

The New Companies Act and the Regulations to the new Companies Act

- The Second Draft of the regulations to the Companies Act was published on 29 November 2010.
- The Regulations to the Companies Act 71 of 2008 was published on 20 April 2011 with some significant changes to section 26 (from the second draft regulation).
- The Act came into existence on 01 May 2011.
- CIPRO will now be called “The Companies and Intellectual Property Commission” (CIPC) and no longer Companies & Intellectual Property Registration Organization (CIPRO).
- From 01 May 2011 no further Close Corporations will be registered.
- However those corporations who are currently in existence will continue to operate as Close Corporations and will continue to be governed by the Close Corporations Act 69 of 1984.
- In those cases the role of the accounting officer remains unchanged and Institutes who are currently able to register accounting officers will continue to do so.

The New Companies Act:

- A. What does it mean for the public?
- B. What does it mean for the accountant?

A. What does it mean for the public:

- Any person wishing to form an entity can no longer form a Close Corporation and must form a company.
- Part of the reason why people have not formed companies in the past was due to the fact that companies required an audit and the cost of auditing was very expensive in comparison to that of a CC who merely required an **Accounting Officer’s** report and not a full blown audit.
- It is also noted that only persons who were members of the Public Accountants and Auditors Board (PAAB) now called The Independent Regulatory Board for Auditors (IRBA) are allowed to conduct audits.

B. What does it mean for the Accountant:

Section 26 to section 29 of the Regulations to the new Companies Act deals with the following:

1. Companies that does not require an Audit
2. Companies that require an Independent Review
3. Companies that require an Audit.
4. Companies who need their Annual Financial Statements Independently Compiled
5. Who can do the Independent Review
6. Who can do the Audit

Section 26 (1) (d) (Deals with the Independent Accounting Professional)

Section 26

(1) For the purposes of this regulation and regulations 27 to 29-

- (a) “employee”, has the meaning set out in the Labour Relations Act, 1995 (Act 66 of 1995);
- (b) “IFRS” means the International Financial Reporting Standards as adopted from time to time by the International Accounting Standards Board or its successor body; and
- (c) “IFRS for SMEs” means the International Financial Reporting Standards for Small and Medium Enterprises, as issued from time to time by the International Accounting Standards Board or its Successor body;
- (d) **“Independent Accounting Professional” when used with respect to any particular company,**

Means a person who;

- (i) is –
 - (aa) a registered auditor in terms of the Auditing Profession Act;
 - or
 - (bb) a member in good standing of a professional body that has been accredited in terms of section 33 of the Auditing Profession Act;
 - or
 - (cc) qualified to be appointed as an **Accounting Officer** of a close corporation in terms of section 60 (1), (2) and (4) of the Close Corporations Act, 1984 (Act No. 69 of 1984);
 - and
- (ii) does not have a personal financial interest in the company or a related or interrelated company;
- and

(iii) is not –

(aa) involved in the day to day management of the company’s business, nor has been so involved at any time during the previous three financial years;
or

(bb) a prescribed officer, or full-time executive employee, of the company or another related or inter-related company, or have been such an officer or employee at any time during the previous three financial years;
and

(iv) is not related to any person who falls within any of the criteria set out in clause (ii) or (iii).

Section 26 (1) (e) (Deals with Independently Compiled)

(e) “Independently Compiled and reported” means that the annual financial statements are prepared -

(i) by an **Independent Accounting Professional**;

(ii) on the basis of financial records provided by the company;

and

(iii) in accordance with any relevant financial reporting standards.

(f) “ISRE 2400” means International Standard for Review Engagements, as issued from time to time, by the International Auditing and Assurance Standards Board, or its successor body;

(g) “SA GAAP” means South African Statement of Generally Accepted Accounting Practice, as adopted from time to time by the Accounting Practices Board or its successor body.

Section 26 (2) (Deals with the calculation of the Companies “Public Interest Score” for each financial year)

(2) For the purposes of Regulations 27 to 30, 43, 127 and 128, every company must calculate its “Public Interest Score” for each financial year, **calculated as the sum of the following:-**

(a) a number of points equal to the average number of **employees of the company** at any one time during the financial year;

(b) one point for every R 1 million (or portion thereof) **in third party liability of the company**, at the financial year end;

(c) one point for every R1 million (or portion thereof) **in turnover during the financial year**;

and

(d) one point for every individual who, at the end of the financial year, is known by the company –

(i) in the case of a profit company, to directly or indirectly have beneficial interest in any of the company's issued securities;

or

(ii) in the case of a non-profit company, to be a member of the company; or a member of an association that is a member of the company.

