice, discuss concerns, and apply the requirements for securities registration and transfer.



LEARNING UNIT 3.3

Governance of companies

INTRODUCTION

This learning unit discusses the way in which a company is governed. It includes matters such as shareholders and their voting rights, the conducting of meetings and shareholders' resolutions.

3.3.1 SHAREHOLDERS AND VOTING RIGHTS (SEC 57)

Take note that a shareholder is entitled to exercise any voting rights in relation to a company, irrespective of the form, title or nature of the securities (shares) to which those voting rights are attached.

Section 57 furthermore provides for the way in which voting rights will be exercised in instances where, in a profit company (other than a state-owned company), there is only one shareholder or only one director, and another instance where every shareholder is also a director of the company.

It also provides that the governance requirements in sections 59 to 65 do not apply where a profit company (other than a state-owned company) has only one shareholder. For example, the requirements for notice, quorum and conduct at meetings will not apply.



STUDY

Study section 57 of the Companies Act.

3.3.2 PROXIES, QUORUMS, NOTICE OF MEETINGS AND CONDUCTING OF MEETINGS (SEC 58–64)

The requirements for the above should be studied, as they form part of the steps in passing ordinary or special resolutions.

What is an ordinary shareholders' resolution? What is a special shareholders' resolution? How do these resolutions differ from a directors' resolution?

Study the definitions of these terms found in section 1 of the Companies Act; note how these two types of resolutions differ from each other. You need to remember that a special resolution requires a higher percentage of voting rights than an ordinary resolution would. This will be discussed in more detail in section 3.3.3.

Directors are discussed in topic 4 of this study guide. They are the people managing the company, and they make the day-to-day decisions necessary to run a company.



STUDY

Study sections 58–64 of the Companies Act.

ACTIVITY 3

TechNet (Pty) Ltd is a large computer services firm that specialises in the implementation of computer networks. As would be expected, TechNet (Pty) Ltd uses leading-edge technology and its own financial and related systems are fully integrated. The company has fifteen ordinary shareholders.

Daniel Buys has informed Nancy Loop of his intention to raise additional finance amounting to R5 000 000 for the company by issuing another number of ordinary shares. The company's only authorised share capital comprises 100 000 ordinary shares that have no par value. However, these shares have already been issued in full. Daniel Buys has therefore asked Jolly & Hills for advice in this regard, particularly about the requirements relating to the issue contained in the Companies Act. It is intended that the directors of TechNet (Pty) Ltd be offered shares. None of the directors currently hold shares. The company's MOI prohibits shareholders' meetings from being held via electronic means.

REQUIRED

Discuss the sections of the Companies Act, with which TechNet (Pty) Ltd will need to comply in respect of the proposed issue, but **only in terms of the requirements applicable to the shareholders' meeting to be held**. You must deal with all matters pertaining to the meeting, for example, the quorum, resolution, notice, etc. You will also have to apply section 65 that relates to section 4.3.3 of the study guide. (21)

(Adapted – Gowar & Jackson 2012)

FEEDBACK ON ACTIVITY 3

As there is a need to hold a shareholders' meeting, the board will have to provide all shareholders with written notice

- of the date, time and place of the meeting
- of the specific purpose of the meeting (to issue shares) (A copy of the resolution must be provided.)

- of the percentage of voting rights required for the resolution (special)
- that a shareholder, who is entitled to vote, may appoint a proxy (this must be reasonably prominently displayed on the notice)
- that satisfactory identification will be required from shareholders to attend

This notice must be given at least 10 business days before the meeting will be held. (The MOI may stipulate a longer or shorter notice period.)

The meeting to pass this resolution may only begin if 25% of the voting rights entitled to be voted in respect of at least one matter to be decided at the meeting (there may be other matters to be covered at the meeting) are present.

For the debate to commence on the share issue resolution, holders of at least 25% of the shares entitled to vote in respect of the share issue must be present when the matter is called on the agenda. For TechNet (Pty) Ltd, it means that holders of at least 25% of the (existing) ordinary shares need to be present. (Note: The MOI may stipulate lower percentages.)

The previous paragraph deals with a voters' quorum. In addition, as TechNet (Pty) Ltd has more than two shareholders, the meeting may not begin or a matter be debated, unless at least three shareholders are present at the meeting.

At the commencement of the meeting, shareholders' identity as well as their right to attend or participate must be verified. The person presiding over the meeting must be satisfied with the validity of the shareholders' identity.

The proposed resolution must be sufficiently clear and specific. It must also be accompanied by sufficient information to enable a shareholder to decide whether to participate in the meeting and "influence the outcome" of the vote on the resolution or not.

For the (special) resolution on the share issue to be passed, at least 75% of the voting rights exercised on the resolution must support it. (**Note:** The MOI may stipulate a lower or higher percentage, but the difference between the percentage for an ordinary and a special resolution must be at least 10%.)

Voting should be by poll (not by a show of hands). Voting by poll enables those shareholders with larger shareholdings to exercise greater influence on the vote.

3.3.3 SHAREHOLDERS' RESOLUTIONS (SEC 65)

Shareholders' resolutions can be one of the following

- **Ordinary resolutions**

In terms of the definition given in section 1, an ordinary resolution means a resolution adopted with the **support of more than 50%** of the voting rights exercised on the resolution, or a higher percentage as contemplated in section 65(8).

- **Special resolutions**

In terms of the definition given in section 1, a special resolution means a resolution adopted with the **support of at least 75% of the voting rights** exercised on the resolution, or a different percentage as contemplated in section 65(10).

Note: Both of the above resolutions are **shareholders'** resolutions. Should you in the exam, or in any of your assignments, refer to "*an ordinary or a special resolution of the board/directors*", you will not receive any marks for the statement.

A company's Memorandum of Incorporation may permit

- (a) a different percentage of voting rights to approve any special resolution; or
- (b) one or more different percentages of voting rights to approve special resolutions concerning one or more particular matters, respectively, provided that a margin of at least 10 percentage points must be maintained at all times between the highest established requirement for approval of an ordinary resolution on any matter, and the lowest established requirement for approval of a special resolution, on any matter.

When is a special resolution needed? A special resolution is required to

- (a) amend the company's Memorandum of Incorporation to the extent required by section 16(1)(c) and section 36(2)(a)
- (b) ratify a consolidated revision of a company's Memorandum of Incorporation, as contemplated in section 18(1)(b)
- (c) ratify actions by the company or directors in excess of their authority, as contemplated in section 20(2)
- (d) approve an issue of shares or grant of rights in the circumstances contemplated in section 41(1)
- (e) approve an issue of shares or securities as contemplated in section 41(3)
- (f) authorise the board to grant financial assistance in the circumstances contemplated in section 44(3)(a)(ii) or 45(3)(a)(ii)
- (g) approve a decision of the board for re-acquisition of shares in the circumstances contemplated in section 48(8)
- (h) authorise the basis for compensation to directors of a profit company, as required by section 66(9)
- (i) approve the voluntary winding-up of the company, as contemplated in section 80(1)
- (j) approve the winding-up a company in the circumstances contemplated in section 81(1)
- (k) approve an application to transfer the registration of the company to a foreign jurisdiction as contemplated in section 82(5)
- (l) approve any proposed fundamental transaction, to the extent required by Part A of Chapter 5
- (m) revoke a resolution contemplated in section 164(9)(c)

The section numbers referred to in the above paragraph are the sources for the particular special resolution requirements. Since some sections referred to are not listed on pages 5 and 6 of this study guide, it will not be necessary for you to discuss, for example, the requirement for a special resolution in instances such as in (b), (i), (j), (k) and (m) in the examination.

Take note that in terms of the Act, sections 57, 59 and 61 to 65, which relate to this topic, are alterable.



STUDY

Study section 65 of the Companies Act.

SUMMARY

In this learning unit, we explained and applied the requirements regarding governance of companies, including the meeting requirements regarding notices, quorums and voting relating to special resolutions in terms of the Companies Act.

After having worked through the learning unit and the references to the prescribed study material, determine if you are able to:

- Give advice, discuss concerns, and apply the requirements for the governance of companies, including the meeting requirements in respect to notices, quorums and voting relating to special resolutions.



LEARNING UNIT 3.4

Public offerings of company securities

INTRODUCTION

The sections that are dealt with in this learning unit are to be studied on level 1 (refer to page 24). This means that you will not be required to give advice, discuss concerns and apply the requirements for the matters included in this learning unit, as set out in the Companies Act.

3.4.1 PUBLIC OFFERINGS OF COMPANY SECURITIES (SEC 95–97 AND 99–111)

Since share offers to the public are restricted (section 99), section 96 lists the instances where an offer is not an offer to the public and where restrictions will not apply. Section 97 provides for standards for qualifying employee share schemes; exemptions, for which an employee share scheme qualifies, are contemplated in sections 42(2)(d), 44(3)(a)(i) or 45(3)(a)(i). The first section refers to shareholder approval (special resolution) that is not required if the issue is pursuant to an employee share scheme, while the second and last sections refer to the board's authorisation of financial assistance if it is pursuant to an employee share scheme.

Section 100 lists the requirements for a prospectus and further provides that every prospectus be subject to the requirements of sections 102 to 111. In order to understand some of the phrases used in the sections listed above, you will have to study the definitions in section 95. For example, section 100(1) provides that the requirements for a prospectus do not apply to listed securities, except listed securities that are the subject of an initial public offering. The definition of the latter is included in section 95(1)(e).

Section 104 provides for liability for untrue statements in the prospectus. It refers to four parties that may be liable to compensate any person, who acquired securities on the faith of the prospectus, for any loss or damage the person may have sustained as a result of any untrue statement in the prospectus. Section 105 provides for liability of experts and others. According to the definition of an expert in terms of section 95, it includes, for example, an accountant or an auditor.



STUDY

Study sections 95–97 and 99–111 of the Companies Act on level 1.

SUMMARY

In this learning unit, we explained and applied the requirements for public offerings of company securities in terms of the Companies Act.

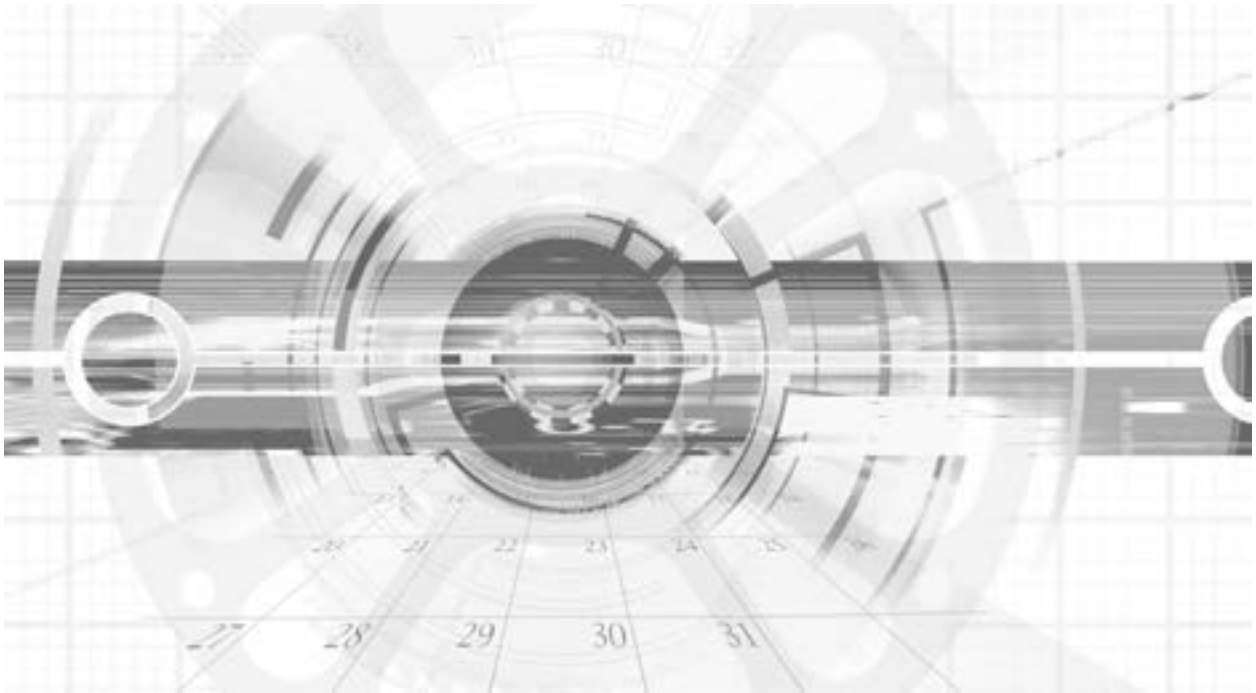
After having worked through the learning unit and the references to the prescribed study material, determine if you have:

A basic knowledge and understanding of the requirements for public offerings of company securities in terms of the Act is required.

CONCLUSION

In this topic about **shareholders and shares**, we explained and applied the requirements regarding capitalisation of profit companies, securities registration and transfer, governance of companies, and public offerings of company securities in terms of the Companies Act.

In the next topic we will deal with these persons who manage the affairs of a company. They are called the directors.



TOPIC 4

Directors

TOPIC OVERVIEW

The Companies Act provides that a company's board of directors must manage the business and affairs of that company. The board of directors of a company has the authority to exercise all of the powers and perform any of the functions of the company (except to the extent that the Act or the company's MOI provides otherwise). The Act and Memorandum of Incorporation (MOI) can restrict the powers of the board of directors and, for instance, ensure that

- for certain transactions, the directors cannot act alone
- certain matters be referred to the shareholders of a company for consideration and approval

The topic deals with the board, directors and prescribed officers, their appointment and removal, board meetings, directors having a financial interest in a matter, standards of directors' conduct, directors' liability, indemnification and insurance. This is a very important topic.

Topic 4 is divided into the following learning units:

Learn- ing unit	Title
4.1	The board, directors and prescribed officers, election, ineligibility and disqualification, and vacancies
4.1.1	The board, directors and prescribed officers (sec 66) – also refer to Regulation 38
4.1.2	Election and removal of directors (sec 67–71)
4.2	Board committees, meetings and directors acting other than at meetings
4.2.1	Board committees (sec 72) – also refer to Regulation 43(1)
4.2.2	Board meetings/directors' meetings (sec 73)
4.2.3	Directors acting other than at board meetings (sec 74)
4.3	Directors' personal financial interests
4.3.1	Directors' personal financial interests (sec 75)
4.4	Standards of directors' conduct, liability of directors and prescribed officers, indemnification and directors' insurance
4.4.1	Standards of directors' conduct (sec 76)
4.4.2	Liability of directors and prescribed officers (sec 77)
4.4.3	Indemnification and directors' insurance (sec 78)

TEXTUAL AMENDMENTS AND ADDITIONS

Before you proceed with the study of this topic, please refer to Tutorial Letter 102 for this module to acquaint yourself with any textual amendments and additions that may have been indicated.

LEARNING OUTCOMES

Learning unit	In this topic, we will focus on the following learning outcomes:	Level
4.1 The board, directors and prescribed officers, election, ineligibility and disqualification, and vacancies	<ul style="list-style-type: none"> Give advice, discuss concerns and apply the requirements for directors' appointment and removal, and vacancies. 	2

4.2 Board committees, meetings and directors acting other than at meetings	<ul style="list-style-type: none"> • Give advice, discuss concerns and apply the requirements for board committees and their meetings. 	2
4.3 Directors' personal financial interests	<ul style="list-style-type: none"> • Give advice, discuss concerns and apply the requirements for directors' personal financial interests. 	2
4.4 Standards of directors' conduct, liability of directors and prescribed officers, indemnification and directors' insurance	<ul style="list-style-type: none"> • Give advice, discuss concerns and apply the requirements for: <ul style="list-style-type: none"> – standards of directors' conduct – the liability of directors and prescribed officers – indemnification and directors' insurance 	2



LEARNING UNIT 4.1

The board, directors and prescribed officers, election, ineligibility and disqualification, and vacancies

INTRODUCTION

A **director** is a member of the body of people that manages a company. Together, the directors of a company are called the **board of directors**.

In this learning unit, we will discuss the number of directors that different types of companies are required to appoint, as well as those persons ineligible or disqualified from being appointed as directors. This learning unit also deals with the process for electing directors to and removing them from the board.

4.1.1 THE BOARD, DIRECTORS AND PRESCRIBED OFFICERS (SEC 66) – ALSO REFER TO REGULATION 38

This section deals with the board, directors and prescribed officers. In terms of the definition in section 1, a director is a member of the board of a company or an alternate director (person appointed to act on behalf of a director).

The minimum number of directors required for different types of companies is indicated in table 4.1.1 below.

Table 4.1.1: Requirements for number of directors

Type of company (as explained in topic 1.1.3 of this study guide)	Minimum number of directors
Private company (Pty)	1
Limited Incorporated company (Inc)	1
Public company (Limited)	3
State-owned company (SOC Limited)	3 (refer to sec 9(1))
Not-for-profit company (NPC)	3

The MOI of a company may specify a higher number of directors. The MOI of a profit company (other than a state-owned company) requires that the shareholders should elect at least 50% of the directors (including alternates). Any other person stipulated in the MOI may appoint the remaining directors.

A director's remuneration for services as a director must be approved by a special resolution adopted within the previous two years.



