TO: SOUTH AFRICAN PHOTOVOLTAIC INDUSTRY ASSOCIATION

REF: CM00428

RE: CONVERTING FROM NONPROFIT ORGANISATION TO NONPROFIT COMPANY

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INTRODUCTION

1. The client is the South African Photovoltaic Industry Association ("SAPVIA"), a Nonprofit Organisation ("NPO"), juristic person established by the Nonprofit Organisations Act 71 of 1997 ("the NPO Act"), as amended.

2. SAPVIA is a universitas personarum statutory body with legal status, with the aim to promote Photovoltaic ("PV") technologies in South Africa and Africa and assist its members in their business development in markets by, amongst others, representing the PV industry before governmental and regulatory institutions in all forums within South Africa and assisting in an advisory role within the South African Development Community region when requested. SAPVIA is a member focused association.

3. We have been requested to provide SAPVIA with a report highlighting the process it would take for SAPVIA to convert from an NPC to a non-profit company ("NPC"). In addressing the request, the report will focus the legal framework regulating NPOs and NPCs, the process, differences and similarities, advantages and disadvantages, effect on members, financial history and lastly, we deal with the possible costs.

LEGAL FRAMEWORK

The NPO Act

4. NPOs are governed by the NPO Act. Section 1 of the NPO Act defines a nonprofit organisation as trust, company or other association of persons established for a public purpose and income and property of which are not distributable to its members or office-bearers except as reasonable compensation for services rendered. The authority regulating the NPOs is the Department of Social Development, previously known as the Department of Welfare ("the Department").

5. NPOs are registered with the Department in accordance with the provisions of section 13 the NPO Act. The NPO applies for registration to the Director in the prescribed form and completed, together with two (2) copies of the NPO's constitution. The Director may also ask for further information while considering if the NPO meets the requirements for registration.

6. The NPO stipulates, section 13(2), that the Director must consider the application within two (2) months and if it is found to be application satisfies the requirements for registration, the Director must register the NPO by entering the NPO's name in the register and provide the NPO with a Certificate of Registration of Nonprofit Organisation, as stipulated in section 15 of the NPO Act.

7. The Certificate of registration is sufficient proof that the organisation has met all the requirements for registration in terms of the Act and is a body corporate.

8. The NPO remains a registered NPO unless the registration is cancelled by the Director in terms of the NPO Act, or the organisation is voluntarily deregistered, or the organisation is wound up or dissolved.

9. Section 17 of the NPO provides for the manner in which accounting records and reports are to be prepare. It states that every registered NPO must, to the standards of generally

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accepted accounting practice; keep accounting records of income, expenditure, assets and liabilities and within six (6) months after each financial year, draw up financial statements. Within two (2) months of the drawing up of its financial statements, the NPO must arrange for a written report to be compiled by an accounting officer. Lastly, the NPO must preserve each of its books of account, supporting vouchers, records of subscription or levies paid by its members, income and expenditure statements, balance sheets and accounting officer's reports, in an original or reproduced form, for the prescribed period.

10. Registered NPOs have a duty to provide reports and information in writing to the Director with reports and information as stated in section 18 of the NPO Act in the prescribed manner. Financial statements and the accounting officer's report are to be provided within nine (9) months after the end of its financial year, and name, physical address, business address and residential address changes of its office-bearers withing one (1) month of the change.

11. A registered NPO can either voluntarily deregister or wind up or dissolve the NPO in accordance section 23 of the NPO Act. A registered NPO may deregister voluntarily by sending the Director a written notice stating its intention to deregister voluntarily and the reasons therefor, specifying a date, at least two months after the date of the notice, on which the deregistration is to take effect, and simultaneously, a copy of the reports referred to in section 18(1) for the period from its previous financial year up to the date of the written notice contemplated in this subsection.

