

Steps taken by SAICA and the final outcome: The application of section 90 of the Companies Act, 2008

Released: 28 November 2013

Section 90(2)(b) contains prohibitions applicable to an auditor engaged to perform a statutory audit of a company or a close corporation. Section 90(2)(b) prohibits an auditor from providing certain non-audit services to the same client.

In interpreting the application of section 90(2)(b) SAICA initially interpreted section 90(2)(b) to apply only to the individual performing the audit.

EXTRACT FROM THE SAICA COMPANIES ACT GUIDE

“10.3.2 Independence of auditor

Reference: Section 90(2)

Issue: Auditor independence required

Discussion

- 10.3.2.1 The Act expressly disqualifies an auditor from being appointed to perform a *statutory* audit if that person provides accounting or secretarial services to the company requiring the audit.
- 10.3.2.2 The Act states that a person cannot be appointed as an auditor if that person has performed any of the functions listed in S90(2)(b). This list includes the following:
- a director or prescribed officer of the company;
 - an employee or consultant involved in the maintenance of financial records or preparation of financial statements;
 - a director, officer or employee of the company secretary;
 - a person who alone or with a partner or employee performs the duties as accountant or bookkeeper, or performs related secretarial duties;
 - a person who during the past five years has been one of the above; or
 - a person related to any of the above.
- 10.3.2.3 It is our view that this prohibition *expressly* extends only to the appointment of an auditor by a public company or company required to be audited in terms of its own MOI or Regulation 28 (public interest score or activity test), and not to voluntary audits.
- 10.3.2.4 Furthermore, SAICA is of the opinion that the prohibition extends only to the individual partner, not the firm. Auditors must, however, carefully consider their independence with reference to the SAICA and Independent Regulatory Board for Auditors (IRBA) Codes of Professional Conduct, specifically S290.
- 10.3.2.5 From a contextual interpretation, it is evident that although S90(2) refers to both "a person or firm", this reference is qualified by subsection 3. Subsection 3 determines that where a firm is appointed as an auditor, it is *the individual auditor* that must satisfy the requirements of subsection 2. The reference to "firm" in subsection 2 only has bearing on subsection 2(a). A firm cannot be a prescribed officer, employee, or

director and the requirements in (b) relate to individuals or natural persons. This is confirmed by subsection 3 and context.

10.3.2.6 An alternative view that has been raised is that the prohibition applies to the firm.”

Based on different interpretations the SAICA and IRBA Board’s jointly obtained a legal opinion to clarify the application of section 90(2)(b).

Sequence of events:

- 10 November 2011 – stakeholders meeting with CIPC
SAICA, IRBA and the CIPC met regarding the application of section 90(2).
- 11 October 2011 - IRBA communication regarding monitoring of compliance
The IRBA sent out communication where they have stated that the monitoring of compliance with section 90(2)(b) will commence on 1 May 2012, further to them clarifying the confusion regarding section 90 in the market.
- 20 October 2011- Communique, SAICA communicated the IRBA message in the newsletter
- 17 May 2012 – IRBA communication extending monitoring of compliance
The IRBA sent out communication where they stated that the monitoring of compliance with section 90(2)(b) will be extended by a further six months from 1 May 2012 to 31 October 2012.
- 24 May 2012 – SAICA bulk e-mail sent to members
SAICA sent out bulk e-mail to members informing members of the further 6 months extension as well as the fact that a legal opinion will be obtained to assist in the clarification.
- 9 July 2012 – legal opinion received from Adv. Cilliers, Senior Counsel (“SC”)
The legal opinion received confirmed that the prohibitions apply to both the firm as well as the individual.
[Brief to Adv. Cilliers, SC](#)
[Opinion from Adv. Cilliers, SC](#)
- 24 October 2012 – legal opinion and communication to members
SAICA issued communication to members informing them of the opinion received. The communication also confirms that SAICA and the IRBA will be developing guidance on the interpretation of terms contained in section 90 and that the CIPC agreed to further extend the monitoring of compliance with section 90(2)(b) to 1 June 2013.
[SAICA’s communication to members](#)

- 26 November 2012 – meeting to discuss impact analysis
Task team met to discuss the impact analysis process.
- 13 December 2012 – status of the impact analysis communicated
SAICA communicated the status of the impact analysis to members.
[Status of impact analysis](#)
- 16 January 2013 – section 90 guidance task team meeting
The task team met to begin drafting the section 90 guidance.
- 31 January 2013 – section 90 guidance task team meeting
The task team met to continue drafting the section 90 guidance.
- 15 February 2013 – section 90 guidance task team meeting
The task team met to finalise drafting the section 90 guidance.
- 22 February 2013 – meeting with the CIPC to discuss section 90 draft guidance
SAICA and the IRBA representatives met with the CIPC to discuss the draft guidance developed on section 90. The CIPC agreed with the proposed guidance but requested that SAICA and the IRBA clear certain interpretational issues with the Specialist Committee on Company Law (“SCCL”) before issuing the guidance. A letter was drafted to the SCCL seeking clarity on the draft guidance. The chair of the SCCL reverted by confirming that SAICA and the IRBA are best placed to issue the guidance on section 90 as intended.
- 26 February 2013 – meeting with IRBA to discuss Impact analysis
SAICA representatives met with the IRBA to plan and begin with the drafting of the impact analysis questionnaire.
- 27 February 2013 – meeting with IRBA to discuss Impact analysis
SAICA representatives met with the IRBA to continue with the drafting of the impact analysis questionnaire.
- 14 to 31 May 2013 - impact analysis period
SAICA and the IRBA requested their respective members to complete the impact analysis survey during this period.
- 14 May 2013 - guidance on section 90 released to members
SAICA and the IRBA issued joint guidance on section 90.
[Guidance on Section 90 of the Companies Act, 2008](#)

- 5 August 2013 - feedback on impact analysis to CIPC
SAICA and the IRBA representatives met with the CIPC to present the results of the impact analysis survey. The CIPC agreed to a final extension on 31 December 2013 for the monitoring of compliance with section 90(2)(b).
- 3 September 2013 – SAICA submission to SCCL
SAICA made a formal submission to the SCCL regarding future amendments to the Companies Act.
- 2 September 2013 – SAICA special Board meeting
SAICA convened a special Board meeting where it was agreed that SAICA will seek a second independent opinion from Senior Counsel on the interpretation of section 90(2)(b).
- 3 September 2013 – 13 November 2013

Stakeholder engagement

SAICA met with and communicated to the following key stakeholders to keep them informed of the impact of section 90 on auditors; companies and the audit committee;

- IRBA
- JSE;
- Audit Committee Forum;
- Top 40 CFOs (SAICA's CFO Forum)

2nd Legal opinion

SAICA engaged with Adv. Trengove, SC and received the [final opinion](#) on 13 November 2013 which confirmed the interpretation of Adv. Cilliers, SC.

- 15 November 2013 – communication to members
SAICA issued communication to members informing them of the second legal opinion obtained by SAICA from Adv. Trengove, SC which confirms the interpretation of Adv. Cilliers, SC. SAICA encourages members comply with provisions of the Companies Act from 1 January 2014 being the effective date of the monitoring of compliance with section 90(2)(b). The communication also includes Frequently Asked Questions developed jointly by SAICA and the IRBA as well as feedback on the impact analysis survey that was conducted.
[SAICA's Communication to members](#)
[Frequently Asked Questions](#)
[Feedback on impact analysis released to members](#)

In addition to the process followed as outlined above the implications of section 90(2)(b) has been discussed at SAICA and the IRBA road shows held during 2012 and 2013.