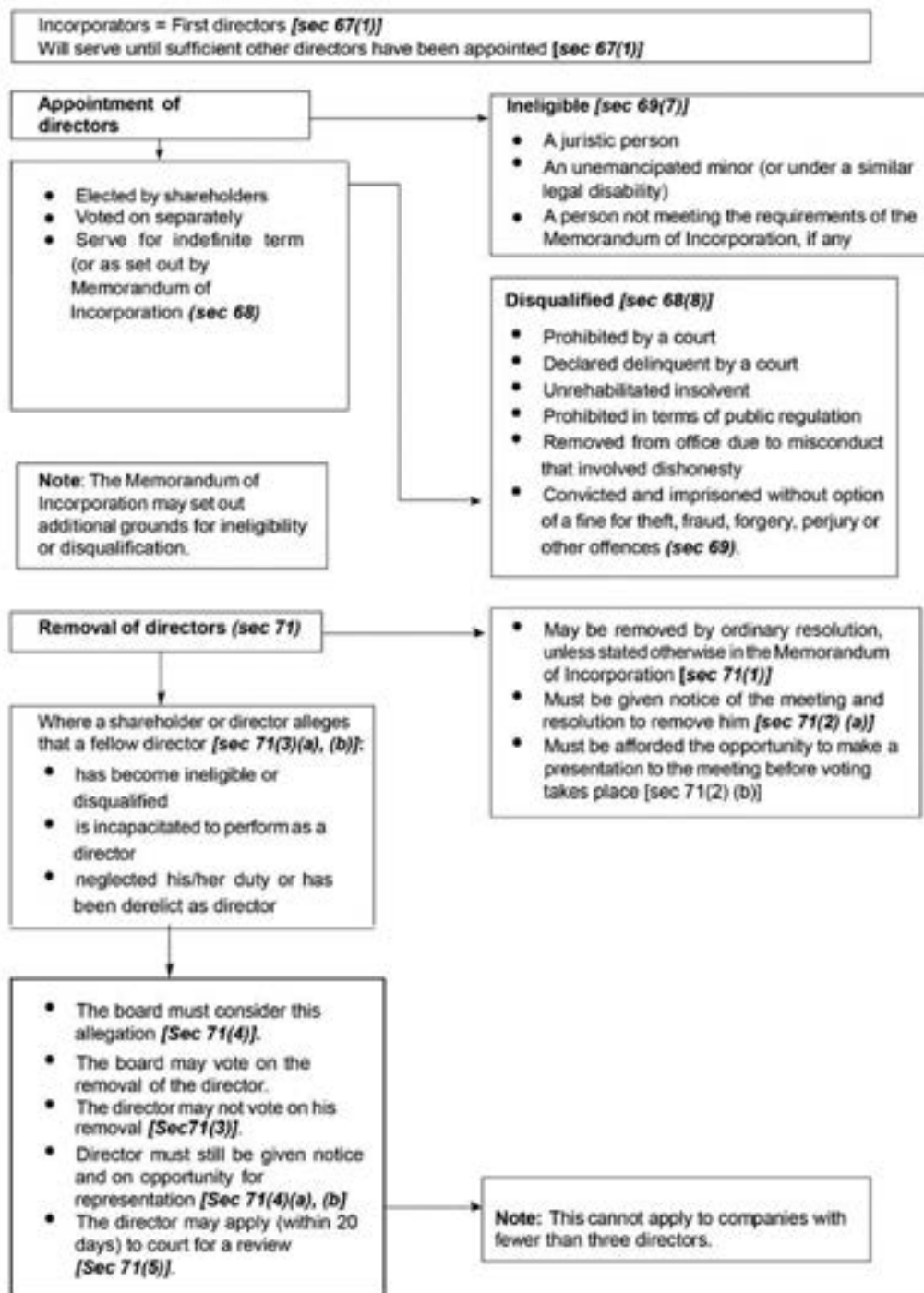
STUDY

Study section 66 of the Companies Act – as well as Regulation 38.

4.1.2 ELECTION AND REMOVAL OF DIRECTORS (SEC 67–71)

Diagram 4.1.2 below illustrates the election and removal of directors. Persons who are ineligible or disqualified from being directors may not be appointed. Take note that the shareholders may remove a director [sec 71(1)] and that certain steps must then be followed [sec 72(a) & (b)]. In some circumstances, the board of directors may remove a director [sec 71(3)–(5)], for example if it is found that the director was negligent.

DIAGRAM 4.1.2: Election and removal of directors



STUDY

Study sections 67 to 71 of the Companies Act.

ACTIVITY 1

Canyon (Pty) Ltd is a private company in the paint wholesaling business. John Wayne, the newly appointed chief executive officer, is keen to improve the

company's corporate governance. He has approached you for some advice on various aspects of the Companies Act, 2008, which directly affect governance.

John Wayne informs you that since he has joined the company, he has been somewhat concerned about the attitude and performance of one of the directors, Doc Hudson. He wants to know whether Doc Hudson can be removed from his position as a director and if so, what procedures will have to be followed. John Wayne is aware that Doc Hudson will not resign his directorship. The company has six directors in total.

Canyon (Pty) Ltd's Memorandum of Incorporation is consistent with the Companies Act, 2008, and contains no variations regarding quorums, notice periods, approval of resolutions, appointments of directors, etc. The company has twenty shareholders.

REQUIRED

Advise John Wayne on whether Doc Hudson can be removed from his position as a director of Canyon (Pty) Ltd. Do not include meeting requirements in your answer. (8)

FEEDBACK ON ACTIVITY 1

If the MOI contained a clause that designated an individual such as John Wayne, in his capacity as CEO, the power to remove a director (like Doc Hudson) from the board of the company, that power could be exercised.

Doc Hudson can also be removed by an ordinary resolution of the shareholders at any general meeting.

Doc Hudson may also be removed if a shareholder or fellow director (for example, John Wayne) alleges, *inter alia*, that he has been negligent or derelict in his duties as a director. The board must consider the allegation and vote on his removal.

Irrespective of the "method" used to remove Doc Hudson, he must be afforded the chance to defend himself, and

- he must be given notice of the meeting (10 business days) and a copy of the resolution to remove him
- he must be afforded a reasonable opportunity to make a presentation (in person or through a representative) before voting takes place

If the board has to remove Doc Hudson, he may not vote on his removal. For the removal resolution to be accepted, the majority of directors voting would need to vote in favour.

If Doc Hudson is removed by the board, he has 20 business days to go to court for a review.

If he is **not** removed, any director or shareholder who voted to have him removed, may go to court for a review (20 business days).

SUMMARY

In this learning unit, we explained and applied the requirements regarding the board, directors and prescribed officers, election, ineligibility and disqualification, and vacancies in terms of the Companies Act.

After having worked through the learning unit and the references to the prescribed study material, determine if you are able to:

- Give advice, discuss concerns, and apply the requirements regarding the board, directors and prescribed officers, election, ineligibility and disqualification, and vacancies.



LEARNING UNIT 4.2

Board committees, meetings and directors acting other than at meetings

INTRODUCTION

A board committee is a committee formed to perform specific functions of the board. This learning unit deals with board committees and board/directors' meetings.

4.2.1 BOARD COMMITTEES (SEC 72) – ALSO REFER TO REGULATION 43(1)

Section 72 of the Companies Act provides that, except when the MOI provides otherwise, the board of directors may appoint any number of committees and may delegate any of the authority of the board to a committee. The board is responsible for performing its duties properly, and a director or the board cannot use the appointment of a committee as a shield against their own responsibility [sec 72(3)].

The audit committee is one of the possible committees that can be formed, and it has an important function to fulfil. In terms of section 94 of the Companies Act, it is compulsory for a public company and a state-owned company to have an audit committee. The King III report (a report on corporate governance that is prescribed in South Africa) recommends that all other companies also appoint an audit committee and define its composition, purpose and duties in the MOI.

You are not required to study the material on the appointment of a social and ethics committee set out in sections 72(4) to (10).

Section 94(7) of the Companies Act 2008 stipulates the duties of the audit committee of a public/state-owned company. The King III confirms and expands on these duties. You are not required to study King III, however. Audit committees as such are discussed in topic 5; they are merely mentioned here as one of the possible committees that a company may appoint.

**STUDY**

Study section 72 of the Companies Act as well as Regulation 43(1).

4.2.2 BOARD MEETINGS/DIRECTORS' MEETINGS (SEC 73)

Section 73 provides that a director, authorised by the board (unless a company's MOI provides otherwise)

- may call a meeting of the board at any time
- must call such meeting if required to do so by at least
 - 25% of the directors (where the board consists of at least 12 members); or
 - two directors, in any other case.

Section 73 also provides that, unless the Companies Act or a company's MOI provides otherwise

- a meeting of the board may be conducted by electronic communication
- one or more directors may participate in a meeting by means of electronic communication, as long as all persons participating in that meeting are able to communicate effectively and concurrently with each other without an intermediary.

A meeting of the board must be convened by means of a notice to all directors. (An exception to this requirement is included in sec 73(5)(a).)

The company's board may determine the form of and time for giving notice (of a meeting) as long as these comply with any requirements included in the company's MOI or rules.

Except to the extent that the company's MOI provides otherwise, section 73(5) (a–d) provides certain requirements that have to be met at board meetings, including the voting rights of each director.

Section 73 also provides for the keeping of the minutes of meetings.

Directors should keep a written record of how and why they voted for matters at board meetings. This requirement flows from their duties and possible liabilities in terms of sections 76 and 77, respectively.

**STUDY**

Study section 73 of the Companies Act.

ACTIVITY 2

Answer the following questions:

- (1) Is the following statement true or false? A resolution at a directors' meeting will be approved if 50% of the directors vote in favour of the resolution. (1½)
- (2) What is the quorum for a directors' meeting where the company has two directors?
 - (i) three directors?

- (ii) nine directors?
 - (iii) twelve directors? (2)
- (3) When the directors of a public company have a meeting, the following individuals cannot be included in determining the quorum for that meeting. Indicate “true” or “false”, and give a reason for your choice.
- (i) Company secretary
 - (ii) Independent non-executive chairperson
 - (iii) Other non-executive directors
 - (iv) The chief audit executive (head of internal audit) (4)

FEEDBACK ON ACTIVITY 2

- (1) False: For a resolution to be approved at a directors’ meeting, a majority of the votes cast must be in favour. If 50% of the directors vote in favour and 50% vote against, the vote is tied. If this occurs, the chairperson will have a casting vote **but only** if he or she (the chairperson) initially did not have a vote or did not cast a vote. (The chairperson does not get 2 votes.)
- (2) (i) two directors
(ii) two directors
(iii) five directors
(iv) seven directors
- (3) (i) True: Not a director
(ii) False: The chairman is a director (non-executive directors have the same status as executive directors)
(iii) False: All (properly appointed) directors, executive or otherwise, can form part of the quorum
(iv) True: The chief audit executive is not a director

4.2.3 DIRECTORS ACTING OTHER THAN AT BOARD MEETINGS (SEC 74)

Except where the MOI of a company provides otherwise, section 74 provides that a decision, on which could be voted at a board meeting, may instead be adopted by the written consent of a majority of the directors, given in person, or by electronic communication, provided that each director received notice of the matter to be decided. A decision taken in such way has the same effect as if it had been approved by voting at a meeting.



STUDY

Study section 74 of the Companies Act.

SUMMARY

In this learning unit, we explained and applied the requirements regarding board committees, meetings, and directors acting other than at meetings in terms of the Companies Act.

After having worked through the learning unit and the references to the prescribed study material, determine if you are able to:

- Give advice, discuss concerns, and apply the requirements regarding board committees, meetings, and directors acting other than at meetings.



LEARNING UNIT 4.3

Directors' personal financial interests

INTRODUCTION

In section 75 of the Companies Act a director's personal financial interests are specifically dealt with. This section provides that if a director's personal interests are in conflict with those of the company, the director should disclose the conflict of interest in the manner described in section 75.

4.3.1 DIRECTORS' PERSONAL FINANCIAL INTERESTS (SEC 75)

The Companies Act sets out procedures that a director should follow in order to disclose his or her personal financial interest or that of a person related to him or her, in respect of any matter the board must consider. Study the definition of the term "personal financial interest" in section 1.

If a director of a company has a personal financial interest in a matter to be considered at a board meeting, or knows that a person related to him or her has a personal financial interest in the matter, the director must make certain specified disclosures. Immediately after disclosing this information, the director must leave the meeting and may not take part in any consideration of the matter.

A decision of the board or a transaction or agreement that the board has approved is valid despite any personal financial interest of a director or person related to the director. However, it is valid only if it was approved following disclosure; or despite having being approved without disclosure if it has subsequently been ratified by an ordinary resolution of the shareholders following disclosure of that interest or after having been declared valid by a court.



STUDY

Study section 75 of the Companies Act.

ACTIVITY 3

You are the auditor of Craft (Pty) Ltd, a manufacturing company in the marine engineering sector. The Memorandum of Incorporation contains, *inter alia*, the following clause:

Any director or prescribed officer of the company who has a personal financial interest in a contract into which this company has entered or will enter, either directly or indirectly, shall comply with the Companies Act, 2008. The contract will be binding, provided that the authority of the company in general meetings is obtained by poll for the contract, prior to the contract being entered into.

Your scrutiny of the minutes of directors' meetings reveals that the company entered into a contract with Marine (Pty) Ltd for the purchase of 10 highly sophisticated and expensive radar systems valued at approximately R1 million each. Tony Teak is a director of Craft (Pty) Ltd and his brother Terry is the majority shareholder of Marine (Pty) Ltd.

REQUIRED

Discuss the requirements of the Companies Act, 2008, relating to the contract that Craft (Pty) Ltd entered into with Marine (Pty) Ltd, particularly in view of the relationship between Tony and Terry Teak. (12)

FEEDBACK ON ACTIVITY 3

In terms of the Companies Act (sec 76), the following holds true:

- Tony Teak, as a director of Marine (Pty) Ltd, should not have used his position of director, or any information obtained while acting as a director, to gain advantage for himself or for another party (his brother Terry). He must act **for the company**, for example, he should not pass confidential information on to Terry about the price that Marine (Pty) Ltd is prepared to pay for the radar systems.
- Tony Teak should have communicated to the board of Craft (Pty) Ltd at the earliest practicable opportunity, any information that was material to Marine (Pty) Ltd. (For example, it would be important for the board to know that Tony and Terry are related, as a R10 million deal could be influenced by their relationship.)
- Tony Teak must perform his function and exercise his powers as a director at all times
 - in good faith; and
 - in the best interests of the company.

In effect, Tony Teak has a conflict of interest (the company or his brother?).

In terms of the Companies Act (sec 75), if Tony Teak had a personal financial interest in the matter to be considered at a meeting of the board (purchase of the radar systems), or had known that a **related** person had a personal financial interest, he should have

- disclosed the interest and its general nature before the matter was considered at the meeting
- disclosed to the meeting any material information relating to the purchase, which was known to him
- disclosed any observations of or pertinent insights into the matter if he had been requested to do so by the other directors
- left the meeting (if he was present) immediately after having made the disclosures to the meeting
- taken no further part in the meeting
- had no right to vote on the decision

As Tony and Terry Teak are brothers and they are within two degrees of consanguinity, they are regarded as related for the purposes of the Companies Act (see section 2).

The information need only be disclosed if it is material (sec 76(2)(b)). A R10 million contract would most probably be regarded as material.

SUMMARY

In this learning unit, we explained and applied the requirements regarding directors' personal financial interests in terms of the Companies Act.

After having worked through the learning unit and the references to the prescribed study material, determine if you are able to:

- Give advice, discuss concerns, and apply the requirements regarding directors' personal financial interests.



LEARNING UNIT 4.4

Standards of directors' conduct, liability of directors and prescribed officers, indemnification and directors' insurance

INTRODUCTION

The Companies Act lays down certain common-law duties and additional statutory duties of directors. This learning unit deals with these duties as well as instances in which a director and prescribed officer may be held liable for losses suffered by the company.

4.4.1 STANDARDS OF DIRECTORS' CONDUCT (SEC 76)

A director of a company must exercise the powers and the functions of a director in good faith and in the best interest of the company, and must act with a certain degree of care, diligence and skill. The section also extends the duty to apply to a subsidiary.

Directors, for the purpose of this section, include prescribed officers and members of board committees.

The most important statutory duties that directors owe to their company, are to

- act in good faith and for a proper purpose
- act in the best interests of the company
- avoid using their position as director or using corporate information to their own advantage or knowingly cause harm to the company or its subsidiary
- convey the company information that may be of importance to the company
- exercise reasonable care, skill and diligence in the performance of their duties
- declare any personal financial interest in a matter in which the company is interested (refer to sec 75).



STUDY

Study section 76 of the Companies Act.

ACTIVITY 4

The shareholders of Tracshion Ltd, a large electronics company specialising in tracking systems in vehicles, have recently appointed a friend of yours named Carmen de Villiers. The company is not listed. Carmen de Villiers is technically well qualified and is considered an important individual with regard to the future of the company, particularly its research and development programmes.

However, Carmen de Villiers has not filled the role of a company director before, and although she is excited about her promotion, she is concerned about her responsibilities as a director, particularly in terms of the Companies Act, 2008. She has heard that the Act contains sections dealing with standards of directors' conduct and is afraid that if she does not perform, she will be removed from the board and dismissed from the company. She has also heard that the chairperson of the board can put her on probation as a director or that she can be declared delinquent. She has put the following questions to you:

- (1) Can I be removed from the board and dismissed from the company if I do not perform as a director? (6)
- (2) If I think things are not going well, may I resign as a director without leaving the company? (2)
- (3) What are the standards of conduct with which I must comply as a director? (13)
- (4) Can the chairperson put me on probation? (3)
- (5) Is there anyone in the company that I can officially approach to help me understand my duties and responsibilities? (3)

REQUIRED

Respond to Carmen de Villiers' questions. (27)

FEEDBACK ON ACTIVITY 4

You should have responded as follows:

- (1) Yes, you can be removed from the board. However, this does not mean that you will be dismissed from the company – being on the board is a role to which you are elected over and above your employment by the company for your skills in the electronics field. As Tracshion Ltd regards your research and development skills as important, it is highly unlikely that the company will dismiss you.

Certain Companies Act requirements must also first be satisfied before the board may remove you as a director.

- If the shareholders wish to remove you, they must pass an ordinary resolution to do so. This means that a majority of the voting rights held by the shareholders, who had the right to vote on your appointment, must support your removal.
- However, if the shareholders intend to remove you, they must give at least 10 business days' notice of the meeting and that they are intending to remove you.

- Before the meeting votes on your removal, the shareholders should give you or your representative a reasonable opportunity to make a presentation on your removal. (Note: The MOI may stipulate a longer or shorter notice period.)

The shareholders will not take a decision lightly to remove you. Remember, they have appointed you.

You should perhaps also bear in mind that if you are negligent or derelict in your duties, the board might resolve to remove you. Negligence or dereliction of your duties is a serious matter, but if you comply with the standards of director conduct, there is no chance of this happening. Even in this situation, you would still be allowed to make representations, and a majority of the directors would have to support your removal.

- (2) Yes. Your appointment as a director is an action separate from your employment contract.

You may resign at any time by giving written notice to the board.

Your company's Memorandum of Incorporation may have other requirements for resignation of a director, but these are unlikely to be very onerous, for example, minimum notice periods.

Within 10 business days of your resignation, the company (not you) will need to notify the Commission (CIPC) of your resignation.

- (3) The standards are laid out in section 76:

3.1 Firstly, you may not use the position of director, or any information obtained while acting in the capacity of director, to

- gain an advantage for yourself or any other person; or
- knowingly cause harm to the company (For example, when hearing at a board meeting that the company is going to call for tenders for a large contract, you may not pass any confidential information about the tender to a friend who is tendering for that contract.)

3.2 Secondly, you must communicate to the board at the earliest practical opportunity, any information that comes to your attention (about the company), unless you

- believe the information is immaterial to the company
- believe the information is generally known to the public or other directors
- would be breaching a legal or ethical obligation of confidentiality (for example, you may have information about technical developments in your field, which might affect Tracshion Ltd's business strategy).