12. In the event the registered NPO resolves to wind itself up or dissolve or is being wound up in terms of any law the organisation must, within one month after completion of the winding up or dissolution process or the relevant order of court, send to the Director a written notice stating this fact, containing certified copies of all relevant documents confirming the winding up or dissolution, and simultaneously, a copy of the reports referred to in section 18(1) for the period from its previous financial year up to the date of the written notice contemplated in this subsection.

13. The Director must then, upon receiving a notice of voluntary deregistration or winding up or dissolution from a registered nonprofit organisation, cancel the NPO's certificate of

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registration, and deregister it by amending the register, on the date specified in the notice and notify the NPO in writing of the deregistration and confirm the date on which the amendment was made to the register.

The Companies Act 71 of 2008

14. Section 1 of the Companies Act 71 of 2008 ("the Companies Act") defines a company as a juristic person incorporated in terms of the Companies Act.

15. Furthermore, a non-profit company is defined as a company incorporated for a public benefit or other object as required by item 1(1) of Schedule 1; and the income and property of which are not distributable to its incorporators, members, directors, officers or persons related to any of them except to the extent permitted by item 1(3) of Schedule 1.

16. The provisions governing non-profit companies are stipulated in schedule 1 of the Companies Act.

1. Objects and policies

(1) The Memorandum of Incorporation of a non-profit company must—

(a) set out at least one object of the company, and each such object must be either—

(i) a public benefit object; or

(ii) an object relating to one or more cultural or social activities, or communal or group interests; and

(b) be consistent with the principles set out in subitems (2) to (9).

(2) A non-profit company—

(a) must apply all of its assets and income, however derived, to advance its stated objects, as set out in its Memorandum of Incorporation; and

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(b) subject to paragraph (a), may—

(i) acquire and hold securities issued by a profit company; or

(ii) directly or indirectly, alone or with any other person, carry on any business, trade or undertaking consistent with or ancillary to its stated objects.

(3) A non-profit company must not, directly or indirectly, pay any portion of its income or transfer any of its assets, regardless whether the income or asset was derived, to any person who is or was an incorporator of the company, or who is a member or director, or person appointing a director, of the company, except—

(a) as reasonable—

(i) remuneration for goods delivered or services rendered to, or at the direction of, the company; or

(ii) payment of, or reimbursement for, expenses incurred to advance a stated object of the company;

(b) as a payment of an amount due and payable by the company in terms of a bona fide agreement between the company and that person or another;

(c) as a payment in respect of any rights of that person, to the extent that such rights are administered by the company in order to advance a stated object of the company; or

(d) in respect of any legal obligation binding on the company.

(4) Despite any provision in any law or agreement to the contrary, upon the winding-up or dissolution of a non-profit company—

(a) no past or present member or director of that company, or person appointing a director of that company, is entitled to any part of the net value of the company after its obligations and liabilities have been satisfied; and

(b) the entire net value of the company must be distributed to one or more non-profit companies, external non-profit companies carrying on activities within the Republic, voluntary associations or non-profit trusts—

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(i) having objects similar to its main object; and (ii) as determined—

(aa) in terms of the company's Memorandum of Incorporation;

(bb) by its members, if any, or its directors, at or immediately before the time of its dissolution; or

(cc) by the court, if the Memorandum of Incorporation, or the members or directors fail to make such a determination.

(5) The Commission may apply to the court, on behalf of a non-profit company, for a determination contemplated in subitem (4)(b)(ii)(cc) if the non-profit company has—

(a) no remaining members or directors; and

(b) failed to—

(i) make a determination contemplated in subitem (4)(b)(ii)(bb); or

(ii) apply to the court for such a determination.

(6) Incorporation as a non-profit company in terms of this Act, or registration as an external non-profit company in terms of this Act, and compliance by either with the provisions of this Act does not necessarily qualify that non-profit company, or external non-profit company, for any particular status, category, classification or treatment in terms of the Income Tax Act, 1962 (Act No. 58 of 1962), or any other legislation, except to the extent that any such legislation provides otherwise.

