

Companies prepare for the CIPC's new compliance checklist

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The Companies and Intellectual Property Commission (CIPC) has introduced a new requirement for all South African companies to declare their compliance with specific sections of the Companies Act 2008 (Act) by completing and submitting a compliance checklist online. The new requirement came into force on 1 January 2020 and requires companies to submit their compliance checklist before they can file their annual returns.



Image source: Getty Images

What is the purpose of the compliance checklist?

Whilst it is a requirement of the Act that companies file an annual return in the prescribed form within the prescribed period, neither the Act nor the regulations to the Act require companies to file a compliance checklist. This new requirement has been set by the CIPC. Companies have questioned the purpose of the compliance checklist and are concerned that compliance will be burdensome.

The stated purpose of the compliance checklist, according to the CIPC, is to ensure compliance with the mandatory requirements of the Act. The CIPC also states that the compliance checklist will serve as an educational tool for directors and company secretaries, in guiding them with regards to their responsibilities in terms of the Companies Act.

The checklist contains a list of 24 questions which a company is required to answer by "yes", "no" or "not applicable". A company is required to consider each question in relation to its business activities during the preceding calendar year. The list of questions can be found [here](#). The questions do not provide any detail about the relevant sections of the Act and merely state the number of the sections. In addition, companies are not afforded the opportunity to provide commentary or an explanation for their answers. This would arguably hinder a company from answering a question in the negative. It is also unclear how the CIPC will assess answers from companies without the provision of any background information. The usefulness of the checklist in its current format for purposes of monitoring compliance with the Act is questionable.

Who will need to complete a compliance checklist and by when does it need to be

submitted to the CIPC?

The new requirement will apply to all personal liability, private, public, state-owned and non-profit companies. Companies will be required to complete and submit their compliance checklist before they can file their annual returns. Companies will therefore need to check when their annual return is due and put processes in place to make sure that their compliance checklist is submitted before this date.

The timing for filing of the compliance checklist gives rise to some practical challenges. Annual returns must be filed within 30 business days after the anniversary date of the company's date of incorporation, together with a copy of the company's annual financial statements or financial accountability statements, as the case may be. The financial statements submitted with the annual return normally represent the financial position of the previous financial year (as a company's financial year-end does not necessarily coincide with the date of filing of its annual return). This could lead to a mismatch in financial and compliance reporting periods and requires clarification from the CIPC.

What are the consequences of not submitting the compliance checklist?

The CIPC intends to utilise the compliance checklist to monitor and regulate proper compliance with the Act and has stated that if it identifies trends of non-compliance, it will "act accordingly". It is unclear what "act accordingly" will entail.

The CIPC had originally indicated that if a company fails to complete the compliance checklist, it will not be able to submit its annual returns. Failure by a company to file its annual return results in the company incurring penalties, and eventual de-registration (if annual returns have not been completed for two consecutive years). However, the compliance checklist e-service available on the CIPC website has not (yet) been linked to the e-service for filing of annual returns. Companies are therefore still able to file their annual returns without filing their compliance checklist first. Accordingly, it is unclear how the CIPC will stop companies from filing their annual returns without filing their compliance checklist first.

What are the consequences of submitting incorrect information in the compliance checklist?

Where a person knowingly provides incorrect information to the CIPC in completing the compliance checklist, then such person commits an offence in terms of the Act and could be liable to a fine or to imprisonment for up to 12 months or to both a fine and imprisonment. The Act defines the term "knowingly" very broadly. It not only includes actual knowledge but also where a person reasonably ought to have investigated the matter to an extent that would have provided the person with actual knowledge or take other measures which, if taken, would reasonably be expected to have provided the person with actual knowledge of the matter. In light of the broad definition of the term "knowingly", a person may be held liable for negligently or accidentally completing the compliance checklist incorrectly.

Ensuring accurate completion of the checklist may prove to be somewhat challenging when one considers that the checklist covers an extensive portion of the Act and regulations to the Act. From a practical perspective, completion of the checklist will require input from various officers at the company, from the directors to the company secretary (if the company has

appointed one) and accountants or auditors. It is therefore essential for businesses and their officers to have a working knowledge and reasonable understanding of the Act and regulations to the Act and to put processes in place to check for compliance. If a company does not have internal resources to do this, they may need to hire the services of a suitably qualified professional. If you do not have a working knowledge or reasonable understanding of the Act, you may experience difficulty in completing the checklist.

The proposed format of the compliance checklist issued by the CIPC is very vague and requires further clarification from the CIPC. In the meantime, companies must apply their mind carefully when completing the checklist to avoid sanctions for non-compliance. Webber Wentzel is working on a guide to assist it in advising companies in ensuring compliance with these new requirements.

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