3.3 Thirdly, you are required to exercise the powers and perform the duties of a director

- in good faith and for proper purpose
- in the best interests of the company
- with the degree of care, skill and diligence that may be reasonably expected of a person performing the same functions as a director
- having a general knowledge, skill and experience of that director

3.4 Essentially this will require you to

- take reasonably diligent steps to become informed about matters serving before the board
- have a rational basis for supporting a board decision and believing it was in the best interests of the company (in other words, you must be able to justify your decision when voting on a matter before the board).

3.5 You are not expected to be “experienced”. You are a new director but you will need to be conscientious, diligent, enquiring, and willing to learn.

3.6 A particularly important aspect of point 3.3 is that if you or anyone related to you (as defined), for example, your husband, has any personal financial interest in any matter brought to the board, or which you think the company should know about anyway, you should notify the board of the nature of the interest. For example, if Tracshion Ltd was proposing to enter into a contract with a company in which your husband is a shareholder, the board must be informed.

3.7 As a director, in making decisions, you are entitled to rely on other people who provide information, reports, or opinions to the board, for example, employees, accountants, and legal counsel, unless you have reason to believe they are not reliable or competent.

(4) No, it is only the court that can declare a director under probation. No chairperson may take this decision.

However, the company, a shareholder, a director, company secretary, or a trade union representative (or similar representative) can apply to the court to have a director declared “on probation”.

Certain company regulatory bodies can also make such an application to the court.

Being declared “on probation” is not an everyday occurrence for directors and is not something you need to worry about if you comply with the required standards. In any event, if things are not going well, you can resign! In a sense, probation is a last option.

(5) You are fully entitled to seek advice from the chairperson of the board, or from any other director.

You are also entitled to seek assistance from individuals not on the board, as long as you do not breach confidentiality.

However, the best person to assist you in this regard will be the company secretary of Tracshion Ltd. One of the functions of the company secretary stipulated in the Companies Act is to advise directors on their rights, duties and responsibilities.

4.4.2 LIABILITY OF DIRECTORS AND PRESCRIBED OFFICERS (SEC 77)

This section deals with instances in which a director and prescribed officer may be held liable for losses suffered by the company. (Two examples of such instances

found in sec 77(2)(a) & (b), and another three examples found in section 77(3) (a)–(c).) You should study the various instances carefully to be able to apply one or more of them to a scenario. We will not request you to list all the instances found in the various subsections of section 77.

In addition to the list of prescribed officers outlined in this section, directors could also be liable to shareholders for fraudulent acts or acts of gross negligence [*refer to sec 20(6)*] or to any third party who has suffered a loss because of directors breaching the Companies Act [*refer to sec 218(2)*].

Bear in mind that members of board committees and audit committees have the same liability as directors under **section 77**, even if the members of the board committees are not directors and even though they have no right to vote on any matters considered by board committees.



STUDY

Study section 77 of the Companies Act.

ACTIVITY 5

May a company recover loss, damages or costs sustained by the company from the director under the following circumstances? Give reasons for your answer:

The director participated in a resolution approving a distribution (dividends) despite knowing that the distribution was contrary to the provisions of section 46 of the Companies Act.

FEEDBACK ON ACTIVITY 5

Reference: Section 77(3)(e)(vi) of the Companies Act

Yes, the company may recover loss, damages or costs sustained by the company from a director, in view of the section mentioned above. This section specifically provides that where directors participated in a resolution approving a distribution (dividends) despite knowing that the distribution was contrary to the provisions of section 46 of the Companies Act, they will be held liable.

4.4.3 INDEMNIFICATION AND DIRECTORS' INSURANCE (SEC 78)

A company may not indemnify (protect against loss or damage) a director against a liability arising from

- wilful misconduct or breach of trust by the director
- the director acting without the necessary authority
- reckless trading
- trading under insolvent circumstances

- fraudulent acts of the director
- a fine relating to an offence committed by the director

Other than the specific instances mentioned above, a company might indemnify a director against any liability, including the liability arising from the director's negligence. In terms of section 78(7), a company may also purchase insurance to protect a director of the company against any liability in respect of which the company is permitted to indemnify a director.



STUDY

Study section 78 of the Companies Act.

SUMMARY

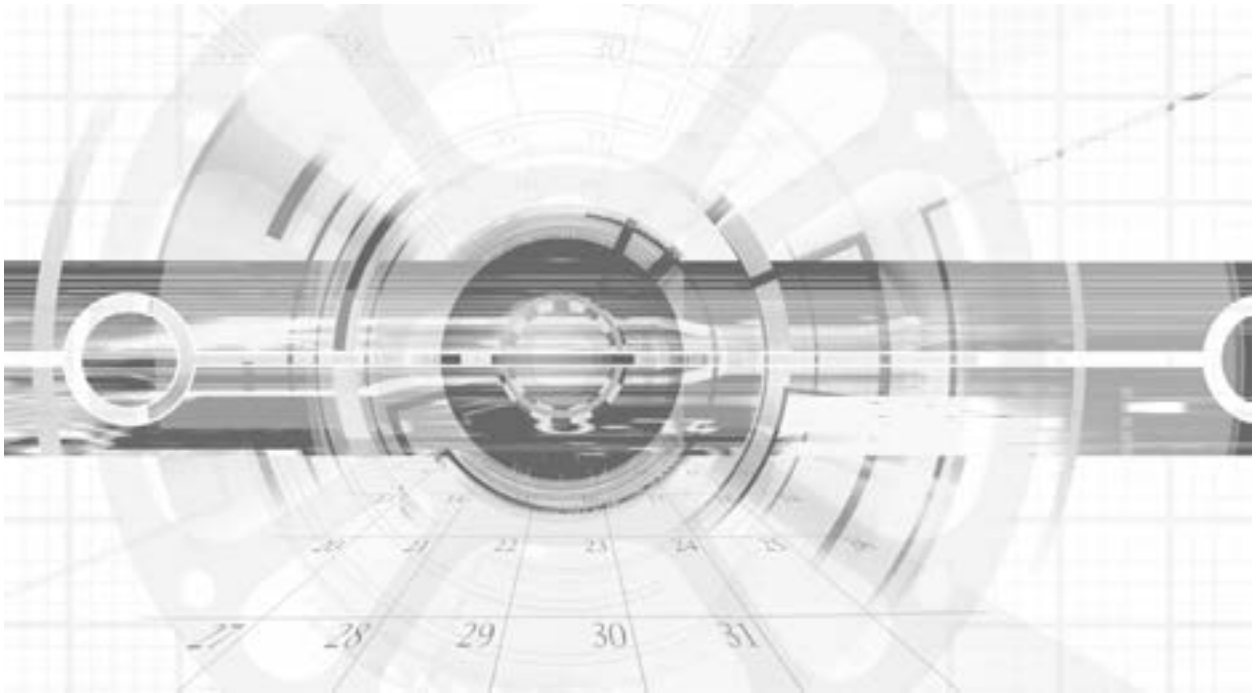
In this learning unit, you learned about the requirements regarding standards of directors' conduct, liability of directors and prescribed officers, indemnification, and directors' insurance in terms of Companies Act.

After having worked through the learning unit and the references to the prescribed study material, determine if you are able to:

- Give advice, discuss concerns, and apply the requirements regarding standards of directors' conduct, liability of directors and prescribed officers, indemnification, and directors' insurance.

CONCLUSION

In this topic about the **standards of directors' conduct, liability of directors and prescribed officers, indemnification, and directors' insurance**, we explained and applied the Companies Act requirements regarding the topic. The next topic deals with enhanced accountability and transparency.



TOPIC 5

Enhanced accountability and transparency

TOPIC OVERVIEW

Chapter 3 of the Companies Act, which includes sections 84 to 93, imposes additional accountability and transparency requirements on certain types of companies. These requirements apply to public companies and state-owned companies (that are not exempted from these provisions). Companies may also voluntarily comply with these requirements.

The requirements deal essentially with the appointment of a secretary (in the manner required in section 86–89), an auditor (in the manner required in section 90–93) and an audit committee (in the manner required in section 94).

Topic 5 is divided into the following learning units:

Learning unit	Title
5.1	Application of and general requirements regarding enhanced accountability and transparency
5.1.1	Registration of secretaries and auditors (sec 84 & 85) – also refer to Regulation 26 to 28
5.2	The company secretary, including the mandatory appointment of the company secretary, juristic person or partnership as company secretary, and the duties, resignation or removal of a company secretary
5.2.1	Company secretary (sec 86–89)
5.3	Auditors, including the appointment, resignation, rotation, and rights and restricted functions of auditors
5.3.1	Auditors (sec 90–93)
5.4	Audit committees
5.4.1	Audit committees (sec 94) – also refer to Regulation 42

TEXTUAL AMENDMENTS AND ADDITIONS

Before proceeding with the study of this topic, please refer to Tutorial Letter 102 for this module to acquaint yourself with any textual amendments and additions that may have been indicated.

LEARNING OUTCOMES

Learning unit	In this topic, we will focus on the following learning outcomes:	Level
5.1 Application of and general requirements regarding enhanced accountability and transparency	<ul style="list-style-type: none"> Give advice, discuss concerns and apply the requirements for the application of and general requirements regarding enhanced accountability and transparency, and vacancies. 	2
5.2 The company secretary, including the mandatory appointment of the company secretary, juristic person or partnership as company secretary, and the duties, resignation or removal of a company secretary	<ul style="list-style-type: none"> Give advice, discuss concerns and apply the requirements for the company secretary. 	2

5.3 Auditors, including the appointment, resignation, rotation, and rights and restricted functions of auditors	<ul style="list-style-type: none">• Give advice, discuss concerns and apply the requirements for auditors.	2
5.4 Audit committees	<ul style="list-style-type: none">• Give advice, discuss concerns and apply the requirements for audit committees	2



LEARNING UNIT 5.1

Application of and general requirements regarding enhanced accountability and transparency

INTRODUCTION

This learning unit deals with the requirements for appointing a company secretary and an auditor.

5.1.1 REGISTRATION OF SECRETARIES AND AUDITORS (SEC 84 & 85) – ALSO REFER TO REGULATIONS 26 TO 28

Sections 84 and 85 of the Companies Act apply to

- every public and state-owned company (SOC)
- a private, non-profit and personal-liability company
 - if required by the Companies Act or the Regulations to be audited, but where the appointment of a company secretary and an audit committee are not required, or
 - to the extent that the company's MOI stipulates that the company comply with this requirement

Regulation 28, which forms part of the Companies Act, requires the following in respect of the categories of companies that have to be audited:

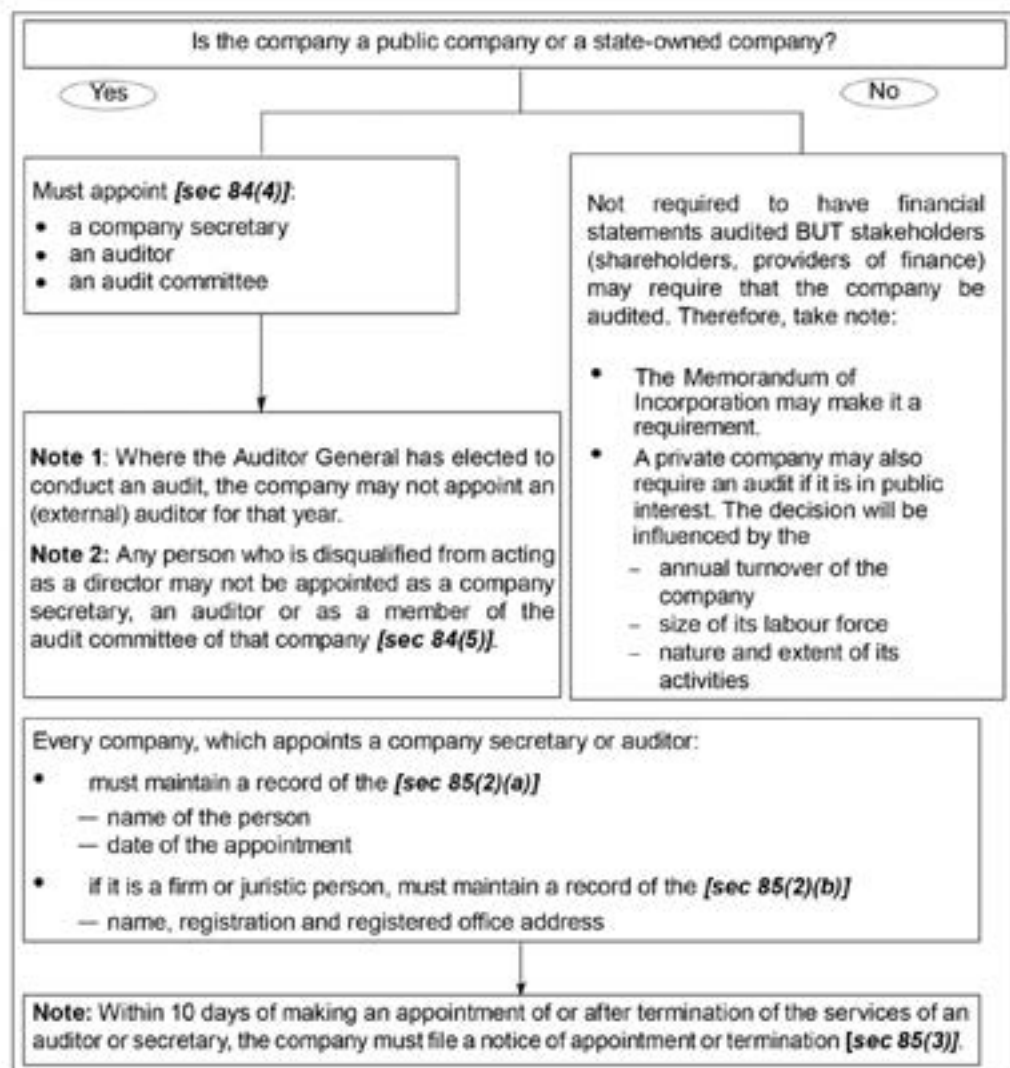
- (1) This Regulation applies to a company unless the company is exempt from having its annual financial statements either audited or independently reviewed in terms of section 30(2).
- (2) In addition to public companies and state-owned companies, any company that falls within any of the following categories in any particular financial year must have its annual financial statements for that financial year audited. It includes
 - (a) any profit or non-profit company if, in the ordinary course of its primary activities, it holds assets in a fiduciary capacity for persons who are not related to the company, and the aggregate value of such assets held at any time during the financial year exceeds R5 million
 - (b) any non-profit company, if it was incorporated

- (i) directly or indirectly by the state, an organ of state, a state-owned company, an international entity, a foreign state entity or a foreign company; or
 - (ii) primarily to perform a statutory or regulatory function in terms of any legislation, or to carry out a public function at the direct or indirect initiation or direction of an organ of the state, a state-owned company, an international entity, or a foreign state entity, or for a purpose ancillary to any such function
- (c) any other company whose public interest score in that financial year, as calculated in accordance with Regulation 26(2)
- (iii) is 350 or more; or
 - (iv) is at least 100, if its annual financial statements for that year were internally compiled

Refer back to the Table 2.1.2 of learning unit 2, Topic 2, where the above requirements are summarised.

Diagram 5.1.1 below summarises the requirement for companies to appoint a company secretary and an auditor.

DIAGRAM 5.1.1: Appointment of company secretary and auditor





STUDY

Study sections 84 and 85 of the Companies Act, as well as Regulations 26 to 28.

ACTIVITY 1

You know much about the Companies Act. Lionel Lester and Wendell Webb have made an appointment to see you about a company they would like to form [Sew-Sew (Pty) Ltd].

Lionel Lester has designed a new industrial sewing machine that he has patented and now wants to sell to the clothing industry. Wendell Webb comes from a wealthy background, and he will provide most of the finance required for the venture. Wendell and Lionel will initially be the only shareholders and directors of the company, but it is expected that over time, a few new shareholders will be found as well as one or two directors appointed.

The company will operate from a factory, which they believe will be suitable for a lease. The owner of the factory wants to tie up the lease as soon as possible. Lionel Lester estimates that in the first year of operation, they will employ about twenty people (including themselves). He also thinks that they will generate a turnover of approximately R20 million, and that their liabilities will not exceed R3 million at any time.

You need to answer the following question:

Wendell Webb heard about something called a public interest score (PIS) and that if your business had such a score, it had to be audited externally. He wanted to know more about the public interest score. Lionel Lester added that he had heard that an auditor would have to review their company independently. (8)

FEEDBACK ON ACTIVITY 1

Reference: Sections 84 and 85, and Regulations 26 to 28 of the Companies Act

All businesses have a public interest score. A public interest score is the sum of the points allocated to four stipulated criteria that apply to every company (and CC) in the financial year. The criteria are as follows:

- A number of points are allocated equal to the maximum number of employees in the business.
- One point is allocated for every R1 million (or portion thereof) of turnover.
- One point is allocated for every individual who has a direct or indirect interest in the shares of the company.
- One point is allocated for every R1 million (or portion thereof) in outstanding unsecured debt of the company held by creditors at year end.

Once a company has calculated its public interest score, it must meet certain requirements, depending on the number of points. For example, a **private** company with a public interest score of 350 or more will have to be audited externally.

As Sew-Sew (Pty) Ltd will initially have a public interest score of less than 100 points (in the range of 45), the company's annual financial statements (AFSs) will not have to be audited externally.

PIS calculation:

Every employee – average number	20
Every security holder	2
Every R1m third-party liabilities	3
Every R1m turnover	<u>20</u>
	<u>45</u>

An independent review of the company's AFSs would normally apply to a company with a public interest score of less than 100 points. However, this will not apply to Sew-Sew (Pty) Ltd because owner-managed companies, that is, those in which the shareholders and the directors are the same individuals, are exempt from this requirement.

SUMMARY

In this learning unit, we explained and applied the requirements applicable to the registration of the company secretary and auditors in terms of the Companies Act.

After having worked through the learning unit and the references to the prescribed study material, you should be able to do the following:

- Give advice, discuss concerns, and apply the requirements regarding the registration of the company secretary and auditors.



LEARNING UNIT 5.2

The company secretary, including the mandatory appointment of the company secretary, juristic person or partnership as company secretary, and the duties, resignation or removal of a company secretary

INTRODUCTION

Public companies and state-owned enterprises must appoint a company secretary. The secretary acts as a chief administrative officer of the company. This learning unit deals specifically with the duties of the company secretary and with the appointment and removal of the company secretary.

