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12 December 2018

Director-General
Department of Trade and Industry
For attention: Mr Desmond Ramabulana

Email: DRamabulana@thedti.co.za

Dear Mr Ramabulana

Comments on the Companies Amendment Bill

In response to the request of the Department of Trade and Industry for comments on the Companies Amendment Bill, please find attached to this covering letter:

- SAICA's comment letter on the Companies Amendment Bill – General comments on the Bill (Attachment 1)
- Part A – Comments on the Bill (Attachment 2)
- Part B - Additional comments on the Companies Act (Attachment 3)

We thank you for the opportunity to provide comments on this document and we would be willing to discuss the comments, if required. Please do not hesitate to contact Juanita Steenekamp (juanitas@saica.co.za) in this regard.

Yours sincerely,

Juanita Steenekamp
Project Director: Governance and
Non-IFRS Reporting

Attachments:
1 – General comments on the Bill
2 – Part A - Comments on the Bill
3 – Part B - Additional comments on the Companies Act

Attachment 1 – General comments

1. Application of changes to the Act on small and medium sized companies

Various proposed changes to the Act and some recent interpretations has impacted smaller and medium sized businesses to a large extent increasing compliance costs, such as filing annual financial statements using iXBRL, the proposal that a person who is not a shareholder can access information, the fact that once information is submitted to the CIPC in terms of section 187 (4) (b) the CIPC has to make the information in the registers available to the public, the interpretation of section 30(2) as discussed in point 2, the application of the Takeover Regulations to all companies that have their annual financial statements audited. We would like to urge the Department to consider the changes and related interpretation in line with the Corporate Law Reform guidelines that company law should simplify the formation of companies as well as that is should be flexible and reducing the costs. The current interpretations and proposed changes seems to be increasing the burden and costs on smaller and medium sized entities and the business owner would not be able to meet the increasing burden without having to employ skilled an knowledgeable advisors at a cost.

2. Section 30(2) - Impact of proposed changes and recent CIPC interpretation on small and medium enterprises

We have noted the recent interpretation off the CIPC that a "voluntary audit" equals a "statutory audit" and that all the sections in the Companies Act that applies to company having their annual financial statements audited in terms of the public interest score (statutory audit) also applies to companies that chooses a voluntary audit of their annual financial statements.

The Companies Act, 1973 required all companies to be audited and appoint an auditor (section 269), required all companies to disclose directors emoluments (section 297) and to submit an annual return.

The Companies Act, 2008 made the distinction between companies that are required to be audited based on public interest and companies that are not required to have their annual financial statements audited, but that voluntarily choose to be audited.

Section 30(2)(b) states that a profit or non-profit company's annual financial statements must be audited if required by the regulations made in terms of subsection (7) taking into account the public interest. The public interest is then calculated based on the information in the regulations. Section 30(2)(b)(ii) thereafter states that the annual financial statements can be voluntarily audited if the company's Memorandum of Incorporation or a shareholders' resolution so requires or the company's board so decides or independently reviewed.

The CIPC's interpretation on the application of the Companies Act on companies that choose to have their annual financial statements voluntarily audited states that these companies must also apply the same requirements that applies to companies with that require the audit of their annual financial statements in terms of the Public Interest Score.

This interpretation has removed the changes that the Companies Act, 2008 has brought in to ensure that smaller companies have lesser requirements. Smaller companies that have a lower Public Interest Score that chooses to have their annual financial statements audited now has the same requirements under the Companies Act to comply with disclosure of directors remuneration (section 30(4)), submission of annual financial statements via iXBRL

(section 33), beneficial interest in securities (section 56(7), Application of Chapter 3 (section 84(1), the appointment of the auditor (section 90) as well as the rotation of the auditor (section 92).

The issue arises with the interpretation of the words used in the Companies Act which states that the certain sections apply to a company "that is required in terms of this Act to have its annual financial statements audited …"
The CIPC's interpretation states that where the wording is used, all the Companies Act requirements applies, this has huge implications on smaller and medium sized entities.

