NOTICE 203 OF 2013

PRACTICE NOTE 4 OF 2012

IN TERMS OF
SECTION 188 (2) (b) OF THE COMPANIES ACT, 2008

INTERPRETATION OF SECTION 11 (3) (b) READ WITH SECTION 15 (2) (b) AND (c) OF THE COMPANIES ACT, 2008, IN RELATION TO THE USE OF "(RF)" IN THE NAME OF A COMPANY

1. From the number of enquiries received by the CIPC it seems clear that there is sufficient uncertainty regarding the use of "(RF)" in the name of a company and the reasons for this requirement to warrant that guidelines be provided in by way of a Practice Note under section 188 of the Companies Act, 2008.

2. RF is the abbreviation for "Ring Fenced" and section 11 (3) (b) requires every company to use "(RF)" as part of its name "if the company's Memorandum of Incorporation includes any provision contemplated in sections 15 (2) (b) or (c) restricting or prohibiting the amendment of any particular provision of the Memorandum".

   2.1 Section 15 (2) (b) refers to provisions that "contain any restrictive conditions applicable to the company and any requirement for the amendment of any such restrictive condition in addition to the requirements set out in section 16; and

   2.2 Section 15 (2) (c) refers to provisions that "prohibit the amendment of any particular provision" of the Memorandum of Incorporation of the company.

3. To understand the rationale behind the requirement the difference between the repealed Act and the Companies Act, 2008, in relation to the powers of a company must be understood.

   3.1 Under the repealed Act a company had the powers and capacity determined by its main object as stated in the specific company's memorandum of association. The powers and capacity of companies were thus restricted. The doctrine of "constructive notice" applied to all outsiders and in terms thereof anyone dealing with the company was presumed to be aware of the contents of the company documents as filed because they are open to inspection by the public. In terms of this doctrine the public was, therefore, presumed to have knowledge of any limitations on the powers and capacity of the company.

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3.2 Under the Companies Act, 2008, a company has, in terms of section 19 (1) (b), the powers and capacity of a natural person or individual of full capacity except to the extent that a juristic person is incapable of exercising any such power or having such capacity (a juristic person, for instance, cannot get engaged or get a driver's licence). Furthermore, section 19 (4) specifically excludes the operation of the doctrine of constructive notice under the Act. Under the Companies Act, 2008, therefore, a person who interacts with a company can accept that the company has the necessary power and capacity to participate in that activity and to bind the company. However, should there be any limitation the outsider would in terms of section 19 (5) (a) only be bound by it if the company's name includes the element "RF" as contemplated in section 11 (3) (b) and the company's Notice of Incorporation or subsequent Notice of Amendment has drawn attention to the relevant provision.

3.3 The doctrine of constructive notice would, therefore, under the Companies Act, 2008, only apply in very limited circumstances.

4. It is against this background that that it must be considered whether the requirement to use (RF) in the company name is applicable or not in any particular case. In principle, if a limitation could have any effect on third parties, it would be advisable to use (RF) in the name. If on the other hand, it is of no consequence to third parties there would also be no need to warn them.

5. Inconsiderate use of the expression "RF" in the name of a company could lead to unnecessary confusion and in the circumstances it is submitted that the expression "(RF)" be used only in cases where it is evident that –

5.1 the purpose or objectives of the company are restricted or limited in the MoI of the company;

5.2 the powers of the company are restricted or limited in its MoI;

5.3 any other pertinent restricting condition is contained in the MoI of the company;

5.4 any requirement in addition to those set out in section 16, for the amendment of any of the abovementioned restrictions or limitations is contained in the MoI; or

5.5 the MoI of a company contains a prohibition on the amendment of any particular provision of the MoI.

6. The CIPC is further of the view that if the Memorandum of Incorporation contains a provision –

6.1 setting higher standards or more onerous requirements under section 15 (2) (a) (iii) than would otherwise apply to the company in terms of an unalterable provision of the Act; or

6.2 requiring a special resolution to approve any matter not listed in section 65 (11);

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such a provision in itself is not a restriction contemplated in section 11 (3) (b) as it does not limit the powers or capacity of the company but rather prescribes a different procedure to perform the activity concerned.

7. The requirements of section 11 (3) (b) to use "(RF)" in the name equally applies to NPC's. This is, however, a specific type of company and the Act in Schedule 1 requires that it must set out its objectives in its MoI and that it must apply all of its assets and income to advance its stated objects only. This in itself constitutes a limitation or restriction of its powers and capacity but as all NPC's are subject to the same restriction it is submitted that special attention to this restriction through the use of "(RF)" in the names of NPC's is not required. The use of the expression NPC in its name already alerts third parties that they are dealing with a special kind of company.

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Commissioner: CIPC
15 / 10 / 2012