5.2.1 COMPANY SECRETARY (SEC 86–89)

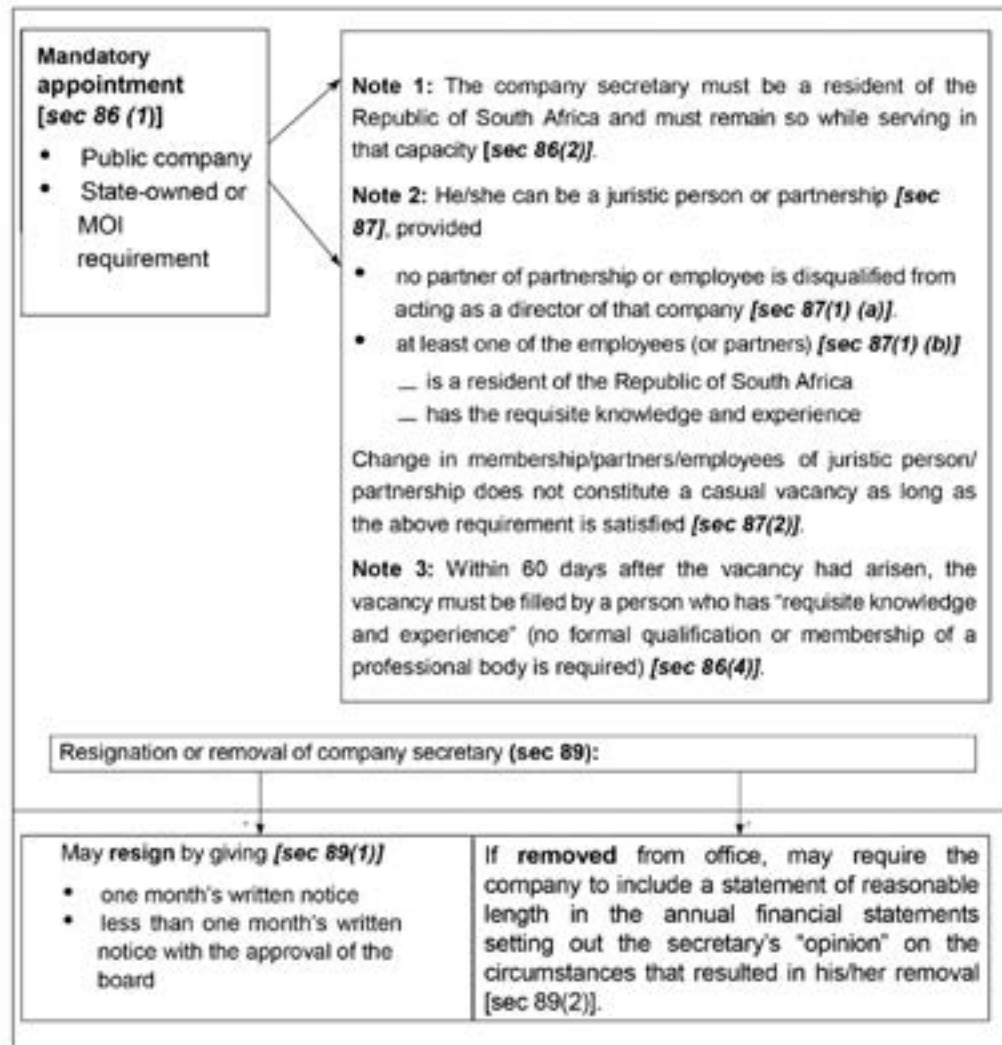
The board of directors appoint the secretary and they must be satisfied that the person is suitably qualified with necessary experience to perform the duties of a company secretary. The secretary is accountable to the board of directors. The secretary's duties are listed below. Study section 88 in this regard.

Duties of the company secretary include the following (but are not restricted to):

- Provide directors with guidance with regard to their duties, responsibilities and powers.
- Make directors aware of any relevant law.
- Report any failure on the part of the company/director to the board in order to comply with the Act or the company's Memorandum of Incorporation.
- Ensure that minutes of all meetings (shareholders, directors, board committees and audit committee) are properly recorded.
- Certify in annual financial statements that necessary returns and notices in terms of the Act have been filed and that they appear to be true, correct and up to date.
- Ensure that a copy of the annual financial statements is sent to all persons entitled to receive them.

In diagram 5.2.1 below the requirements concerning the appointment and resignation or removal of the company secretary in terms of the Companies Act are summarised.

DIAGRAM 5.2.1: Company secretary



STUDY

Study sections 86 to 89 of the Companies Act.

SUMMARY

In this learning unit, you learned about the company secretary, including the mandatory appointment of the company secretary, juristic person or partnership as company secretary, and the duties, resignation or removal of a company secretary.

After having worked through the learning unit and the references to the prescribed study material, you should be able to:

- Give advice, discuss concerns, and apply the requirements regarding the company secretary, including the mandatory appointment of the company secretary, juristic person or partnership as company secretary, and the duties, resignation or removal of a company secretary.



LEARNING UNIT 5.3

Auditors, including the appointment, resignation, rotation, and rights and restricted functions of auditors

INTRODUCTION

Public and state-owned companies (as well as companies required to do so in terms of their MOI or their public interest score) must appoint an individual or firm as their auditor. This learning unit deals with the appointment and resignation of an auditor, as well as with the requirement for auditors to rotate. We will also look at the rights and restricted functions that an auditor has in terms of the Act.

5.3.1 AUDITORS (SEC 90–93)

An auditor can be appointed at incorporation, and thereafter each year at the company's annual general meeting (AGM). The appointed auditor will hold office until the next AGM – in other words, the company cannot remove him or her during the year.

The duties of an auditor in a statutory or voluntary audit are fulfilled in terms of the Auditing Profession Act.

The auditor has, in terms of section 93(1)(a), right of access at all times to

- accounting records
- all books
- documents

The auditor is also entitled to request any information and explanations necessary for performing his or her duties.

In terms of section 93(1)(c), the auditor is entitled to

- attend any general shareholders meeting (including the AGM)
- receive all notices of and other communications relating to any shareholder's meeting
- be heard at any general shareholder's meeting on any part of the business that concerns his or her duties or functions

When it comes to rotation requirements, bear in mind that counting the five years should only start from the effective date of the Act, in other words, from 1 May 2011. In effect, an individual who had served as an auditor for longer than five years on 1 May 2011 may still serve another five years from that date before the rotation requirement becomes effective. An audit firm may thereafter appoint another designated auditor in the firm. Audit firms with one partner have to resign after five years [Schedule 5 to the Companies Act, sec 7(11)].

Diagram 5.3.1 and 5.3.2 below summarise the requirements concerning the appointment and resignation, as well as the rotation, of auditors in terms of the Companies Act.

DIAGRAM 5.3.1: Appointment of auditors

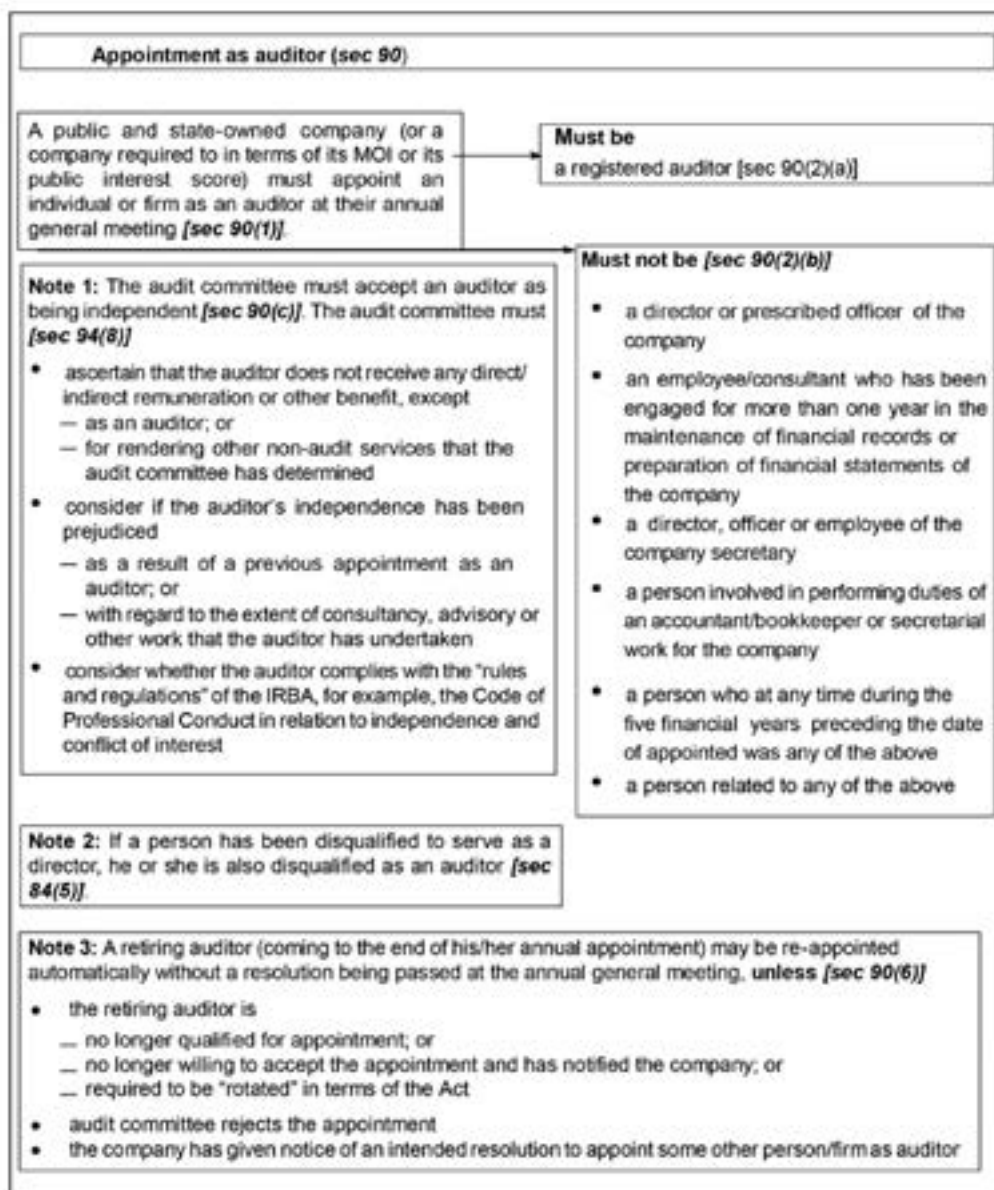
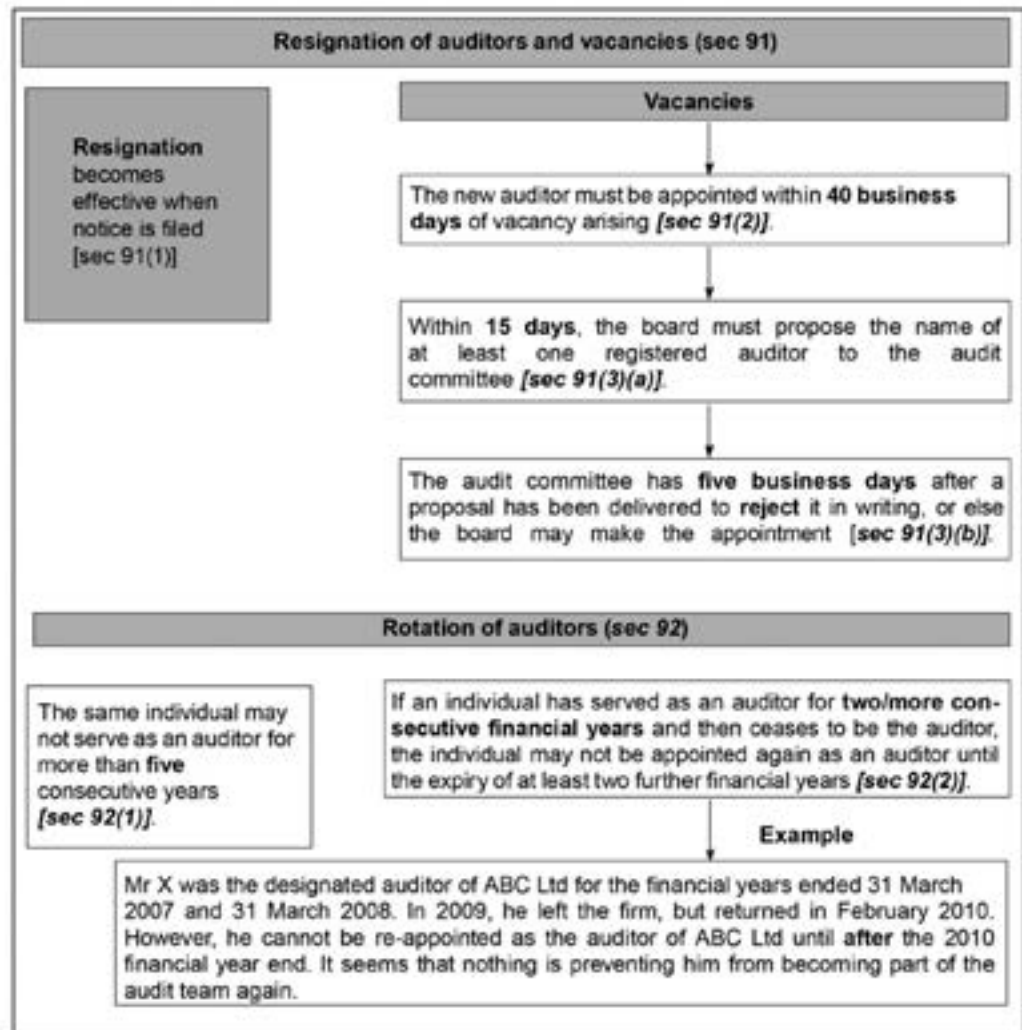


DIAGRAM 5.3.2: Removal and rotation of auditors



STUDY

Study sections 90 to 93 of the Companies Act.

ACTIVITY 2

Now try to answer the following question:

One of your audit clients, xYZ Limited, is a public company that owns a number of warehouses. The CEO of xYZ Limited asks you the following questions via e-mail:

- (a) Apparently, your audit firm can only be our auditors for five consecutive years, after which time your firm must step down. This seems quite harsh. Is there any truth in it? (3)
- (b) Is your firm what one could call a “designated auditor”? (2)

(Adapted from Gowar & Jackson 2010)

FEEDBACK ON ACTIVITY 2

Reference: Section 92 of the Companies Act

- (a) This is not entirely correct. The Act has introduced auditor rotation for public (and certain other) companies. (1)

The following applies to public companies:

- The same individual (not firm) may not serve as a designated auditor for more than five consecutive years. (1)
- If an individual has served for two consecutive years and then ceases to fill the role, he or she may not be reappointed until two financial years have elapsed. (1)

- (b) No. The designated auditor is the individual partner responsible for XYZ Limited's audit. Our audit firm is appointed as your company's auditors in terms of the Companies Act, and the designated auditor will be the individual auditor (usually a partner) who takes charge of the audit. (2)

ACTIVITY 3

Read the scenario presented in activity 4 of learning unit 5.4.

REQUIRED

Explain to John Wayne how the external audit of Canyon (Pty) Ltd's annual financial statements can become a requirement in terms of the company's Memorandum of Incorporation. Your answer must include details of meetings that may have to be held, for example, notice, quorums, etc. (12)

FEEDBACK ON ACTIVITY 3

If John Wayne wants to include the audit requirement in the company's MOI, the MOI will have to be amended in terms of the Act.

A special resolution to amend the MOI is required.

The board (or shareholders) can call a meeting of shareholders to exercise 10% of the votes. John Wayne will therefore need the approval of his board or the relevant shareholders to call the meeting.

As Canyon (Pty) Ltd is a private company, the following will apply to the meeting:

- A notice period of 10 business days must elapse before the meeting is to begin.
- Notices must include the date, time and location of the meeting.
- The specific purpose for which the meeting has been called (to amend the MOI) must be stated.
- A copy of the proposed resolution **and** the percentage of voting rights needed to pass the resolution must be included, that is, the resolution to amend the MOI for an annual audit requirement, and 75% of voting rights.

The notice must also include a reasonably prominent statement that

- a shareholder may appoint a proxy (who does not have to be a shareholder)
- personal identification is required to attend the meeting

To obtain a quorum, the meeting must have

- at least three shareholders present
- shareholders holding 25% of the voting rights, which can be exercised on the amendment, in attendance before the meeting can begin or the matter be discussed

Voting of the matter may be done by a show of hands or by polling those present and entitled to vote.

If the resolution is passed, a Notice of Amendment (with the prescribed fee) must be filed with CIPC (the registrar).

SUMMARY

In this learning unit, you learned about the requirements relating to auditors, including the appointment, resignation, rotation, and rights and restricted functions of auditors, in terms of the Companies Act.

After having worked through the learning unit and the references to the prescribed study material, you should be able to:

- Give advice, discuss concerns, and apply the requirements regarding the auditors, including the appointment, resignation, rotation, and rights and restricted functions of auditors.



LEARNING UNIT 5.4

Audit committees

INTRODUCTION

All public and state-owned companies must elect an audit committee. Other companies may elect an audit committee voluntarily.

This learning unit deals with the composition and duties of the audit committee in terms of the Companies Act.

5.4.1 AUDIT COMMITTEES (SEC 94) – ALSO REFER TO REGULATION 42

At each annual general meeting, a public company or state-owned company must elect an audit committee (for other companies, this is a voluntary requirement) **[sec 94(2)]**. See diagram 5.4.1 below in this regard.

DIAGRAM 5.4.1: Audit committees

Composition of an audit committee

An audit committee must consist of at least three members. A member must **[sec 94(4)(a)]**

- be a director of the company
- satisfy minimum qualifications as prescribed by the Minister (adequate financial knowledge and experience)

A member must not be **[sec 94(4)(b), (c)]**

- involved in day-to-day management (currently or at any time during the previous financial year)
- a prescribed officer, or full-time executive employee of the company or a related/interrelated company, or have held such a post at any time during the previous three financial years
- a material supplier or customer of the company
- a person related to any of the above-mentioned persons

Duties of an audit committee [sec 94(7)]

- Nominates an independent registered auditor for appointment
- Determines the auditor's fees and terms of engagement
- Ensures that the appointment of the auditor complies with provisions of the Act and other legislation
- Determines the nature and extent of any non-audit services
- Pre-approves any proposed agreement with the auditor for provision of non-audit services
- Prepares a report to be included in the annual financial statements for that financial year
 - describing how its functions were carried out
 - stating whether it is satisfied that the auditors were independent
 - commenting on the appropriateness of the financial statements, accounting practices and internal financial control
- Receives and deals appropriately with any concerns/complaints, relating to
 - accounting practices and the internal audit
 - the content or auditing of the financial statements
 - internal financial controls
 - other related matter
- Makes submissions to the board on any matter concerning accounting policies, financial control, records, and reporting of the company
- Performs other functions determined by the board

**STUDY**

Study section 94 of the Companies Act, as well as Regulation 42.