(7) Each voting member of a non-profit company has at least one vote.

(8) The vote of each member of a non-profit company is of equal value to the vote of each other voting member on any matter to be determined by vote of the members, except to the extent that the company's Memorandum of Incorporation provides otherwise.

(9) If a non-profit company has members, the requirement in section 24(4) to maintain a securities register must be read as requiring the company to maintain a membership register.

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2. Fundamental transactions

(1) A non-profit company may not—

(a) amalgamate or merge with, or convert to, a profit company; or

(b) dispose of any part of its assets, undertaking or business to a profit company, other than for fair value, except to the extent that such a disposition of an asset occurs in the ordinary course of the activities of the non-profit company.

(2) If a non-profit company has voting members, any proposal to—

(a) dispose of all or the greater party of its assets or undertaking; or

(b) amalgamate or merge with another non-profit company, must be submitted to the voting members for approval, in a manner comparable to that required of profit companies in accordance with sections 112 and 113, respectively.

(3) Sections 115 and 116, read with the changes required by the context, apply with respect to the approval of a proposal contemplated in subitem (2).

3. Incorporators of non-profit company

The incorporators of a non-profit company are its—

(a) first directors; and

(b) its first members, if its Memorandum of Incorporation provides for it to have members.

4. Members

(1) A non-profit company is not required to have members, but its Memorandum of Incorporation may provide for it to do so.

(2) If the Memorandum of Incorporation of a non-profit company provides for the company to have members, it—

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(a) must not restrict or regulate, or provide for any restriction or regulation of, that membership in any manner that amounts to unfair discrimination in terms of section 9 of the Constitution;

(b) must not presume the membership of any person, regard a person to be a member, or provide for the automatic or ex officio membership of any person, on any basis other than life-time membership awarded to a person—

(i) for service to the company or to the public benefit objects set out in the company's Memorandum of Incorporation; and

(ii) with that person's consent;

(c) may allow for membership to be held by juristic persons, including profit companies;

(d) may provide for no more than two classes of members, that is voting and non-voting members, respectively; and

(e) must set out—

(i) the qualifications for membership;

(ii) the process for applying for membership;

(iii) any initial or periodic cost of membership in any class;

(iv) the rights and obligations, if any, of membership in any class; and

(v) the grounds on which membership may, or will, be suspended or lost.

5. Directors

(1) If a non-profit company has members, the Memorandum of Incorporation must—

(a) set out the basis on which the members choose the directors of the company; and

(b) if any directors are to be elected by the voting members, provide for the election each year of at least one-third of those elected directors.

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(2) If a non-profit company has no members, the Memorandum of Incorporation must set out the basis on which directors are to be appointed by its board, or other persons.

(3) A non-profit company must not provide a loan to, secure a debt or obligation of, or otherwise provide direct or indirect financial assistance to, a director of the company or of a related or inter-related company, or to a person related to any such director.

(4) Subitem (3) does not prohibit a transaction if it—

(a) is in the ordinary course of the company's business and for fair value;

(b) constitutes an accountable advance to meet—

(i) legal expenses in relation to a matter concerning the company; or

(ii) anticipated expenses to be incurred by the person on behalf of the company;

(c) is to defray the person's expenses for removal at the company's request; or

(d) is in terms of an employee benefit scheme generally available to all employees or a specific class of employees.

17. The rules apply differently to NPCs, which are governed by the Companies Act. Schedule 1 of the Companies Act predominantly deals with NPC, and broadly speaking, the goal of the NPC is not to make a profit but to further a certain public benefit, by using the legal entity of an NPC to do so, and any income received must be applied to further this benefit.