The interpretation by the CIPC is not in line with the Guidelines for Corporate law reform, Government Gazette 26496, Notice 1183 of 2004 which stated that company law should encourage entrepreneurship by simplifying the formation of companies and reducing costs associated with the formalities of forming a company and maintaining its existence. It also stated that there should be flexibility in the formation and management of companies. The guidelines also stated that it should be possible for small business and their advisors to understand the administrative requirements, without having to resort to expert advice.

The subsequent proposed change to section 118 in the Amendment Bill, will also be impacted by this interpretation and therefore all companies that chooses to have their annual financial statements audited will now have to apply to the Takeover Regulation Panel and not just companies that has qualifying transactions of 10%.

We would like to request the Department of Trade and Industry to clarify what sections of the Companies Act is applicable to companies that voluntarily choose to have their annual financial statements audited.

We would like to request that this section be rewritten to ensure that companies that are required to be audited are clear in terms of the Companies Act and to ensure that companies that voluntarily have their annual financial statements audited are not subject to the same requirements. Details of the section have been included in Part B, number 7 of the SAICA submission.

3. <u>Application of Companies Act requirements on Close Corporations</u>

The Close Corporations Act has been amended in section 58(2A), which states the following:

"(*2A) Section 30(2)(b) and (3) to (6) of the Companies Act read with changes required by the context, apply to a close corporation that is required in terms of the Regulations made in terms of section 30(7) of the Companies Act, to have of its annual financial statements audited*."

The amendments to the Close Corporations Act therefore only states that the relevant sections in the Companies Act will apply to close corporations that requires an audit of its annual financial statements. The independent review requirements are therefore not applicable to close corporations. The requirement for a close corporation to also have an accounting officer's report has not been removed. A close corporation therefor has to have an accounting officer and an auditor appointed, if an audit is required, which increases compliance costs.

The CIPC has, based on the amendments to the Close Corporations Act, applied certain Companies Act requirements on close corporations which have not been affected by the changes to the Close Corporations Act, e.g.

- independent review of close corporation's annual financial statements, even though the inclusion of the Companies Act amendments only refer to close corporation that are audited as per section 58(2A);
- exemption to an independent review as per section 30(2A), although the exemption to an independent review is also not applicable to close corporations as the section was not included in the amendments to the Close Corporations Act;
- submission of annual financial statements via iBRL although the Close Corporations Act only requires close corporations to submit an annual return, refer to the CIPC XBRL Frequently Asked Questions 13, 14 and 74 and the CIPC Notice 52 of 2018.

The requirement to be audited is included for close corporations but none of the requirements regarding the appointment, removal and duties of the auditor is included. This creates confusion as close corporations are not sure which sections of the Act apply and which not.

We would like to request that the subsequent amendments to the Close Corporations Act be clarified. Close corporations should be exempt from having an accounting officer and accounting officer's report should they require or choose to have their annual financial statements audited. We would also like to request that the application of independent review is clarified and submission of annual financial statements is clarified.

4. Protection of personal information versus publication of information

Subsequent to the submission of annual financial statements to the CIPC using iXBRL we are concerned with the privacy of the information. Based on the information provided in sections (1) and (2) that all companies and close corporations that voluntarily decide to have their annual financial statements audited must submit their annual financial statements to the CIPC using iXBRL we are concerned about the privacy of the information as this data is being sold utilizing electronic data sales on the CIPC webpage.

We would like to request that a balance is struck between the promotion of access to information and the protection of personal information, also taking into account international protection laws.

5. Financial statements to be compiled in 6 months after year end

Many practitioners find the 6 months deadline for completion of annual financial statements very onerous. They believe that the six months is too short due to other constraints such as staff and deadlines for tax purposes. In SAICA's consultation on the proposed Companies Act amendments practitioners requested that the deadline of six months for the completion of the annual financial statements be extended. Smaller companies also do not always have accounting staff which leads to an enormous workload during the six months, especially since year ends of companies in many cases is February. Smaller and medium sized entities do not always have qualified staff that can perform the accounting services and they rely on an accountant to provide these services. With the proposed amendments to the Act also requiring ALL companies to submit their annual financial statements to the CIPC using iXBRL this is creating more requirements for smaller

and medium sized entities that did not previously had to submit their annual financial statements to the CIPC.