ACTIVITY 4

Canyon (Pty) Ltd is a private company in the paint wholesaling business. John Wayne, the newly appointed chief executive officer, is keen to improve the company's corporate governance. He has subsequently approached you for some advice on various aspects of the Companies Act, 2008, which directly affect governance. Currently, the company's public interest score is about ninety and the company's annual financial statements are subject to independent review.

However, John Wayne informs you that he would like the company's annual financial statements to be audited externally annually, and an audit committee to be appointed. He tells you that the directors have agreed to have the financial statements of the current year audited voluntarily, but that he wants to make the annual external audit a requirement in terms of the company's Memorandum of Incorporation. He believes that an external audit is very beneficial and that it should not be dependent on the company's public interest score.

With regard to appointing an audit committee, John Wayne requires that the audit committee be constituted as required by the Companies Act, 2008, and that its duties be at least those that are required by the Act.

For the voluntary audit of the current financial statements, the board of directors will appoint the auditor but for future years, the auditor will be appointed as laid down in the Companies Act. This is of course, assuming that the annual audit becomes mandatory in terms of the Memorandum of Incorporation.

Canyon (Pty) Ltd's Memorandum of Incorporation is consistent with the Companies Act, 2008, and contains no variations on quorums, notice periods, approval of resolutions, appointments of directors, etc. The company has twenty shareholders.

REQUIRED

Describe to John Wayne the requirements applicable to appointing an audit committee and outline the duties of the audit committee in terms of the Companies Act, 2008 (do not concern yourself with the King III report). (15)

FEEDBACK ON ACTIVITY 4

Reference: Section 94 and Regulation 42 of the Companies Act

To comply with the requirements regarding the appointment of an audit committee in terms of the Companies Act

- shareholders must appoint the audit committee at each annual general meeting
- it must consist of at least three members
- each member must be a director of the company
- each member must satisfy the minimum qualifications prescribed by the minister to ensure that the audit committee as a whole comprises persons with adequate financial knowledge and experience (Regulation 42 requires that at least one third of the members of the audit committee have academic qualifications or experience in economics, law, accounting, corporate governance, etc.)
- members of the audit committee **must not** be

- involved in the day-to-day running of the company or have been so involved at any time during the previous financial year
- prescribed officers, or full-time executive employees of Canyon (Pty) Ltd (or any related or interrelated company), or have held such post at any time during the previous three financial years
- material suppliers or customers of the company, such that a reasonable and informed third party would conclude that, in the circumstances, the integrity, impartiality or objectivity of that member of the audit committee would be compromised
- “related persons” to any person subject to these prohibitions, for example, the wife of a full-time executive employee of Canyon (Pty) Ltd

The duties of the audit committee are to

- nominate a registered auditor in order that the shareholders appoint him/her as auditor (The shareholders must be satisfied that the nominated person/firm is independent of Canyon (Pty) Ltd.)
- determine the auditor’s fees and terms of engagement
- ensure the appointment of the auditor complies with the Companies Act and the Auditing Profession Act
- determine the nature and extent of any non-audit services the auditor may provide to Canyon (Pty) Ltd and pre-approve any agreement with the auditor for the provision of these services
- prepare a report to be included in the AFS, which
 - describes how the audit committee performed its functions
 - states whether the auditor was independent of the company
 - includes comments that the committee considers appropriate of the financial statements, the accounting practices and internal controls of the company
- receive and manage appropriately any concerns or complaints relating to
 - the accounting practices and internal audit of the company
 - the content or audit of the AFS
 - internal financial controls
 - any other related matters
- submit to the board any matters dealt with above
- perform other functions determined by the board

SUMMARY

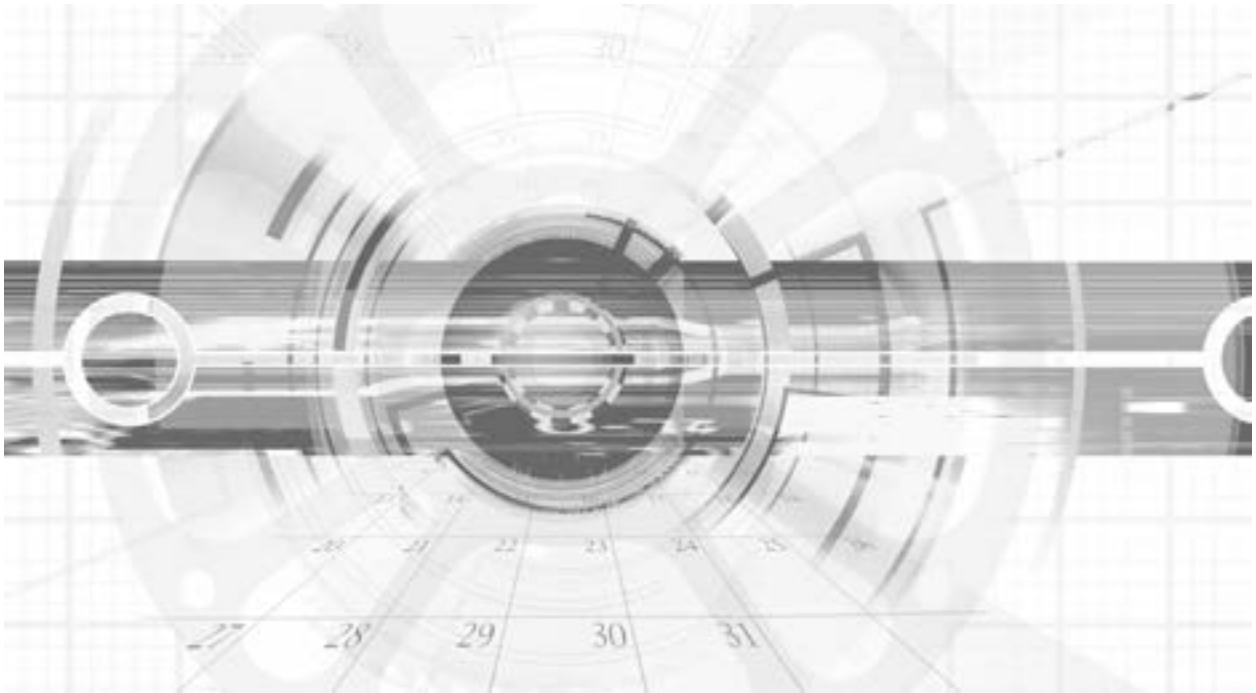
In this learning unit, you learned about the requirements for audit committees in terms of the Companies Act.

After having worked through the learning unit and the references to the prescribed study material, you should be able to:

- Give advice, discuss concerns, and apply the requirements for the audit committee.

CONCLUSION

In this topic about **enhanced accountability and transparency**, we explained and applied the Companies Act requirements and Regulations regarding the topic. In the following topic, we will be looking at company transactions.



TOPIC 6

Transactions

TOPIC OVERVIEW

The topic deals with transactions where **financial assistance and loans** are provided (sec 44 & 45, respectively), and with **fundamental transactions** (sec 112 & 115).

Sections 44 and 45 are very important sections for your studies of the Companies Act.

Davis, Cassim, Geach, Mongalo, Buler, Loubser, Coetzee and Burdette (2011:191)¹ describe fundamental transactions as transactions that significantly affect ownership of a company's assets or that signal a notable change in shareholding of a company. This attracted additional regulation under the Companies Act; however, some transactions are not permitted at all

Fundamental transactions refer to the following transactions:

- the disposal of all or the greater part of the company's assets or undertaking (sec 112)
- amalgamations or mergers (sec 113) for information purposes)
- schemes of arrangement (sec 117) (for information purposes)

¹ Davies, D, Cassim, F, Geach, W, Mongalo, T, Buler, D, Loubser, A, Coetzee, L & Burdette, D. 2011. *Companies and other business structures in South Africa*. Cape Town, SA: Oxford University Press.

We will just focus on the first fundamental transaction (sec 112) and you are only required to have a broad idea about the last two types of transactions.

Topic 6 is divided into the following learning units:

Learning unit	Title
6.1	Financial assistance for subscription of securities
6.1.1	Financial assistance for subscription of securities (sec 44)
6.2	Loans or other financial assistance to directors
6.2.1	Loans or other financial assistance to directors (sec 45)
6.3	Proposals to dispose of all or the greater part of assets or undertaking
6.3.1	Proposals to dispose of all or the greater part of assets or undertaking (sec 112 & 115)

TEXTUAL AMENDMENTS AND ADDITIONS

Before proceeding with the study of this topic, please refer to Tutorial Letter 102 for this module to acquaint yourself with any textual amendments and additions that may have been indicated.

LEARNING OUTCOMES

Learning unit	In this topic, we will focus on the following learning outcomes:	Level
6.1 Financial assistance for subscription of securities	<ul style="list-style-type: none"> Give advice, discuss concerns, and apply the requirements regarding financial assistance for subscription of securities. 	2
6.2 Loans or other financial assistance to directors	<ul style="list-style-type: none"> Give advice, discuss concerns, and apply the requirements regarding loans or other financial assistance to directors. 	2
6.3 Proposals to dispose of all or greater part of assets or undertaking	<ul style="list-style-type: none"> Give advice, discuss concerns, and apply the requirements regarding proposals to dispose of all or greater part of assets or undertaking. 	2



LEARNING UNIT 6.1

Financial assistance for subscription of securities

INTRODUCTION

The Act deals with two types of financial assistance. The first is financial assistance for subscription of securities, and the second is loans or other financial assistance to directors. In this learning unit, we will deal with the first. An example of financial assistance for subscription of securities would be a company that lends money to someone to enable that person to purchase shares in the company. This will now be discussed in more detail.

6.1.1 FINANCIAL ASSISTANCE FOR SUBSCRIPTION OF SECURITIES (SEC 44)

It is important to note that section 44(1) indicates that financial assistance does not include lending money in the ordinary course of business by a company whose primary business is the lending of money. **For example**, a bank normally lends money in its ordinary course of business. If you were to lend money from the bank, at the same interest rate and repayment terms as would apply to any other person, and thereafter used this money to purchase shares in the bank, which lent you the money, this would **not** constitute financial assistance in terms of section 44.

Financial assistance includes a loan, a guarantee, or the provision of security or otherwise to any person for the purpose of, or in connection with, the subscription of any option, or securities, issued or to be issued by the company or a related or interrelated company, or for the purpose of any securities of the company or a related or interrelated company [sec 44(2)].

From the above paragraph, it is evident that the lending of money is not the only type of financial assistance covered by section 44. If a company would give up a building, which it owns as security in order for you to obtain a loan (to enable you to purchase shares in this company), it would constitute financial assistance in terms of section 44.

In order for financial assistance to be provided legally in terms of section 44

- it should be approved by the board (directors' resolution)
- any restrictions in the company's MOI must be complied with; a special resolution should have been passed within the previous two years, which approved such assistance either for the specific recipient or generally for a category of potential recipients, and the particular recipient(s) should fall within this category
- the board should be satisfied that the solvency and liquidity tests have been satisfied immediately after providing the financial assistance
- the board should be satisfied that the terms under which the financial assistance is to be given are fair and reasonable to the company
- the board must ensure that if the company's MOI includes any conditions or restrictions regarding the giving of financial assistance, they must have been complied with (Note: It is not a prerequisite that the company's MOI must authorise such a transaction. In other words, if no reference is made in the MOI to financial assistance, the transaction can still go ahead, provided the company has complied with the other requirements set out above.)

The inclusion of the special resolution requirement is an essential safeguard against potential abuse of power by the directors.

Securities referred to above include

- bonds, debentures and any other form of security
- the purchase of any securities of the company or a related or interrelated company (in other words, the securities of upward, downward and sideways-related companies)

Diagram 6.1.1 below contains a summary of section 44.

Loftus (Pty) Ltd also holds 55% of the shares in Sundown (Pty) Ltd; numerous individuals, who are not connected with the Loftus Group at all, hold the other 45% of the shares.

The directors of the various companies are as follows:

Loftus (Pty) Ltd	Bulle (Pty) Ltd	Sundown (Pty) Ltd
Victor Hatfield	Hotboy Rapele	Brave Baloyi
Lane Kershner	Wynand Oliver	Danny Mudow
Hotboy Rapele	Jon Mametsi	Patrick Motsepa
Frans Hougie	Dupree Fourie	Frans Hougie

The following matters with possible legal implications have been referred to you:

Matter 1

Sundown (Pty) Ltd intends issuing shares to all its current shareholders. Bulle (Pty) Ltd agreed to finance the shareholders of Sundown (Pty) Ltd to enable them to purchase those shares. This is not financial assistance pursuant to an employee share scheme.

REQUIRED

In respect of **matter 1**, discuss the requirements of the Companies Act, 2008, which must be complied with in respect of the loan to the shareholders of Sundown (Pty) Ltd. (12)

FEEDBACK ON ACTIVITY 1

Reference: Section 44 of the Companies Act

Matter 1

Bulle (Pty) Ltd may make this loan, provided

- any conditions or restrictions in respect of the granting of “financial assistance” set out in the MOI are adhered to
- the board is satisfied that immediately after providing the loan, Bulle (Pty) Ltd satisfied the liquidity/solvency test
- considering all reasonably foreseeable financial circumstances of the company
 - the assets of the company, fairly valued, equalled or exceeded the liabilities of the company, fairly valued
 - it appears as if the company would be able to pay its debts as they become due in the ordinary course of business for a period of 12 months from the date of considering the liquidity and solvency of the company
- the board is also satisfied that the terms of the loan are fair and reasonable to the company
- a **special** resolution was obtained

The special resolution must have been obtained within the previous two years and could have been for a specific loan to the shareholders of Sundown (Pty) Ltd, or generally for a category of potential recipients, and the specific recipient falls into that category (sec 44(3)(a)(ii)).

The MOI cannot permit the granting of a loan in contravention of this section, for example, that it provides that the loan does not require a special resolution.

SUMMARY

In this learning unit, we explained and applied the requirements regarding financial assistance for subscription of securities in terms of the Companies Act.

After having worked through the learning unit and the references to the prescribed study material, you should be able to:

- Give advice, discuss concerns, and apply the requirements regarding financial assistance for subscription of securities.



LEARNING UNIT 6.2

Loans or other financial assistance to directors

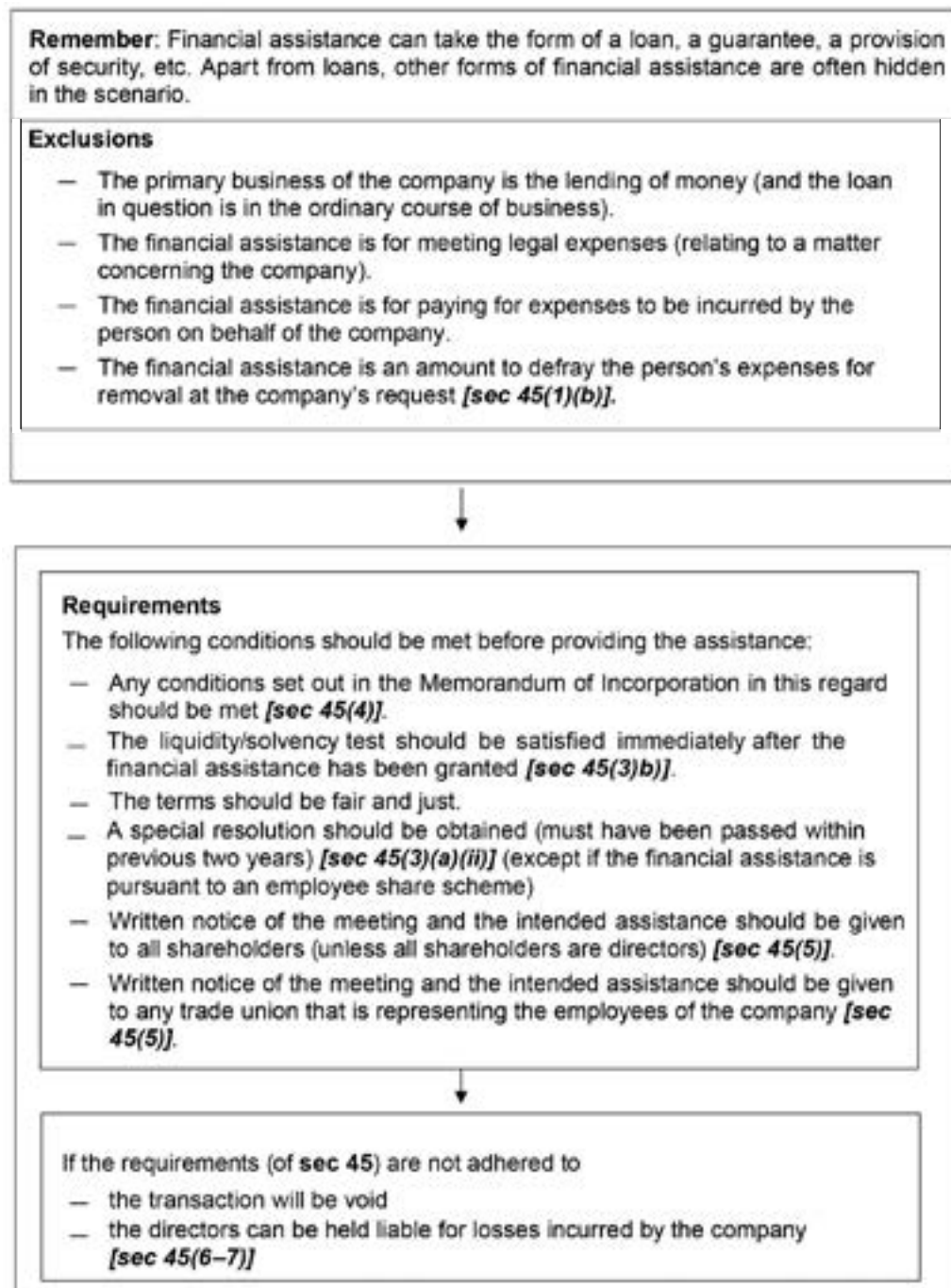
INTRODUCTION

In this learning unit, we will discuss the second type of financial assistance, namely, loans or other financial assistance to directors. Section 45 applies to loans or financial assistance to directors and includes the granting of a loan or other financial assistance from a company to one of its directors or a related person (sec 2 of the Act) of the director. The requirements of section 45 are largely similar to those of section 44.