DISCUSSION

18. SAPVIA requires advice on the process required to transition from an NPO to a NPC and what are the associated consequences thereof. The report will focus on the following issues:
    - 18.1. The transition;
    - 18.2. Impact and implications;
    - 18.3. The differences and similarities;
    - 18.4. Advantages and disadvantages;

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18.5. Change in governance;

18.6. The effect on the members;

18.7. Financials and bank accounts; and

18.8. Associated cost of the transition.

The Transition

19. It is important from the onset to note that, that a NPO and a NPC are regulated by different bodies; NPOs are governed by the NPO Act and accountable to the DSD whereas NPCs are governed by the Companies Act and the accountable to the Companies and Intellectual property Commission ("CIPC").

20. The Companies Act provides for a smooth transition from a close corporation to a private company as both types of companies are governed by the same Act. Unfortunately, the same cannot be said about the transition from an NPO to an NPC, the reason being that the governing statues are different. Should an NPO wish to change to become an NPC, the only way is to register a new NPC with the CIPC in accordance with the Companies Act and dissolve the NPO according to the NPO Act.

21. The process will take the following shape:

i. Resolution by the members of the SAPVIA.
The resolution will be passed in accordance with the provisions of Article 20.1.2 of SAPVIA's Constitution.

ii. Consultations with staff and union.
SAPVIA will have to notify and conduct consultations with all staff personnel as well as all the unions that are recognised by the SAPVIA. The purpose for the consultations is to advise the staff of the transition as well as on job security.

iii. Application for the registration of a non-profit company.

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Client will then have to register the new NPC with the CIPC. The process will involve an application for the name reservation and thereafter, the completion of all relevant documents for the application for registration. Given the fact the SAPVIA is a member focused association, registration for non-profit company with members should be considered; that is, a customised Memorandum of Incorporation ("MOI") together with a Notice of Incorporation should be completed and filed with the CIPC. A customised MOI entails that the entity can customise its MOI to best suite is needs and objectives.

iv. Notification to funders staff and all paying members.

Once the NPC has been registered SAPVIA will have to notify is funders, suppliers, staff and union(s) about the change, the effective date and the moving and transitioning process.

v. Notifying the Director of the Department.

In terms of 23 of the NPO Act, a registered non-profit organisation may deregister voluntarily by sending the director a written notice regarding the intention to deregister voluntarily with the reasons thereof. The notice has to specify the date of the intention to deregister, which should be at least two months after the date of the notice.

vi. Transfer assets and all contracts

Upon the registration of the NPC, the Labour Department as well as the South African Revenue Service ("SARS") will have to be notified of the existence of the new company. All assets will have to be transferred to the new company, Article 20.3 of SAPVIA's Constitution provides the transfer of assets to other associations having similar objectives. Employee contracts will also have to be transferred to the to reflect that the employer is the NPC. This can easily be done by way of an amendment.

vii. De-registration of NPO

The de-registration will then take place as prescribed by section of the NPO Act. The NPO should be dissolved upon finalisation of all the relevant transfers.

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The impact and implications

22. The first is that the NPC will have to be registered and the NPO will then have to be dissolved. This implies that a new entity is registered and the governing Act and authority will change.

23. Unfortunately, the mere registration of an NPC does not result in automatic tax exemption. Once the new NPC has been registered with the CIPC, it is incumbent on the directors to notify SARS of the existence of the new company. The newly formed NPC will have the same duty to pay tax as any other entity, unless it has been applied with SARS and recognised as a Public Benefit Organisation under section 30 of the Income Tax Act 58 of 1962.

Differences and similarities

24. The table herein identifies the differences and similarities of an NPO and an NPC:

	NPO	**NPC**
Primary requirement	Profits not enjoyed by individuals	Profits not enjoyed by individuals
Ownership	No owners or shareholders	No owners or shareholders
Legal framework	NPO Act	Companies Act
Registration body	Department of Social Development	Companies and Intellectual Property Commission
Registration requirement	Constitution	Memorandum of Incorporation
Name	No specification	Must have the abbreviation 'NPC' at the end
Purpose	For public purpose	To serve a public benefit or an objective related to

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		cultural, social activities or communal interests
Governance	Minimum of 5 members	At least 3 directors who are also 3 incorporators
Reporting	Annual narrative reporting together with annual financial statements to the Department	Submit annual returns to CIPC
Record keeping	5 years	7 years
Solvency & reckless trading	Members not liable	Directors may be personally liable

Advantages

25. The advantages of an NPC include the enhanced governance and accountability measures. This will provide more confidence from the members. Secondly, an NPC can register as an NPO (an NPO cannot incorporate an NPC), this will assist with funding from the Department as well.