Section 27: Financial Reporting Standards

Deals with the compilation of the annual financial statements which may be compiled internally or independently (see s.29 (4))

(1) A company's financial statements may be compiled internally or independently.

(2) For all purposes of this regulation and Regulations 28 and 29, a company's financial statements must be regarded as having been **compiled internally**, unless they have been **"independently compiled and reported"**, as defined in Regulation 26 (1)(e).

(3) Nothing in this regulation precludes a company –

(a) That is required to prepare its financial statements to the standards of IFRS for SMEs, from preparing its financial statements to the standards of IFRS instead;

or

(b) That is not subject to any prescribed standards, from preparing its financial statements to the standards of either IFRS or IFRS for SMEs or SA GAAP.

(4) For any particular company, any financial statements contemplated in section 28 or 29 must comply with the applicable standards for that category of company as follows:

State owned and Profit Companies

Category of Companies	Financial Reporting Standard
State owned companies	IFRS, but in the case of any conflict with any requirements in terms of the Public Finance Management Act, the latter prevails.
Public companies listed on an exchange	IFRS
Public companies not listed on an exchange	One of- (a) IFRS; or (b) IFRS for SME's, provided that the company meets the scoping requirements outlined in the IFRS for SME's.
Profit companies, other than state-owned or public companies, whose public interest score for the particular financial year is at least 350.	One of- (a) IFRS; or (b) IFRS for SME's, provided that the company meets the scoping requirements outlined in the IFRS for SME's
Profit companies, other than state-owned or public companies- (a) whose public interest score for the particular financial year is at least 100 but less than 350; or (b) whose public interest score for the particular financial year is less than 100, and whose statements are independently compiled.	One of- (a) IFRS; or (b) IFRS for SME's, provided that the company meets the scoping requirements outlined in the IFRS for SME's or (c) SA GAAP
Profit companies, other than state-owned or public companies, whose public interest score for the particular financial year is less than 100, and whose statements are internally compiled.	The Financial Reporting Standard as determined by the company for as long as no Financial Reporting Standard is prescribed.

Non Profit Companies

Category of Companies	Financial Reporting Standard
Non profit companies that are required in terms of Regulation 28 (2) (b) to have their annual financial statements audited.	IFRS, but in the case of any conflict with any requirements in terms of the Public Finance Management Act, the latter prevails.
Non profit companies, other than those contemplated in the first row above – whose public interest score for the particular financial year is at least 350.	One of- (a) IFRS; or (b) IFRS for SME's, provided that the company meets the scoping requirements outlined in the IFRS for SME's
Non profit companies, other than those contemplated in the first row above- (a) whose public interest score for the particular financial year is at least 100, but less than 350; or (b) whose public interest score for the particular financial year is less than 100, and whose financial statements are independently compiled.	One of- (a) IFRS; or (b) IFRS for SME's, provided that the company meets the scoping requirements outlined in the IFRS for SME's; or (c) SA GAAP
Non profit companies, other than those contemplated in the first row above, whose public interest score for the particular financial year is less than 100, and whose financial statements are internally compiled.	The Financial Reporting Standard as determined by the company for as long as no Financial Reporting Standards is prescribed.

(5) The Financial Reporting Standards prescribed by this regulation apply to every company with a financial year end starting on or after the effective date of the Act.

Section 28: Categories of companies required to be audited

(see s.30 (2), read with 30 (7))

- (1) This regulation applies to a company unless, in terms of section 30 (2A), it is exempt from having its annual financial statements either audited or independently reviewed.
- (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:
- (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;
or
- (c) any other company whose public interest score in that financial year, as calculated in accordance with Regulation 26 (2) –
- (i) is 350 or more;
or
- (ii) is at least 100, if its annual financial statements for that year were internally compiled.

Section 29: - Independent review of Annual Financial Statements (see s.30 (2), read with 30 (7))

(1) For the purpose of this regulation -

(a) “Independent Reviewer”, means a person referred to in regulation 29 (4) and who has been appointed to perform an independent review under this regulation;

and

(b) “reportable irregularity; means any act or omission committed by any person responsible for the management of a company, which –

(i) unlawfully has caused or is likely to cause material financial loss to the company or to any member, shareholder, creditor or investor of the company in respect of his, her or its dealings with that entity;

or

(ii) is fraudulent or amounts to theft;

or

(iii) causes or has caused the company to trade under insolvent circumstances.