6.2.1 LOANS OR OTHER FINANCIAL ASSISTANCE TO DIRECTORS (SEC 45)

To determine if a company may provide financial assistance to any of the parties as set out in **section 45(2)** of the Companies Act, the requirements as set out in diagram 6.2.1 below should be considered:

DIAGRAM 6.2.1: Loans or other financial assistance to directors



STUDY

Study section 45 of the Companies Act.

ACTIVITY 2

After you have studied the relevant sections from your prescribed textbook, you should try to answer the following questions to test your knowledge.

You are a member of the audit team working on the 30 June 2012 audit of Smugglers (Pty) Limited, an export/import company. Borders Limited holds 70% of

Smugglers (Pty) Limited's capital, while other companies in the group are Guards (Pty) Limited (of which Borders Limited holds 100%) and Contraband (Pty) Limited (of which 60% is held by Smugglers (Pty) Limited). Eleven private investors hold the remaining shares in Smugglers (Pty) Limited.

Of the four companies within the group, you are responsible for the audit appointment of Smugglers (Pty) Limited only. The three remaining companies are audited by other firms.

Borders Limited purchased 30% of its shares in Guards Proprietary Limited on 31 October 2011. Prior to this, it already owned 70% of the shares.

Your permanent audit file revealed the following:

Directors of:

Borders Limited	Billy Kidd Roy Rogers Davy Crockett Horst Trigger
Smugglers (Pty) Limited	J T Edson Louis L'amour Bill Ocean
Contraband (Pty) Limited	Roy Rogers Willy Nelson
Guards (Pty) Limited	Bill Haley Chuck Berry

You have been assigned to the audit of statutory matters and as part of the procedures you will need to perform, you have extracted the following matter for consideration:

A loan of R1.5 million made to Roy Rogers for his personal use.

REQUIRED

Discuss the loan made by Smugglers (Pty) Limited in terms of the Companies Act, 2008. (8)

FEEDBACK ON ACTIVITY 2

Reference: Section 45 of the Companies Act

In terms of section 45 of the Companies Act, the board of Smugglers (Pty) Limited may authorise the loan to a director of itself (not the case) or the director of a related company. Roy Rogers is a director of Smugglers (Pty) Limited's holding company and of its own subsidiary Contraband (Pty) Limited. Roy Rogers therefore qualifies as "related".

In making any loans to directors, the board has to comply with any conditions or restrictions contained in the MOI.

In making the loan, the board must

- ensure the loan is pursuant to a special resolution of the shareholders, adopted within the previous two years and which approved the loan specifically to Roy Rogers or generally to a category of potential recipients into which Roy Rogers would fall (for example, directors)
- be satisfied that immediately after providing the financial assistance, Smugglers (Pty) Limited would satisfy the solvency and liquidity test
- be satisfied that the terms and conditions of the loan are fair

The MOI cannot overrule the above conditions.

The board must provide written notice of this resolution to the shareholders and any trade union representing its (Smugglers (Pty) Limited's) employees. If the total value of all financial assistance (contemplated under this section) given within the financial year exceeds one-tenth of 1% of the company's net worth at the time of the resolution, this notice must be given within 10 business days of the resolution. If the total value does not exceed one-tenth of 1% of the net worth, the notice period will be 30 days from year end.

If the board approves the loan in contravention of section 45 or the MOI, it will be void.

ACTIVITY 3

Using the information provided in activity 1 (learning unit 6.1) and the following matters, answer the question below.

Matter 1

The board of Loftus (Pty) Ltd approved low-interest unsecured loans of R500 000 each to Frans Hougie and Brave Baloyi to enable them to invest (in their private capacities) in a newly formed company that manufactures rugby and soccer balls. The loans were approved based on a unanimous decision the four directors of the board made after the board had considered the liquidity and solvency of Loftus (Pty) Ltd and found it to be satisfactory.

REQUIRED

In respect of **matter 1**, discuss the possible consequences of granting the loans to Frans Hougie and Brave Baloyi. (15)

FEEDBACK ON ACTIVITY 3

Reference: Sections 45, 76 and 77 of the Companies Act

Matter 1

These loans were granted in contravention of the Companies Act, 2008. The loans were granted on the strength of the **board's** approval that required a special resolution of the shareholders. A special resolution was required, as the loans were granted to a director (Frans Hougie) of the company itself **and** a company related to Loftus (Pty) Ltd (Sundown [Pty] Ltd) and another director, Brave Baloyi, of the same related company. Sundown (Pty) Ltd is a subsidiary of Loftus (Pty) Ltd.

It is also evident that Frans Hougie voted on a transaction in which he had a direct financial interest. He is not entitled to vote on the matter or even participate in the consideration of the loan.

The board of directors also failed to ensure that the conditions of the loan were fair to the company. Providing **unsecured** low-interest loans, which they should have known were to be invested in a newly formed company, is not fair to the company (Loftus [Pty] Ltd).

It is further evident that these loans were given in contravention of section 45; they will therefore be void. As all four directors voted in favour of the loan, they will be jointly and severally liable for any losses that Loftus (Pty) Ltd may suffer because of, say, the loans not being repaid.

Then there is the matter of the directors' standards of conduct. In terms of section 76, a director must exercise the powers and functions of a director

- in good faith and for a proper purpose
- in the best interest of the company
- with the degree of care, skill and diligence reasonably expected of a director

This means that the director should take reasonable, diligent steps to be informed about the matter at hand. A diligent director would definitely have been aware of the authority and procedures required for the proper authorisation of a loan to a director. Thus, the directors have not acted in accordance with the above guidelines.

In terms of section 77, the directors of Loftus (Pty) Ltd may be held liable for any loss, damages or costs the company sustained because of a breach of fiduciary duty. Did they, for example, act in bad faith when approving the loans, or did they commit a delict regarding any breach of the directors' duty to act with the necessary degree of care, skill and diligence?

SUMMARY

In this learning unit, you learned about the requirements regarding loans or financial assistance to directors in terms of the Companies Act .

After having worked through the learning unit and the references to the prescribed study material, you should be able to:

- Give advice, discuss concerns, and apply the requirements regarding loans or financial assistance to directors.



LEARNING UNIT 6.3

Proposals to dispose of all or the greater part of assets or undertaking

INTRODUCTION

A company's board of directors has the power to manage the company, but what happens if the board wants to dispose of the whole or the greater part of the company's business or assets? This does not constitute managing the business, but involves putting an end to the business or the greater part of it. This is a decision of a fundamental nature and sections 112 and 115 deal with decisions of this nature.

6.3.1 PROPOSALS TO DISPOSE OF ALL OR THE GREATER PART OF ASSETS OR UNDERTAKING (SEC 112 AND 115)

Section 112(2) provides that [except for those instances mentioned in sec 112(1)] the requirements for disposal of the greater part of the assets or undertaking include *inter alia*

- a special resolution of the shareholders, in accordance with section 115 (A special resolution is required in order to protect minority shareholders in particular by ensuring that a significant minority can block large disposals.)
- that the company has satisfied all other requirements set out in section 115, to the extent that those requirements are applicable to such disposal by that company (The protective measure in section 115(4) promotes fairness and decreases the risk of conflicts of interest.)
- the notice of a shareholder's meeting to consider a resolution to approve the special resolution in the first point above, which must
 - be delivered in terms of section 62
 - include or be accompanied by a written summary of the precise terms of the transaction to be considered at the shareholder's meeting as well as the provisions of sections 115 and 164

Section 112(4) requires that where any part of the assets of the company or the undertaking is disposed, the company must be sold at its fair market value. The

price should be that which an interested seller would pay to an interested buyer in an open market.

A resolution contemplated in this section is effective only to the extent that it authorises a specific transaction [sec 112(5)]. The effect of this provision is to remove the possibility of a company seeking broad approval at an annual general meeting and then making substantial asset sales soon thereafter.

Section 115 makes provision for approvals required for major disposals, mergers and amalgamations, and schemes of arrangement. It provides *inter alia* that the proposed transaction must be approved

- by a special resolution adopted by persons entitled to exercise voting rights on such matter, at a meeting called for that purpose and at which sufficient persons are present to exercise, in aggregate, at least 25% of all the voting rights that are entitled to be exercised on the matter, or any higher percentage as may be required by the company's MOI, as contemplated in section 64(2)
- by a special resolution, also in the manner described in the above paragraph, by the shareholders of the company's holding company (if applicable), if
 - the holding company is a company or an external company
 - the proposed transaction concerns a disposal of all or the greater part of the assets or undertaking of the subsidiary
 - having regards for the consolidated financial statements of the holding company, the disposal by the subsidiary constitutes a disposal of all or the greater part of the assets or undertaking of the holding company
- by the court, to the extent required under the circumstances and in the manner contemplated in subsections (3) to (6) of section 115.

Take note that despite a resolution having been adopted as contemplated in the first two manners set out above, a company may not proceed to implement that resolution without the **approval of a court** and without meeting certain further requirements (refer to sec 115(3)(a) and (b)).

ACTIVITY 4

Block (Pty) Ltd is a company that manufactures brass-plumbing requisites. The company has five directors. The most senior directors of Block (Pty) Ltd, John Joint and Eric Elbow, have been concerned about the falling sales of brass-plumbing requisites and the appearance on the market of a new plastic range of plumbing requisites imported from Taiwan. They intend taking the following action:

They are planning to sell all the company's manufacturing equipment, thus getting out of the brass-plumbing requisites market.

A scrutiny of the company's statutory records has revealed that the company has 150 000 authorised shares, 100 000 of which are in issue. John Joint and Eric Elbow hold minor shareholdings, while no other directors hold shares. The authorised shares are no par value shares.

REQUIRED

Discuss the intentions of John Joint and Eric Elbow regarding the selling of all the company's manufacturing equipment in terms of the Companies Act.

FEEDBACK ON ACTIVITY 4

Reference: Sections 112 and 115 of the Companies Act

Disposal of the greater part of the assets

- (1) The directors may not dispose of the greater part of the assets of Block (Pty) Ltd without a special resolution taken by the shareholders.
- (2) As the two directors are "minor" shareholders, they will not have sufficient voting rights on their own.
- (3) The directors need to give 10 business days' notice of the meeting to the shareholders.
- (4) The notice must include a written summary of the terms of the transactions (selling the assets).
- (5) To form a quorum, sufficient persons (shareholders/proxies) must attend the meeting to exercise at least 25% of the voting rights that are entitled to be exercised on the matter.
- (6) Unless the MOI stipulates a different percentage, the resolution must be passed by 75% of the voting rights (exercisable on the matter) present in person or by proxy.

SUMMARY

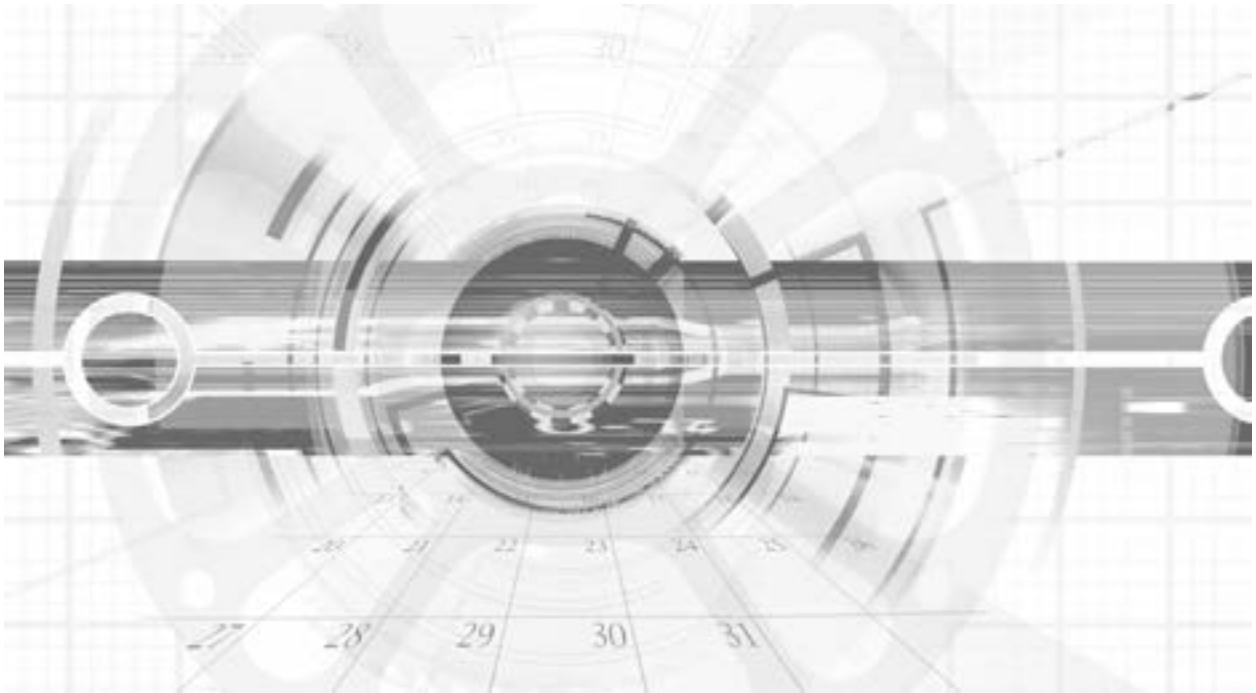
In this learning unit, you learned about the requirements regarding proposals to dispose of all or greater part of assets or undertaking of a company in terms of the Companies Act.

After having worked through the learning unit and the references to the prescribed study material, you should be able to:

- Give advice, discuss concerns, and apply the requirements regarding proposals to dispose of all or greater part of assets or undertaking of a company.

CONCLUSION

In this topic about **transactions**, we explained and applied the requirements regarding financial assistance for subscription of securities, loans or other financial assistance to directors and proposals to dispose of all or greater part of assets or undertaking of a company. The next topic, topic 7, deals with business rescue, compromise with creditors as well as deregistration and winding up of a company (when a company ends).



TOPIC 7

Business rescue, compromise with creditors, winding-up and deregistration of companies

TOPIC OVERVIEW

Many factors may lead to a company's failure, for example, poor management, no demand for the products the company manufactures due to bad planning, and the inability to identify other products in demand, etc. These factors can sometimes lead to the liquidation or take-over of a company (in terms of the old Companies Act, 1973), which may have a huge impact on the employees of the company, group of companies, or the economy.

The Companies Act, 2008, now follows a new approach to financially stressed companies. This Act provides for business rescue proceedings with the aim of saving a business by following certain proceedings, even if the outcome is not always successful. If the business is rescued, it means that jobs may be saved and the company's creditors may receive a larger portion of the monies owed to them. Normally, there must at least be the prospect that the company can be rescued before these proceedings are undertaken. According to Cassim (2011:144), rescue means that the company is reorganised in order to restore it to a profitable entity and thereby avoid liquidation.

The Companies Act, 2008, also makes provision for voluntary winding up of solvent companies, but companies that failed and cannot be saved by business rescue proceedings will have to be liquidated.

Topic 7 is divided into the following learning units:

Learning unit	Title
7.1	Winding-up of solvent companies and deregistration of companies (sec 79–83)
7.1.1	Winding-up of solvent companies (sec 79)
7.1.2	Voluntary winding-up of solvent company (sec 80)
7.1.3	Winding-up solvent companies by court order (sec 81)
7.1.4	Dissolution of companies and removal from register (sec 82–83)
7.2	Business rescue
7.2.1	Business rescue (sec 128–155)
7.3	Protection for whistle-blowers, application to declare a director delinquent or under probation, relief from oppressive or prejudicial conduct or from abuse of the separate juristic personality of the company, complaints to the Commission or Panel, powers to support investigations and inspections, and companies' tribunal adjudication procedures
7.3.1	Protection for whistle-blowers (sec 159)
7.3.2	Application to declare a director delinquent or under probation (sec 162)
7.3.3	Relief from oppressive or prejudicial conduct or from abuse of the separate juristic personality of the company (sec 163)
7.3.4	Complaints to the commission or panel (sec 168–184)

TEXTUAL AMENDMENTS AND ADDITIONS

Before proceeding with the study of this topic, please refer to Tutorial Letter 102 for this module to acquaint yourself with any textual amendments and additions that may have been indicated.

LEARNING OUTCOMES

Learning unit	In this topic, we will focus on the following learning outcomes:	Level
7.1 Winding-up of solvent companies and deregistration of companies	<ul style="list-style-type: none"> Give advice, discuss concerns, and apply the requirements regarding the winding up of solvent companies and deregistration of companies. 	2
7.2 Business rescue	<ul style="list-style-type: none"> Give advice, discuss concerns, and apply the requirements for business rescue. 	2

<p>7.3 Protection for whistleblowers, application to declare a director delinquent or under probation, relief from oppressive or prejudicial conduct or from abuse of the separate juristic personality of the company, complaints to the Commission or Panel, powers to support investigations and inspections, and companies' tribunal adjudication procedures</p>	<ul style="list-style-type: none"> • Gain basic knowledge of the requirements regarding <ul style="list-style-type: none"> – the protection for whistle-blowers – an application to declare a director delinquent or under probation – relief from oppressive or prejudicial conduct or from abuse of the separate juristic personality of the company – complaints to the Commission or Panel – powers to support investigations and inspections – company and Tribunal adjudication procedures. 	<p>1</p>
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LEARNING UNIT 7.1

Winding-up of solvent companies and deregistration of companies

INTRODUCTION

The winding-up of solvent companies is regulated by Part G of Chapter 2 (sec 79–83) under the Companies Act, 2008. Insolvent companies will be wound up under the provisions of the Companies Act, 1973, item 9(1) of Schedule 5 until the proposed Bankruptcy Act is announced. This learning unit deals more specifically with the winding-up of solvent companies.

7.1.1 WINDING-UP OF SOLVENT COMPANIES (SEC 79)

Section 79 provides that a solvent company may be dissolved by

- **voluntary winding-up** initiated by the company as contemplated in section 80 of the Companies Act (section 7.1.2), and conducted either by the company or its creditors as determined by a special resolution adopted by the company
- **winding-up and liquidation by a court order**, as contemplated in section 81 of the Companies Act (section 7.1.3).

Where a company has adopted a resolution for the voluntary winding-up of a solvent company (sec 80), or after an application has been made to a court for winding-up (sec 81), and subsequently it is determined that the company to be wound up is or may be insolvent, a court, on application by any interested person, may order that the company be wound up as an insolvent company in terms of the laws referred to or contemplated in item 9(1) of Schedule 5.



STUDY

Study section 79 of the Companies Act.

