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Update: Legal opinion on section 90(2) of the Companies Act

The release of the Companies Act, 2008 resulted in different interpretations of Section 90(2). Section 90(2) specifies who can be appointed as the statutory auditor of the company and contains prohibitions. There was uncertainty as to whether the prohibitions extended to the firm appointed as the auditor or only applied where the individual is appointed as the auditor. The SAICA and IRBA Boards' jointly agreed to brief Senior Counsel for a written opinion. The opinion confirms that some of the prohibitions contained in section 90(2)(b) also applies to firms appointed as auditors.

Related issues requiring clarity are what would constitute:

- Maintenance of the company's financial records
- Preparation of a company's financial statements
- Performing the duties of accountant or bookkeeper or related secretarial services

SAICA and the IRBA are in the process of developing guidance on the above and will communicate the outcome after discussions with the Companies and Intellectual Property Commission (CIPC). We have already confirmed with the CIPC that related secretarial services to performing the duties of accountant or bookkeeper do not include the completion and lodging of forms for a company.

The prohibitions contained in section 90(2) apply to all **statutory** audits (including a company required to be audited in terms of its Public Interest Score or as included in the Memorandum of Incorporation). Should a company decide to voluntarily have an audit, by board or shareholder resolution, the company and the auditor is not obliged to follow the Companies Act requirements and therefore section 90 - 93 will not apply, unless so required by the company. Companies and auditors should however still take note of the SAICA Code of Professional Conduct and the independence requirements.

The effective date of section 90 was 1 May 2011. The IRBA sent out a communication on 17 May 2012 where they have stated that the monitoring of compliance with section 90(2) will be extended for a further six months from 1 May 2012 to 31 October 2012. The CIPC agreed to further defer enforcement of the application with section 90(2)(b) to 1 June 2013. Accordingly, registered auditors should continue to follow current requirements as prescribed by the IRBA Code of Professional Conduct in respect of the provision of audit and non-audit services.

Section 90(2)(b)(v) further prohibits the auditor from filling the positions contained in provisions (i) to (iv) for the previous five years. This has been interpreted as a provision applied prospectively and therefore also applies with effect from 1 May 2011. The CIPC confirmed that compliance with prohibition (v) read with (ii) and (iv) will also be extended to 1 June 2013.

The IRBA requested SAICA to assist in conducting an impact analysis to which SAICA agreed. The results will assist in further engagements with the CIPC.

We encourage all SAICA members appointed as **statutory** auditors to ensure compliance with section 90(2).

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