(2) This regulation applies to a company, with respect to any particular financial year, unless the company-

(a) is exempt, in terms of section 30 (2A), from any requirement to have its annual financial statements for that year audited or reviewed;

(b) is required by its own Memorandum of Incorporation, or required in terms of the Act or regulation 28, to have its annual financial statements for that financial year audited;

or

(c) has voluntarily had its annual financial statements for that year audited.

(3) A company to which this regulation applies must have its annual financial statements Independently reviewed in accordance with ISRE 2400.

(4) **An independent review** of a company’s annual financial statements must be carried out-

(a) in the case of a company whose public interest score for the particular financial year was at least 100, by a **registered auditor**, or a member in good standing of a professional body that has been accredited in terms of section 33 of the Auditing Professions Act;

or

(b) in the case of a company whose public interest score for the particular financial year was less than 100 (99.9), by –

(i) a person contemplated in paragraph (a);

or

(ii) a person who is qualified to be appointed as an **Accounting Officer** of a Close Corporation in terms of section 60 (1), (2) and (4) of the Close Corporations Act, 1984 (Act No.69 of 1984).

(5) An independent review of a company's annual financial statements must not be carried out by an independent accounting professional who was involved in the preparation of the said annual financial statements.

(6) (a) An independent reviewer of a company that is satisfied or has reason to believe that a reportable irregularity has taken place or is taking place in respect of that company must, without delay, send a written report to the Commission.

(b) The report must give particulars of the reportable irregularity referred to in paragraph (a) and must include such other information and particulars as the independent reviewer considers appropriate.

(7) (a) The independent reviewer must within three business days of sending the report to the Commission notify the members of the board of the company in writing of the sending of the report referred to in subregulation (6) and the provisions of this regulation.

(b) A copy of the report to the Commission must accompany the notice.

(8) The independent reviewer must as soon as reasonably possible, but no later than 20 business days from the date on which the report referred to in subregulation (6) was sent to the Commission-

(a) take all reasonable measures to discuss the report referred to in subregulation (6) with the members of the board of the company;

(b) afford the members of the board of the company an opportunity to make representations in respect of the report;

and

(c) send another report to the Commission, which report must include-

(i) a statement that the independent reviewer is of the opinion that-

(aa) no reportable irregularity has taken place or is taking place;

or

(bb) the suspected reportable irregularity is no longer taking place and that adequate steps have been taken for the prevention or recovery of any loss as a result thereof, if relevant;

or

(cc) the reportable irregularity is continuing;

and

(ii) detailed particulars and information supporting the statement referred to in subparagraph (i).

(9) The Commission must as soon as possible after receipt of a report containing a statement referred to in paragraph (c) (i) (cc) of subregulation (8), notify any appropriate regulator in writing of the details of the reportable irregularity to which the report relates and provide it with a copy of the report and may investigate any alleged contravention of the Act.

(10) For the purpose of the reports referred to in subregulations (6) and (8), an independent reviewer may carry out such investigations as the independent reviewer may consider necessary and, in performing any duty referred to in the proceeding provisions of this regulation the independent reviewer must have regard to all information which comes to the knowledge of the independent reviewer from any source.

(11) Where a company is liquidated, whether provisionally or finally, and an independent reviewer at the time of the liquidation-

(a) has sent or is about to send a report referred to in subregulation (6) or (8), the report must also be submitted to a provisional liquidator or liquidator, as the case may be, at the same time as the report is sent to the Commission as soon as reasonably possible after his or her appointment;

or

(b) has not sent a report referred to in subregulation (6) or (8), and is requested by a provisional liquidator or liquidator, as the case may be, to send a report, the independent reviewer must as soon as reasonably possible-

(i) send the report together with a motivation as to why a report was not sent;

or

(ii) submit a notice that in the independent reviewer's opinion no report needed to be submitted, together with a justification of the opinion.

(12) Every profession recognized by the Minister under section 60 of the Close Corporations Act, 1984 (Act 69 of 1984), whose members are entitled to perform an independent review as contemplated in subregulation (4) (b) (ii), must annually file a report with the Commission demonstrating that-

(c) it has proper mechanisms for ensuring that its members participate in continued professional development and achievement of professional competence;

(d) it has mechanisms to ensure that its members are disciplined where appropriate;

(e) it is, and is likely to continue to be, financially and operationally viable for the foreseeable future;

(f) it keeps and maintains a proper register of its members;

(g) it has in place appropriate programmes and structures to ensure that it is actively endeavouring to achieve the objective of being representative of all sectors of the South African population;

and

(h) it meets any other requirements that may be determined by the Commission from time to time.