

Impact of the withdrawal of the CIPC non-binding opinion on sections 90 and 92 of the Companies Act

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In October 2019, the Companies and Intellectual Property Commission (CIPC) issued a notice of the withdrawal of the non-binding opinion ("this" or "the" "opinion") pertaining to Regulation 28(2)(a) of the Companies Regulations, 2011 (the Companies Regulations) to the Companies Act, 2008 (the Companies Act). This opinion applied to legal practitioners who are registered as companies in terms of the Companies Act. This opinion considered whether the holding of assets in the legal practitioners' trust accounts is regarded as part of the ordinary course of the legal practitioner's primary business. This article serves as a reminder of the requirements contained in section 90 of the Companies Act that auditors should be cognisant of in accepting the appointment as an auditor of the business accounts of a legal practitioner.

Section 90 of the Companies Act

Section 90 of the Companies Act deals with the appointment of the auditor. This section of the Companies Act applies to the following categories of companies:

- public companies (listed and not listed on an exchange);
- state owned companies;
- private, personal liability and non-profit companies if the company is required to have the annual financial statements audited by either the Companies Act or the Companies Regulations; and
- private, personal liability and non-profit companies that voluntarily elect to have their annual financial statements audited and such requirement is contained in the company's Memorandum of Incorporation (MOI).



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Section 90 of the Companies Act does not apply to companies that have voluntarily decided on an audit by way of a shareholder or board decision, as long as such a requirement is not contained in the MOI.

Two specific sections of the Companies Act that auditors should pay close attention to in accepting the appointment as auditor include section 90(2), which outlines persons that are prohibited from being appointed as the auditor and section 92 that deals with the requirement for audit partner rotation. These two sections are expanded on below.

Section 90(2) of the Companies Act

Section 90(2) of the Companies Act outlines the requirements for a person to qualify for appointment as the auditor of the company. It states that an employee or consultant who was or has been engaged for more than one year in the maintenance of any of the company's financial records or the preparation of any of its financial statements or has performed the duties of accountant or bookkeeper, or performed related secretarial work (collectively referred to as non-audit services) may not be appointed as the auditor for a period of five years from performing these non-audit services.

Section 92 of the Companies Act

Section 92 of the Companies Act provides for audit partner rotation in stating that the same individual may not serve as the

auditor of a company for more than five consecutive years.

Implications of the withdrawal of the non-binding opinion

In withdrawing the opinion, the CIPC has made it clear that legal practitioners that are subject to the Companies Act, for example as incorporated companies, do in fact hold assets in a fiduciary capacity as part of the ordinary course of the firm's primary business. If the aggregate value of assets held in trust exceeds R5 million, an audit of the business accounts and related annual financial statements of the legal practitioner is now required.

The withdrawal of the opinion has had the effect of moving from either no audit requirement or a voluntary audit requirement to a statutory audit requirement. It is SAICA's view that the legal practitioner should consider sections 90–93 of the Companies Act when appointing the auditor.

In many instances, the auditor of the trust account has historically provided non-audit services to the legal practitioner, by way of maintaining the financial records, including the preparation of the financial statements of the business accounts. The impact of a change from a voluntary audit to a statutory audit on the application of the requirements of section 90(2) is that if the auditor has provided any of the non-audit services as outlined in section 90(2) the auditor will be disqualified from being appointed as auditor for a period of five years.

The impact of a change from a voluntary audit to a statutory audit on the application of the requirements of section 92 is best illustrated by way of the following example as contained in the SAICA Guide to the Companies Act:

A company's Public Interest Score is 200. The annual financial statements were independently compiled and a voluntary audit in terms of a shareholders' decision was performed for four years. The annual financial statements are then internally compiled in year five and as such, a statutory audit is now required in terms of the Companies Act. The question arises on whether the same auditor can perform the audit.

The auditor in the example above, can therefore be auditor for the first financial year after the statutory requirement for an audit is triggered but after that, the individual auditor needs to rotate off.

The interpretations presented above are not viewed as being retrospective in application but rather applying the Companies Act at a point in time.

In summary

When a statutory audit of the annual financial statements is triggered by requirements contained in section 30 of the Companies Act and Regulations 26 and 28 of the Companies Regulations, the legal practitioner should consider the requirements of sections 90–93 to determine whether the auditor can be appointed as the statutory auditor. This would require the consideration of the non-audit services provided by the auditor, as well as the period served by the auditor prior to the change in the requirement to be audited. If there is no requirement in terms of the Companies Act or the MOI for the company to be audited, then sections 90–92 do not apply to the appointment of the auditor.

Additional resources

[The IRBA and SAICA Guidance on the provision of non-audit services by the auditor of a company \(Section 90 of the Companies Act, No. 71 of 2008\).](#)

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