Disadvantages

26. Directors of an NPC can be held liable for solvency and reckless trading, they have a fiduciary duty to act in good faith and in the best interest of the NPC. However, the laws are not so strictly applied to NPOs.

27. NPCs require stricter compliance with regards governance. The NPC will be required to align itself with governance best practices. Furthermore, financial oversight is also more stringent than required with NPOs. NPCs are required to file their annual returns with the CIPC, failure which, the CIPC may start the process of de-registration of the NPC.

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Change in governance

28. Whereas NPOs are headed by members within the governance structures, NPCs are headed by directors as required by the law. The function is the same, the only difference is the term used.

29. Best practice requires strict governance compliance from directors of a company. The new NPC will be required to adhere to governance compliance and align its policies with best practices. This will help in ensuring good governance within the company.

30. NPCs need to strictly adhere to their MOI. The MOI is a foundational document that outlines the objectives of the company, the governance structure, operational guidelines as well as the rights, duties and responsibilities of its members and directors. An MOI can be compared to a company's constitution.

Effect on the members

31. The Companies Act provides for registration of NPCs with or without members. The definition clause of the Companies Act defines a member for the purpose of a non-profit company as a person who holds membership in, and specified rights in respect of, that non-profit company, as contemplated in Schedule 1.

32. In terms of schedule 1 item 1(9), NPCs with members are required, in terms of section 50 of the Companies Act, to keep a member's register. The register is the same as the securities register that would be required of a profit company.

33. SAPVIA, as a member focused association, will be required to keep a member's register in accordance with the law. The members will not be negatively affected by the change, the only impact is that there are more stringent rules to comply with.

Financials and bank accounts

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34. As previously indicated, transitioning from an NPO to a NPC is a process where a whole new company has to be registered and the legal framework therein also changes.

35. The newly registered non-profit company is a separate legal entity with its own governance structures and legal framework. Unlike the smooth transition from a close corporation to a private company, the same cannot be said about the transition from an NPO to an NPC. This then means that historical financials cannot be carried over, the same applies for the bank accounts.

36. The newly registered NPC will have to start its financial reporting as a new entity. With regards to the bank accounts, various banks deal with changes differently, however, the banks will also view the NPO and the NPC are two separate entities, and as a result, a new bank account will have to be opened for the newly registered NPC.

37. The key issue to be mindful of in this whole process is that a new company will have to be registered.

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Associated Costs

38. The costs as they relate to the registration of the new non-profit company are limited to those costs stipulated by the CIPC for the application process. The CIPC requires payment accompanying the applications for registrations. In this regard, the fee to accompany the name reservation is R50 (fifty rands) when done electronically and R75 (seventy-five rands) when done manually, and the fee accompanying the application for a customised non-profit company with members is R475 (four hundred and seventy-five rands). Should your require our office to assist with the company registration, we estimate our fees at R5 000.00 (five thousand rands) excluding VAT, official fees and disbursements.

39. The other foreseeable costs are those associated with the actual transfer of the asset, these costs are dependant on the type of assets, the value of the assets as well as the service provider(s) responsible for the transfer.

RECOMMENDATION

40. As indicated above, the is no direct process for the direct conversion from an NPO to an NPC. SAPVIA will have to register as newly formed NPC with the CIPC under the prescripts of the Companies Act. Considering the added advantage that an NPC can register as an NPO, we recommend that SAPVIA considers the registration of a non-profit company.

41. Please do not hesitate to contact us should you require any clarity herein.

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