

HOW TO IMPLEMENT THE NEW COMPANIES ACT (ACT 71 OF 2008, AS AMENDED)

The new Companies Act has brought with it a number of material changes to the way in which companies have been administered until now. It is vital for all companies to consider the impact of these changes and to prepare an action plan of important items to be addressed.

Below, a number of these items are listed for consideration to provide some guidance to companies and their management teams. This should not be regarded as an exhaustive list but only a high-level guideline. You are welcome to contact iThemba should you require any assistance in this regard.

	STEPS TO CONSIDER	WHAT TO DO?	WHAT TO KNOW?
1	Articles of Association	Replace current memorandum and articles of association with memorandum of incorporation.	Prior to 30 April 2013, your articles of association (referred to in the Act as the memorandum of incorporation even prior to being replaced) must be replaced with a memorandum of incorporation that is aligned with the requirements of the Act.
2	Shareholders' agreements	Amend shareholders' agreements to ensure that it is consistent with the Act.	Shareholders' agreements can no longer override the memorandum of incorporation and thus need to be aligned. Also, items that were normally addressed in a shareholders' agreement, such as the limitation of directors' authority, now need to be included in the memorandum of incorporation.
3	Classification of the company	Classify the company in terms of the Act.	Public or private companies that do not meet the requirements of the Act will have to be converted to ensure compliance. For example, a public company with a restriction on the transferability of its shares will have to be converted to a private company.
4	Company name	Consider alignment of company name with requirements of the Act.	Changes have been made to the expressions at the end of a company name.
5	Directors, prescribed officers, committee members, company secretaries and auditors	Identify prescribed officers and inform relevant individuals accordingly.	A number of important provisions of the Act apply to prescribed officers and it is vital for prescribed officers to be informed and to understand the implications of these provisions.
6	Responsibilities of directors, prescribed officers and other relevant staff	Educate directors, prescribed officers and other relevant staff in respect of their responsibilities.	A specific standard of conduct is now expected from directors, prescribed officers and members of board committees with potential liabilities in the event of non-compliance.
7	Liabilities of directors and prescribed officers and indemnity insurance against liability	Consider whether adequate indemnity and/or insurance has been provided to protect directors and prescribed officers	Directors, prescribed officers and board committee members may, in certain instances, be indemnified against liability and insurance cover put in place for this purpose.

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8	Audit committee	Establish audit committee with correct membership, if required.	Instances where statutory audit committee will be required and consequences thereof.
9	Social and ethics committee	Establish social and ethics committee with correct membership, if required.	When is a social and ethics committee required and what are the statutory composition and duties of such a committee.
10	Financial statements audited and appoint an auditor	Establish whether annual financial statements have to be audited or independently reviewed or neither.	Depending on the category and size of a company, it may not be necessary to have the annual financial statements audited. Should an audit be required there are a number of requirements as per Chapter 3 of the Act.
11	Notices to shareholders and other documents are in the prescribed form	Ensure that all notices to shareholders and other documents are in the prescribed form or in plain language.	Requirements for content and delivery of notices to shareholders in terms of the Act. Posting of documents in terms of the Act has to be done by registered post.
12	Solvency and liquidity test	Determine whether your company should apply the solvency and liquidity test	In a number of instances, such as the approval of a distribution (which includes dividends) the board first has to do a solvency and liquidity test as set out in section 4 of the Act.
13	Share certificates	Endorse share certificates where the transfer of shares is restricted.	Restriction on share certificates
14	Conversion of par and nominal value shares	Convert par and nominal value shares to shares having no par or nominal value	Once all par value shares have been issued, no further par value shares can be created and all par value shares will have to be converted to no par value shares prior to increasing the authorised share capital of the company.
15	Companies limited by guarantee	Companies limited by guarantee, other than in terms of section 21 of the old Act of 1973, must elect to become a profit company and make the necessary consequential changes or become a non profit company	Changes to companies limited by guarantee
16	Registers, documents and records	Ensure that measures are instituted to keep the required documents and maintain the necessary registers	Applicable requirements in respect of registers, documents and other records to be maintained by the company in terms of the Act.
17	Directors and board composition	Ensure that the company's board has sufficient members to meet the requirements of the Act, where applicable to the company.	Requirements for directors, appointment of directors and board composition.

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18	Disqualification of directors and prescribed officers	Consider whether any of the directors or prescribed officers of the company may be disqualified in terms of the Act to continue in such capacity.	The Act sets out the grounds for disqualification and these need to be communicated to directors and prescribed officers.
19	Meetings of shareholders	Implement procedures to comply with the requirements in respect of shareholder meetings.	Requirements for shareholder meetings.
20	Meetings of directors	Implement procedures to comply with the requirements in respect of directors' meetings.	Requirements for director meetings.
21	Resolutions	Implement numbering procedure for all board resolutions and ensure that round robin resolutions are signed by majority of directors.	The Act requires that all board resolutions must be dated and sequentially numbered.
22	Distributions, financial assistance (including intra-group loans), insider share issues and options	Comply with the provisions of the Act dealing with approvals required for any distributions, financial assistance (including intra-group loans), insider share issues and options.	No inter-group financial assistance may be provided without shareholder approval by way of special resolution. Shareholder approval is also required in some instances where shares or options are issued. Solvency and liquidity test is required when distributions are approved by the board.
23	Fundamental transactions, take-overs and offers	Consider provisions of Chapter 5 to identify transactions that may be subject to the requirements of this chapter.	Fundamental transactions, mergers, acquisitions, the sale of a major part of the assets or business and similar transactions may be subject to the requirements of Chapter 5.
24	Listed companies	Amend memorandum of incorporation in line with Schedule 10 of the JSE Listings Requirements.	The JSE has amended the Listings Requirements to address the implications of the Act in respect of listed companies and it is important for listed companies to ensure compliance with the amended requirements.
25	Business rescue	Consider the business rescue provisions of Chapter 6 of the Act when the company is financially distressed.	Know when the company is financially distressed and what to do in these circumstances.
26	Non-profit companies	Consider whether the company is required to have members and amend constitutional documents accordingly, if necessary.	The Act makes provision for non-profit companies not to have members and this structure may be appropriate for some non-profit companies.



Monument Office Park, Block 5, Suite 102,
79 Steenbok Avenue, Monument Park
Tel: 086 111 10 10
Fax: 086 604 1315
e-mail: avdm@ithembaonline.co.za
website: www.ithembaonline.co.za

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