7.1.2 VOLUNTARY WINDING-UP OF A SOLVENT COMPANY (SEC 80)

As indicated in 7.1.1, a solvent company may be wound up voluntarily if the company has adopted a special resolution to do so. The special resolution may provide for the company or its creditors to perform the winding-up.

Section 80 further provides that such resolution be filed with the Commission, together with the prescribed notice and filing fee. It also provides for arranging for security, satisfactory to the Master, for the payment of the company's debts within 12 months after the start of the winding-up of the company, or obtaining the Master's consent to dispense with security. Section 80(3)(b)(i) & (ii) indicates under which circumstances the Master would consent to dispense with security.

It is interesting to note [sec 80(8)] that the company remains a juristic person and retains all of its powers as such while it is being wound up voluntarily. However, when the company's winding-up starts, the company must stop carrying on its business, except to the extent required for the beneficial winding-up of the company. All the powers of the company's directors also ceases, except when specifically authorised in the case of the winding-up of the company, by the liquidator or the shareholders at a general meeting; or in the case of a winding-up by creditors, the liquidator or the creditors.

7.1.3 WINDING-UP SOLVENT COMPANIES BY COURT ORDER (SEC 81)

Section 81 provides that a court may order a solvent company to be wound up if

- the company has passed a special resolution to the effect that it be wound up by the court; or applied to the court to have its voluntary winding-up continued by the court
- the practitioner of a company appointed during business rescue proceedings has applied for liquidation in terms of section 141(2)(a), on the grounds that there is no reasonable prospect of the company being rescued
- one or more of the company's directors have applied to the court
- the company, one or more directors, or one or more shareholders have applied to the court
 - a shareholder has applied, with leave from the court, for an order to wind up the company
 - the Commission or Panel has applied to the court for an order to wind up the company

Section 81(2) stipulates the circumstances under which a shareholder may apply to a court, while section 81(3) provides that a court may not make an order applied for in terms of subsection 1, where certain actions have taken place before the conclusion of the court proceedings. Section 81(4) determines when the winding-up of a company begins.

The dissolution of companies, the removal from the register and the effect of the removal of a company from the register are dealt with in sections 82 and 83.



STUDY

Study sections 81 of the Companies Act.

7.1.4 DISSOLUTION OF COMPANIES AND REMOVAL FROM REGISTER (SEC 82 AND 83)



STUDY

Study sections 82 and 83 of the Companies Act.

SUMMARY

In this learning unit, we explained and applied the requirements regarding the winding-up of solvent companies and deregistration of companies in terms of the Companies Act. We have also dealt with the dissolution of companies and removal from register.

After having worked through the learning unit and the references to the prescribed study material, you should be able to:

- Give advice, discuss concerns, and apply the requirements regarding the winding-up of solvent companies, deregistration of companies and dissolution of companies and removal from register.



LEARNING UNIT 7.2

Business rescue

INTRODUCTION

Section 128 deals with the definitions used in Chapter 6 of the Companies Act. You should study this section; otherwise, you may find it difficult to understand the use of some of these phrases in the sections thereafter and in this learning unit.

What is business rescue?

Business rescue is defined as proceedings that facilitate the rehabilitation of a company, which is financially distressed (insolvent), by providing for

- the temporary supervision of the company and its management, and of its affairs, business and property
- a temporary moratorium (suspension or halt) on the rights of any parties claiming against the company or in respect of property in its possession
- the development and implementation (if approved) of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in such a manner that
 - the company is given a better chance of continuing its existence in a solvent manner, or
 - if not possible, it will result in a better return for the company's creditors or shareholders, than in the case of immediate liquidation of the company

7.2.1 BUSINESS RESCUE (SEC 128–155)

According to section 129(1), the board of a company may resolve that the company voluntarily begin business rescue proceedings if the board has reasonable grounds to believe that

- the company is financially distressed [sec 128(1)(f)]
- there is a reasonable prospect that the company can be rescued

Section 129 also provides the further steps to be followed, including the appointment of a practitioner. The practitioner's functions and terms of appointment are included in sections 138 to 143.

Section 130 provides for objections (by an affected person) to a company's resolution regarding voluntary business rescue by applying to the court for an

order setting aside the resolution. It also provides for a period restriction and the grounds on which the application may be made.

Section 131 provides that an affected person may apply to the court for an order placing the company under supervision and commencing business rescue proceedings where the company itself has not adopted a resolution for voluntary business rescue.

The rights of affected persons during business rescue proceedings are included in sections 144 to 149.

After the practitioner has consulted with the creditors, other affected persons and the management of the company, he or she must prepare a business rescue plan (sec 150) for consideration and possible adoption at a meeting to determine the future of the company (sec 151). At that meeting, the practitioner must also inform the meeting, for example, whether there may be a reasonable prospect of the company being rescued (sec 152).

Section 153 deals with the steps that should be followed when the business rescue plan has been rejected as contemplated at the abovementioned meeting.

Section 155 provides that, irrespective of whether a company is financially distressed, or not, but is not engaged in business rescue proceedings, the board of the company or the liquidator of the company, if the company is being wound up, may propose an arrangement or a compromise of its financial obligations to all of its creditors, or to all the members of any class of its creditors, by delivering a copy of the proposal and notice of the meeting to consider the proposal to

- every creditor or every member of the relevant class of creditors whose name or address is known to or can reasonably be obtained by the company
- the Commission.



STUDY

Study sections 128 to 155 of the Companies Act.

SUMMARY

In this learning unit, we explained the requirements for business rescue in terms of the Companies Act.

After having worked through the learning unit and the references to the prescribed study material, you should be able to:

- Give advice, discuss concerns, and apply the requirements for business rescue.



LEARNING UNIT 7.3

Protection for whistle-blowers, application to declare a director delinquent or under probation, relief from oppressive or prejudicial conduct or from abuse of the separate juristic personality of the company, complaints to the commission or panel, powers to support investigations and inspections, and companies' tribunal adjudication procedures

INTRODUCTION

This learning unit is presented on knowledge level 1, and you are therefore only required to have a basic understanding of the sections discussed in the learning unit.

7.3.1 PROTECTION FOR WHISTLE-BLOWERS (SEC 159)

Whistle-blowers, who disclose information about a company or its directors, must be provided with protection against dismissal, demotion or legal action.

The explanation below indicates that a whistle-blower must make any disclosures in **good faith** and to the effect that the information disclosed shows or tends to show that the company or a director (or prescribed officer) has contravened an act or legislation, failed to comply with a legal obligation or engaged in certain conduct, etc.

A company cannot override this section of the Companies Act in its Memorandum of Incorporation or in its rules.

Section 159 applies to whistle-blowers who disclose in good faith that the company or director has

- contravened the Companies Act or another act enforced by the Commission failed (or is failing) to comply with any legal obligation to which the company is subject

- engaged in conduct that poses a health or safety risk to any individual, or a risk of environmental damage
- discriminated unfairly against any person
- contravened any legislation that could expose the company to risk/liability [sec 159(3)(b)]

by offering

- qualified privilege in respect of the disclosure
- immunity from civil, criminal or administrative liability with regard to the disclosure [sec 159(4)]

to the following whistle-blowers with regard to the company:

- Shareholders
- Directors
- Company secretary
- Prescribed officers
- Employees
- Trade unions
- Other representatives of employees
- Suppliers of goods or services
- Employees of such suppliers



STUDY

Study section 159 of the Companies Act.

7.3.2 APPLICATION TO DECLARE A DIRECTOR DELINQUENT OR UNDER PROBATION (SEC 162)

Some of the parties, who may apply to a court for an order declaring a person delinquent or under probation, are set out in section 162(2). They include the company, shareholders, directors, company secretary or prescribed officer of a company, a registered trade union that represents employees of the company, or another representative of the employees of a company. The prerequisites for taking this action are included in section 162(2)(a) and (b). Other parties that may apply to the court include the Commission or the Panel and any organ of state responsible for the administration of any legislation [sec 162(3) & (4)].

You should be able to list the instances in which the court must make an order declaring a person a delinquent director [sec 162(5)] and the court may make an order placing a person under probation [sec 162(7)].

Note that a declaration of delinquency is unconditional and subsists for the lifetime of the person declared delinquent, if so declared in terms of subsection 5(a) or (b) – for example, where a director acted as a director while he or she was ineligible or disqualified in terms of section 69.

Where a person was declared delinquent under subsection 5(c) to (f), it may be made subject to any conditions that the court considers appropriate and will

subsist for seven years from the date of the order, or such longer period as determined by the court. Examples of the latter would be where a director grossly abused the position of director or took personal advantage of information or an opportunity, contrary to section 76(2)(a).



STUDY

Study section 162 of the Companies Act.

ACTIVITY 1

The shareholders of your company has recently appointed a friend of yours, Maria Bueno, as a director of GPS Limited, an electronics company specialising in the development and manufacturing of global positioning systems (GPSs) for vehicles and motorcycles. The company is not listed. Maria is considered a valuable individual with regard to the future of the company, particularly concerning its research and development programmes.

Maria has never filled the position of a company director before and although she is excited about her promotion, she is concerned about her responsibilities as a director, particularly those arising from the Companies Act. She has heard that the Companies Act contains sections dealing with standards of directors' conduct and that if she does not perform, she can be removed from the board and dismissed from the company. She has also heard that the chairperson of the board can put her on probation as a director or declare her delinquent.

She has put the following questions to you:

Can the chairperson or any other party put me on probation? What requirements must be met in this regard in terms of the Companies Act? (4½)

FEEDBACK ON ACTIVITY 1

Reference: Section 162 of the Companies Act.

Can the chairperson or any other party put me on probation?

No, in terms of section 162, **only the court** can put you as director on probation; the chairperson cannot make this decision. (1½)

However, the **company, a shareholder, a director, company secretary, a trade union representative (or similar representative) can apply to the court to have you declared "on probation"**. (1½)

Certain **company regulatory bodies**, such as the **Companies and Intellectual Property Commission (the Commissioner)** can also make an **application to the court** if, for example, a director **grossly abused the position of director** or took **personal advantage of information or an opportunity** contrary to the standards of directors' conduct (sec 76). (1½)

(4½)

7.3.3 RELIEF FROM OPPRESSIVE OR PREJUDICIAL CONDUCT OR FROM ABUSE OF THE SEPARATE JURISTIC PERSONALITY OF THE COMPANY (SEC 163)

This section enables a shareholder or a director of a company to apply to a court for relief if any of the circumstances are present [subsection 1(a)–(c)]. You should be able to list the various interim or final orders that a court considers fit [subsection (2)(a) to (l)].

7.3.4 COMPLAINTS TO THE COMMISSION OR PANEL (SEC 168–184)

You should be aware of complaints to the Commission or Panel (awareness level) by carefully reading the relevant sections in the prescribed book.

SUMMARY

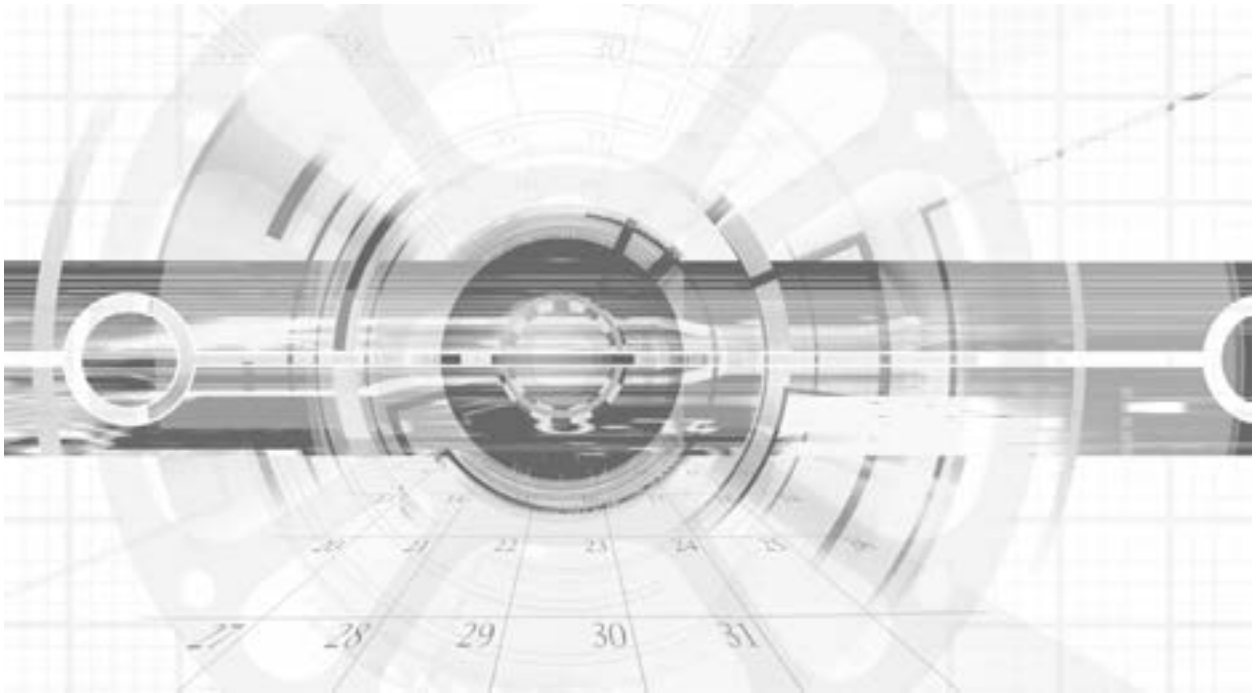
In this learning unit, we explained and applied the requirements regarding protection for whistle-blowers, application to declare a director delinquent or on probation, relief from oppressive or prejudicial conduct or from abuse of the separate juristic personality of the company, complaints to the Commission or Panel, powers to support investigations and inspections, and Companies' tribunal adjudication procedures in terms of the Companies Act.

After having worked through the learning unit and the references to the prescribed study material, you should:

Have a basic understanding of the requirements regarding protection for whistle-blowers, application to declare a director delinquent or under probation, relief from oppressive or prejudicial conduct or from abuse of the separate juristic personality of the company, complaints to the Commission or Panel, powers to support investigations and inspections, and Companies' tribunal adjudication procedures.

CONCLUSION

In this topic about **compromise with creditors, winding-up and deregistration of companies, business rescue and protection for whistle-blowers, application to declare a director delinquent or on probation, relief from oppressive or prejudicial conduct or from abuse of the separate juristic personality of the company, complaints to the Commission or Panel, powers to support investigations and inspections, and companies' tribunal adjudication procedures**, we explained and applied the Companies Act requirements. In the following topic we will be dealing with regulatory agencies, offences and penalties.



TOPIC 8

Regulatory agencies, offences and penalties

TOPIC OVERVIEW

The Companies Act relies on a system of administrative enforcement combined with a minimum number of criminal sanctions. Enforcement of the Companies Act takes place through various bodies and by way of various mechanisms.

The Companies Act also makes provision for instances that are deemed to be an offence. These instances include

- disclosing any confidential information concerning the affairs of any person, obtained in a certain way
- false statements, reckless conduct and noncompliance with a compliance notice
- hindering, obstructing or improperly attempting to influence the Commission and certain other parties when they are exercising a power or performing a duty in terms of the Act

The Act, in section 216, also makes provision for penalties for contravention of sections 213 to 215.

In section 218, the Act provides for civil actions where loss suffered can be recovered from a person who contravened any provision in the Act and section 219 provides for a limited time to initiate complaints.

Bear in mind that this topic as a whole is on knowledge level 1, which entails that you should gain a basic understanding of the sections of the Act covered in the topic.

Topic 8 is divided into the following learning units:

Learning unit	Title
8.1	Regulatory agencies and their functions
8.1.1	Regulatory agencies and their functions (sec 185 –204)
8.2	Breach of confidence, false statements, reckless conduct and non-compliance, hindering administration of the Act and penalties
8.2.1	Breach of confidence, false statements, reckless conduct and non-compliance, hindering administration of the Act and penalties (sec 213–216)
8.3	Civil actions and the limited time for initiating complaints
8.3.1	Civil actions (sec 218)
8.3.2	Limited time for initiating complaints (sec 219)

TEXTUAL AMENDMENTS AND ADDITIONS

Before proceeding with the study of this topic, please refer to Tutorial Letter 102 for this module to acquaint yourself with any textual amendments and additions that may have been indicated.

LEARNING OUTCOMES

Learning unit	In this topic, we will focus on the following learning outcomes:	Level
8.1 Regulatory agencies and their functions	<ul style="list-style-type: none"> Gain a basic understanding of the Companies Act requirements for regulatory agencies. 	1
8.2 Breach of confidence, false statements, reckless conduct and non-compliance, hindering administration of the Act and penalties	<ul style="list-style-type: none"> Gain a basic understanding of the requirements regarding breach of confidence, false statements, reckless conduct and noncompliance, hindering administration of the Act and penalties. 	1
8.2 Civil actions and limited time for initiating complaints	<ul style="list-style-type: none"> Gain a basic understanding of civil actions and limited time for initiating complaints. 	1



LEARNING UNIT 8.1

Regulatory agencies and their functions

INTRODUCTION

Enforcement of the Companies Act takes place through various bodies and by way of various mechanisms.

The regulatory agencies under the Act are

- the Companies and Intellectual Property Commission (CIPC)
- the Companies Tribunal (CT)
- the Take-Over Regulation Panel (TORP or Panel)
- The Financial Reporting Standards Council (FRSC)

Each of the agencies has specific functions.

8.1.1 REGULATORY AGENCIES AND THEIR FUNCTIONS (SEC 185–204)

The Companies and Intellectual Property Commission (CIPC) (section 185–192), which was previously known as CIPRO, registers companies, juristic persons and intellectual property rights, maintains information on companies, *inter alia*, and enforces the Companies Act and other Schedule 4 acts. You need to know that the Close Corporations Act is one of these acts.

The Companies Tribunal (CT) (section 193–195), which is an independent juristic person, has to perform its functions impartially and without fear, favour or prejudice and in a transparent manner. The Minister appoints its members and the functions of these members are to adjudicate on any application made to it in terms of the Act, assist in voluntary resolutions of disputes, and perform functions assigned to it in terms of the Companies Act or other acts included in Schedule 4. It functions basically as an appeal body.

The Take-Over Regulation Panel (TORP or Panel) (section 196–202) has been long in existence and is an independent juristic person that must perform its functions impartially without fear, favour or prejudice. Its members include the Commissioner (the head of the CIPCO) and stipulated positions. The Minister appoints other members of the Panel. The duties of the Panel are to regulate and investigate complaints about affected transactions and offers (that is, mergers),

to apply to the court to wind up a company in certain cases, and to consult with the Minister about amendments to the Take-over Regulations.

