

Companies Act, 2008 – Financial assistance to directors (Section 45)

The heading of section 45 is somewhat misleading, as this section regulates financial assistance to persons other than only directors.

In terms of this section, unless the company's Memorandum of Incorporation provides otherwise, the board may authorise direct or indirect financial assistance to the following parties:

- a director or prescribed officer of the company or a related or inter-related company, or
- a related or inter-related company or corporation
- a member of a related or inter-related company or corporation, or
- a person related to any of the above parties.

The Act defines financial assistance widely to include the lending of money, guaranteeing of a loan and securing any debt or obligation. However, it should be noted that this section of the Act does apply to the lending of money where the primary business of the company is to lend money.

By extending the provision of financial assistance to related and inter-related companies, the new Act effectively requires companies to comply with the provisions of this section in the case of intercompany loans, or any type of financial assistance from one company to another within the same group.

Before the board may authorise any financial assistance, it has to ensure that all statutory requirements are met. Despite any provision of a company's Memorandum of Incorporation to the contrary, the board may not authorise any financial assistance contemplated in section 45, unless:

- the financial assistance is:
 - provided pursuant to an employee share, **or**
 - it is done in line with a special resolution of the shareholders, adopted within the previous two years, which approved such assistance either for the specific recipient, or generally for a category of potential recipients, **and**
- the board has ensured that:
 - the company will satisfy the solvency and liquidity test immediately after providing the financial assistance and
 - the terms under which the financial assistance is proposed to be given are fair and reasonable to the company.

Note: This means that the requirements of this section must be complied with where a holding company provides financial assistance to subsidiaries.

With respect to the special resolution required, it should be noted that the resolution must be passed before the provision of financial assistance. Ratification after the fact is not possible. It is possible for the company to phrase the special resolution generally to ensure that it covers all types of financial assistance. However, it is advisable to include at least maximum limits of financial assistance that may be given pursuant to that particular special resolution. It is not necessary to wait for an AGM to pass the required special resolution. The new Act allows for resolutions to be circulated to all shareholders as a round robin, and it is no longer required for special resolutions to be registered with the Companies Commission.

Of course, in addition to the requirements set out above the board must ensure that any conditions or restrictions respecting the granting of financial assistance set out in the company's Memorandum of Incorporation have been satisfied.

An important development is the fact that the Act requires the board to provide written notice to all shareholders (unless every shareholder is also a director of the company) and trade unions representing employees whenever it resolves to provide financial assistance in terms of this section. The required written notice must be provided:

- within 10 business days *after the board adopts the resolution*, if the total value of all loans, debts, obligations or assistance contemplated in that resolution, together with any previous such resolution during the financial year, exceeds one-tenth of 1% of the company's net worth at the time of the resolution, or
- within 30 business days *after the end of the financial year*, in any other case.

Any board resolution approving the provision of financial assistance that is inconsistent with the requirements of this section is void, and directors may incur personal liability for the damage, cost or loss suffered by the company as a result.

Article written by Dr Johan Erasmus, chairman of the SAICA Legal Compliance Committee and Regulatory Analyst at Deloitte.