SAICA is requesting that the DTI considers allowing smaller companies that do not require their financial statements to be audited based on the public interest score calculation to compile their annual financial statements within nine (9) months or even twelve (12 months) to align with the SARS requirements.

6. Amendment of Section 16(9)(b)

We are in agreement with the proposal to amend Section 16(9)(b) and would just request that the related forms, such as the CoR 15.2, be amended with the subsequent changes. The CIPC would also need to amend their turnaround time on amendments to MOIs which is currently 25 days. The CIPC released a non-binding opinion, dated 2 November 2011 (available on request) where they stated that mere delivery of a Notice of Amendment does not constitute filing of a notice. The CIPC would need to take note of the change in legislation in their implementation of the Act. Currently the CIPC has stated that they have a statutory right to not accept a document filed.

7. Turnover definition

SAICA would like to request that the application of the definition of turnover be clarified. The CIPC released two media statements, Media Statement 9 of 2016 and Media Statement 10 of 2016 which created a furore on the interpretation of the Companies Act, specifically with reference to the interpretation of the calculation of the turnover amount to be used for the calculation of annual return fees. The CIPC stated that companies were incorrectly calculating their turnover when submitting their annual returns.

The Companies Act requires that all companies submit an annual return (Section 33). The fee paid for an annual return is set out in Table CR 2B – *Commission fee schedule* and states in paragraph 8 that the fee for filing an annual return varies according to the company or external company turnover, and time of filing, as set out in a table attached to paragraph 8.

The CIPC stated the following, per the Media Statement 9 of 2016:
"*Section 223 of the Companies Act read with Regulation 164 (4) of the Companies Regulations, 2011 clearly sets out what constitutes turnover for a company and a holding company and the method required to calculate turnover for the purpose of determining the correct annual return fee to be paid to the CIPC. Further, Section 33 of the Companies Act read with Regulation 30 deals with the filing of annual returns by a company and annual turnover is referred to in table CR 2B – Commission Fee Schedule of the Companies Regulation 2011."*

Regulation 164(4) states that the annual turnover of a holding company is the consolidated gross revenue of that company and each of its subsidiaries from income from the Republic, and also arising from transactions as recorded in the most recent financial statements, including the sale of goods, rendering of services or the use by other persons of the company's assets that yields interest, royalties or dividends.

The dispute in question arises from difference in opinion on whether Regulation 164(4)'s calculation of the turnover of a group for purposes of calculating administrative fines is also applicable to the calculation of turnover for the payment of annual returns.

If this interpretation prevails the result is that the holding company is paying an annual return fee on a combined turnover figure. It is also important to take into consideration that in many groups of companies there are a number of companies that will qualify as "holding companies". This leads to the fictitious result that a group of companies are required to include the same turnover repeatedly and are therefore paying annual return fees on the relevant turnover as many times as there are companies constituting "holding companies" in the corporate structure.

Turnover is also not defined in the financial reporting frameworks, identified in the Companies Act. The International Financial Reporting Framework does not define "turnover". Turnover is interpreted differently by companies.

SAICA agrees that section 223 of the Companies Act allows the CIPC, amongst other things, to regulate filing fees. The question is whether Regulation164 is intended to regulate such filing fees or whether it is intended to regulate another matter that section 223 allows it to regulate. On the face of the provisions of Regulation 164, it appears to be punitive, which makes sense if applied in the context of regulatory fines. The impression that Regulation 164 is intended to apply in the context of Regulatory fines is strengthened by the heading of the section.

Therefore, although SAICA does not dispute the CIPC's ability (and in fact the duty to determine filing fees, SAICA believes that it is clear from the context of Regulation 164 that it does not, in fact, pertain to the calculation of filing fees.

An article by Sibusile Khusi from Adams and Adams Attorneys, published on 19 September 2016 makes valid points with regards to the fact that it makes little sense for a holding company to take its subsidiaries turnover into account when calculating annual turnover.

Section 7 of the Act requires that the Act should be interpreted to promote the development of the South African economy by creating flexibility and simplicity in the formation and maintenance of companies. The current interpretation by the CIPC seems to create confusion and double counting of the same amounts.

SAICA is requesting that the DTI clarifies that Regulation 164(4) does not apply to the calculation of holding companies' turnover to determine the filing fee for annual returns as required in section 33.

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