The last agency is the Financial Reporting Standards Council (FRSC) (section 203–204), which is established by the Minister and which members are appointed by the Minister in terms of requirements of the Act (for example, four practising auditors, two persons knowledgeable about company law, etc). The duties of the FRSC are to receive and consider any relevant information on the reliability of and compliance with financial reporting standards, to advise and consult with the Minister on financial reporting standards, and to make regulations establishing financial reporting standards.



STUDY

Study sections 185 to 204 in the Companies Act. You are only expected to know what is stated above.

SUMMARY

In this learning unit, we explained the requirements for regulatory agencies in terms of the Companies Act.

After having worked through the learning unit and the references to the prescribed study material, you should:

- Have a basic understanding of regulatory agencies.



LEARNING UNIT 8.2

Breach of confidence, false statements, reckless conduct and non-compliance, hindering administration of the act, and penalties

INTRODUCTION

The Companies Act makes provision for instances where certain actions may lead to offences (sec 213–215) and eventually to penalties (sec 216).

8.2.1 BREACH OF CONFIDENCE, FALSE STATEMENTS, RECKLESS CONDUCT AND NON-COMPLIANCE, HINDERING ADMINISTRATION OF THE ACT, AND PENALTIES (SEC 213–216)

Diagram 8.2.1 below summarises sections 213 and 214. An example of an offence in terms of false statements is a company that issues a prospectus to the public in order to invite subscribers to subscribe to securities/shares they want to issue. As the prospectus must contain the prescribed specifications and all the information that an investor may reasonably require to assess the assets and liabilities, as well as the company's financial position, profits and losses, cash flow, etc, it may very well happen that the preparer includes untrue statements. The sections mentioned are therefore included for the protection of investors. You have to be aware of the applicable penalties.

DIAGRAM 8.2.1: Penalties

<p>Breach of confidence (sec 213)</p> <p>It is an offence to disclose any confidential information concerning the affairs of any person obtained in performing any function in terms of the Act or participate in any proceeding in terms of the Act [sec 213(1)(a) & (b)]</p>	<p>Note 1: A person convicted of breaching this section is liable to a fine or imprisonment (not exceeding 10 years), or both [sec 216(a)]</p>
<p>Note 2: Does not apply to information disclosed [sec 213(2)]</p> <ul style="list-style-type: none"> • for the purpose of proper administration or enforcement of this Act • for the purpose of administering justice • at the request of a regulatory agency entitled to receive the information • when required to do so by any court or under any law 	
<p>False statements, reckless conduct and noncompliance (sec 214)</p>	
<p>A person is guilty of an offence if he or she</p> <ul style="list-style-type: none"> • is party to the falsification of any accounting records • knowingly provided false or misleading information, with a fraudulent purpose was knowingly a party to <ul style="list-style-type: none"> — conducting the business recklessly, with gross negligence, and with the intent to defraud any person or for any fraudulent purpose — trading of business under insolvent circumstances — an act or omission calculated to defraud a creditor, employee or security holder or with other fraudulent purpose • is a party to the preparation, approval, dissemination or publication of financial statements, knowing that the statements do not comply with the requirements of section 19 or knowing they are false or misleading 	



STUDY

Study sections 213 to 216 in the Companies Act.

SUMMARY

In this learning unit, we explained the requirements regarding breach of confidence, false statements, reckless conduct and noncompliance, hindering administration of the Act, and penalties in terms of the Companies Act.

After having worked through the learning unit and the references to the prescribed study material, you should:

- Have a basic understanding of the breach of confidence, false statements, reckless conduct and non-compliance, hindering administration of the Act, and penalties



LEARNING UNIT 8.3

Civil actions and the limited time for initiating complaints

INTRODUCTION

This learning unit gives a broad overview of civil actions with regard to any person who contravenes any provision of the Act as well as the limited time for initiating complaints in terms of the Act.

8.3.1 CIVIL ACTIONS (SEC 218)

Section 218 provides that any person who contravenes any provision of the Act is liable to any person for any loss or damage suffered by that person because of that contravention.

This section also provides that nothing in the Act renders void any other agreement, resolution or provision of an agreement, MOI or rule of a company that is prohibited, voidable or that may be declared unlawful in terms of this Act, unless a court has made a declaration to that effect.

8.3.2 LIMITED TIME FOR INITIATING COMPLAINTS (SEC 219)

Section 219 provides that complaints in terms of the Act may not be initiated by or made to the Commission (that is, complaints concerning alleged contraventions of the Act [sec 187(2)(c)] or the Panel (that is, complaints relating to the affected transactions and offers [sec 201(1)(b)], more than three years after the act or omission that is the cause of the complaint; or in the case of a course of conduct or continuing practice, the date on which the conduct or practice ceased.

SUMMARY

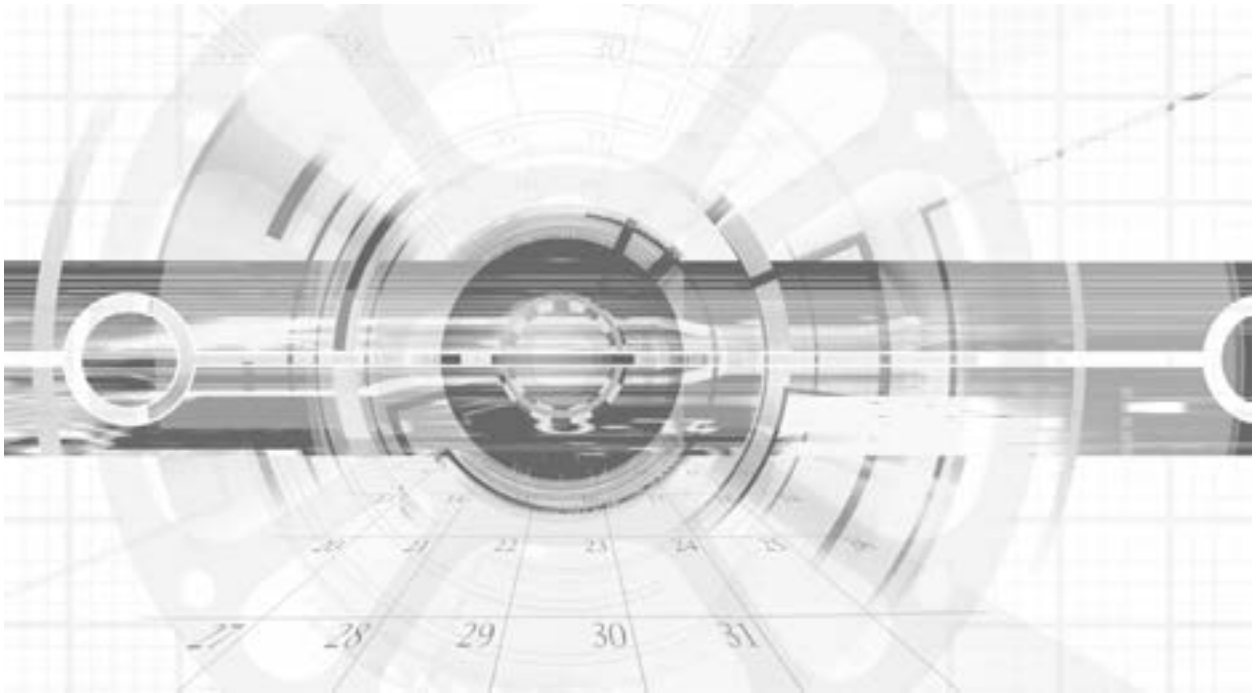
In this learning unit, you learned about the requirements for civil actions and the limited time for initiating complaints in terms of the Companies Act.

After having worked through the learning unit and the references to the prescribed study material, you should:

- Have a basic understanding of civil actions and the limited time for initiating complaints.

CONCLUSION

In this topic about regulatory agencies, offences and penalties, we explained the requirements regarding regulatory agencies and their functions, breach of confidence, false statements, reckless conduct and noncompliance, hindering administration of the Act, and penalties. We also discussed civil actions and the limited time for initiating complaints. Can you explain the link to the other learning units? In the following topic, which is the last topic of our study guide, we will deal with the schedules to the Companies Act, as well as other legislation that is applicable to companies.



TOPIC 9

Schedules to the Companies Act and other legislation applicable to companies

TOPIC OVERVIEW

There are five Schedules to the Companies Act, of which you are required to study Schedules 2, 3 and 5.

We do not expect you to study the Close Corporations Act, even though it is discussed in a learning unit below. However, you must be aware that this form of business is still very much in use and will probably be phased out over time. It is also important to know that certain sections of the Companies Act and/or the Companies Regulations are also applicable to close corporations.

Moreover, you must be aware that other legislation also applies to companies. You will not be examined on the content of that legislation in this module, however.

Topic 9 is divided into the following learning units:

Learning unit	Title
9.1	Schedules to the Companies Act
9.1.1	Schedule 2: Conversion of close corporations to companies, clauses 1 and 2
9.1.2	Schedule 3: Amendments of laws, specifically relating to the Close Corporations Act
9.1.3	Schedule 5: Transitional arrangements
9.2	Close Corporations Act
9.2.1	Close Corporations Act
9.3	Other legislation
9.3.1	Other legislation

TEXTUAL AMENDMENTS AND ADDITIONS

Before proceeding with the study of this topic, please refer to Tutorial Letter 102 for this module to acquaint yourself with any textual amendments and additions that may have been indicated.

LEARNING OUTCOMES

Learning unit	In this topic, we will focus on the following learning outcomes:	Level
9.1 Schedules to the Companies Act (Schedules 2, 3 & 5)	<ul style="list-style-type: none"> Give advice and apply the requirements included in certain Schedules to the Companies Act. 	2
9.2 Close Corporations Act	<ul style="list-style-type: none"> Gain a basic awareness of the Close Corporations Act. 	2
9.3 Other legislation	<ul style="list-style-type: none"> Gain a basic awareness of other legislation of relevance to an accountant. 	1



LEARNING UNIT 9.1

Schedules to the Companies Act (Schedules 2, 3 & 5)

9.1.1 SCHEDULE 2: CONVERSION OF CLOSE CORPORATIONS TO COMPANIES, CLAUSES 1 AND 2

Close corporations could be registered up until section 13 of the Companies Act came into operation on 1 May 2011. Since that date, no company could either be converted into a close corporation. Close corporations continue to exist until they are deregistered or dissolved in terms of the Close Corporations Act, or if they have been converted to a company in terms of the Companies Act.

Section 1 provides for the conversion of close corporations to companies. When a notice of conversion is lodged, it must be accompanied by a written statement approving the conversion, signed by members of the close corporation holding in aggregate at least 75% of the members' interest in the corporation; an MOI; and the prescribed filing fee. In this section, the responsibility of the Commission upon conversion is also dealt with.

Section 2 stipulates that every member of a close corporation, which is converted into a company, be entitled to become a shareholder of the company. However, the shares to be held in the company by the shareholders individually need not necessarily be in proportion to the members' interests previously held. The effect of conversion on the juristic person that existed as a close corporation before conversion; in whom the assets, liabilities, rights and obligations will vest after conversion; and so forth, are also dealt with in section 2.



STUDY

Study sections 1 and 2 in Schedule 2 to the Companies Act.

9.1.2 SCHEDULE 3: AMENDMENTS OF LAWS, SPECIFICALLY RELATING TO THE CLOSE CORPORATIONS ACT

When reading the points below, you will become aware of provisions in the Companies Act and in the Companies Regulations, which also apply to a close

corporation. The following references are made to sections in the Close Corporations Act.

Some of the changes/additions/repeals are as follows:

- The Minister may make regulations prescribing financial reporting standards, or the form and content requirements for financial statements [sec 10(3)] – refer to point 5 in Schedule 3.
- Certain categories of companies are required to have their annual financial statements audited. This also applies to close corporations [section 58(2A)] – refer to point 5 in Schedule 3.
- No more conversions from a company to a close corporation will be allowed because section 27 of the Close Corporations Act has been repealed – refer to point 2 in Schedule 3.
- The provisions regarding persons being removed from an office of trust on account of misconduct; or persons convicted of theft, fraud, etc, who had previously been disqualified from taking part of in the management of a close corporation, except if a court authorised them to take part in the management, have been repealed [sec 47(1)(b)(ii) & (iii)] – refer to point 5 in Schedule 3.
- A person, who has been put on probation by a court in terms of section 162 of the Companies Act, may not participate in the management of the business of a corporation, except to the extent permitted in the order of probation [sec 47(1A)] – refer to point 5 in Schedule 3.
- Application of accountability provisions [sec 34(2) & Chapter 3] of the Companies Act to a close corporation (sec 62A) has been amended – refer to point 5 in Schedule 3. This means that a close corporation should be audited under certain circumstances.



STUDY

Concentrate only on the points listed above, since this will be sufficient for your studies.

ACTIVITY 1

After you have studied the relevant sections from your prescribed textbook, you should try to answer the following questions to test your knowledge. This should help you identify the specific relationships in a given scenario.

- (1) Can a private company convert itself into a close corporation? Give a reason for your answer. (1½)
- (2) All close corporations must calculate a public interest score. True or false? Give a reason for your answer. (1½)
- (3) If a CC must be audited because of its public interest score, its accounting officer may conduct the audit, provided the accounting officer is registered with IRBA. Discuss. (3)

FEEDBACK ON ACTIVITY 1

- (1) No. In terms of Schedule 3 of the Companies Act, 2008, no new close corporations may be registered as from 1 May 2011.
- (2) True. Section 62A of the Close Corporations Act, section 34(2) and section 84(1)(c) of the Companies Act and Companies Regulations 26 and 28

become applicable should the public interest score of a close corporation indicate that an audit is required.

- (3) The accounting officer is a prescribed officer of the close corporation. In terms of the Act and its Regulations, a company or a close corporation, which must be audited, cannot be audited by its own prescribed officer [sec 90(2)(b)(i)].

9.1.3 SCHEDULE 5: TRANSITIONAL ARRANGEMENTS

Every company that was incorporated or recognised in terms of the Companies Act 61 of 1973 continues to exist as a company as of 1 May 2011, as if it had been incorporated and registered in terms of the Companies Act 71 of 2008, as amended, using the same name and registration number previously assigned to it under the old Act (sec 2).

An existing company may file, within two years from 1 May 2011, without charge

- an amendment to its MOI to harmonise it with the Act
- if necessary, a notice of name change and the copy of a special resolution under section 16 to alter its name to meet the requirements of the Act [sec 4(2)]

During the period of two years immediately following 1 May 2011, if there is conflict between a provision of the Act and a provision of a pre-existing MOI of the company, the latter prevails [sec 4(4)(a)].

Section 4(1)(a) to (d) makes provision for Section 21 companies, Section 53(b) companies, companies falling within the definition of state-owned companies and companies limited by guarantee, and they are respectively all deemed to change their MOIs. Each company should state in its MOI that it is a non-profit company; a personal-liability company; that it changed its name in so far as required to complying with section 11(3); and lastly, that it elects to become a profit company, failing which it must change its MOI to state that it is a non-profit company.

Any shares of an existing company that have been issued at a nominal or par value and are held by a shareholder immediately before 1 May 2011 will continue to have the nominal or par value assigned to them when issued [sec 6(2)].

A person holding office as a director, company secretary or auditor of an existing company immediately before 1 May 2011 continues to hold that office as from 1 May 2011, subject to the company's MOI and this Act [section 7(1)]. Where the person referred to above in terms of the Act is ineligible to be or disqualified from being a director, alternative director, prescribed officer, company secretary or auditor, that person is regarded as having resigned from every such office in any company as from 1 May 2011 [sec 7(2)].

The approval of any distribution, financial assistance, insider share issues or options is subject to the Companies Act, even if a company's shareholders approved such action before 1 May 2011, despite anything to the contrary in the company's MOI [sec 7(6)].

SUMMARY

In this learning unit, we explained and applied certain Schedules to the Companies Act.

After having worked through the learning unit and the references to the prescribed study material, you should be able to:

- Give advice, discuss concerns, and apply the requirements of Schedules 2, 3 and 5 of the Companies Act.



LEARNING UNIT 9.2

Close Corporations Act

9.2.1 CLOSE CORPORATIONS ACT

The future of the Close Corporations Act

Registration of close corporations (CCs) will cease under the new Companies Act that came into effect on 1 May 2011. However, currently registered CCs will still be maintained. The new Companies Act provides for the continued existence of currently registered CCs, but negates any further registrations of new CCs. All existing CCs registered with the Companies and Intellectual Property Registration Office (CIPRO) as of the effective date of the new Act (1 May 2011) will continue to exist. The new Companies Intellectual Property Commission (CIPCO), which was implemented at the same time that the Act was put into effect, will accommodate all amendments to CCs.

The new Act does not force CCs to convert into companies, but because of simplified legislation, reduction of regulatory burden and simplicity of formation, conversion is encouraged. Under the new Act, the private company will replace the CC as the preferred vehicle for small and medium businesses. CCs will probably be phased out over the next ten years, specifically if one takes into account the amendments made to the Close Corporations Act (see learning unit 9.1.2 above).

What we expect you to know about the Close Corporations Act

We expect you to gain a broad overview of the Close Corporations Act in respect of sections 1, 2, 12, 13, 15, 22, 24, 28 to 30, 33 to 40, 46 to 54, 57 to 60, and 62 and 63, as well as the amendments to the Close Corporations Act through Schedule 3 of the Companies Act as referred to in learning unit 9.1.2 above. You will not be examined on any individual sections.



STUDY

Study the sections listed above as well as the amendments to the Close Corporations Act through Schedule 3 of the Companies Act.

SUMMARY

In this learning unit, we explained what we want you to know about the Close Corporations Act.

After having worked through the learning unit and the references to the prescribed study material, you should be able to:

- Give broad advice on the Close Corporations Act.



LEARNING UNIT 9.3

Other legislation

9.3.1 OTHER LEGISLATION

Depending on the type of company or business, the following legislation is of relevance to an accountant: the Income Tax Act, Banking Act, Insurance Act, Attorneys Act, Insolvency Act, Administration of Estates Act, Insider Trading Act and the Public Finance Management Act.

You must be aware of the various acts that may be relevant and may apply to your client, but are not required to study the individual Acts mentioned.

SUMMARY

In this learning unit, we explained other legislation of relevance to an accountant.

After having worked through the learning unit and the references to the prescribed study material, you should be able to:

- Give broad advice on other legislation applicable to companies, which the accountant must take into account.

CONCLUSION

In this topic about schedules to the companies act and other legislation applicable to companies, we explained and applied the requirements regarding the Schedules to the Companies Act and explained the Close Corporations Act and other legislation applicable to companies. Congratulations! You have now completed the whole study guide.



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