

TO: THE SOUTH AFRICAN INSTITUTE OF CHARTERED ACCOUNTANTS
FROM: ADV TINA RABILALL - SENIOR LEGAL ADVISOR
DATE: 19 JUNE 2013
RE: REQUEST FOR NON-BINDING OPINION



Companies and Intellectual
Property Commission
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INTRODUCTION

We have been requested to issue a non-binding opinion on the issue pertaining to Regulation 28(2) (a) of the Companies Act 2008.

The provision reads provides the following:-

28. Categories of companies required to be audited - See s. 30 (2), read with 30 (7)

(1) This regulation applies to a company unless, in terms of section 30 (2A), it is exempt from having its annual financial statements either audited or independently reviewed.

(2) In addition to public companies and state owned companies, any company that falls within any of the following categories in any particular financial year must have its annual financial statements for that financial year audited:

(a) any profit or non-profit company if, in the ordinary course of its primary activities, it holds assets in a fiduciary capacity for persons who are not related to the company, and the aggregate value of such assets held at any time during the financial year exceeds R 5 million;

(b) any non-profit company, if it was incorporated—

(i) directly or indirectly by the state, an organ of state, a state-owned company, an international entity, a foreign state entity or a foreign company; or

(ii) primarily to perform a statutory or regulatory function in terms of any legislation, or to carry out a public function at the direct or indirect initiation or direction of an organ of the state, a state-owned company, an international entity, or a foreign state entity, or for a purpose ancillary to any such function; or

(c) any other company whose public interest score in that financial year, as calculated in accordance with regulation 26 (2)—

(i) is 350 or more; or

(ii) is at least 100, if its annual financial statements for that year were internally compiled.



DISCUSSION

I refer to the views of the LSSA as well as SAICA Legal Compliance committee, Companies and Intellectual Property Commission

The CIPC has reviewed these opinions that appear to be in contrast with each other, based on the interpretation of the same provision, Regulation 28(2) (a) of the Companies Act 2008

The requirement for an audit hinges on whether the company holds assets in a fiduciary capacity for a broad group of persons.

One will have to apply their mind as to:

- What constitutes the 'ordinary course of activities' of the company;
- What size the 'broad group of persons' might have to be to fall under the Act;
- How the company's 'primary activities' are defined, and
- Where activities 'incidental' to these primary activities

Interpretation of "Fiduciary capacity"

The term "fiduciary capacity" appears in Regulation 28 of the Companies Act 2008, within the categories of Companies that require to have its annual financial statements audited.

The term 'fiduciary' possesses a core meaning, namely that a person in that position is under a duty of loyalty to some other person or body. This duty is then translated into a fundamental legal principle that a fiduciary should not allow his personal interests to conflict with that duty.

Interpretation of Regulation 28

The proper interpretation of Regulation 28(2)(a) turns on whether the operation of trust accounts by attorneys' firms is in "*the ordinary course of the firms' primary activities.*" It appears to me that the conclusion that the operation of trust accounts by attorneys firms is in the ordinary course of the firms' primary activities will be far-fetched, as the primary activities of the attorneys' practice are the provision of legal services.



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Whether in the provision of such services, another piece of legislation requires them to operate a trust account is a completely different matter, and one which is excellently taken care of by that other piece of legislation, being the Attorneys Act, 1979.

If the trust account was operated by the attorneys' firms for the sole purpose of pursuing investment opportunities on behalf of the clients (and this was the requirement of the relevant professional legislation), rather than to ensure that the payment of professional legal services being provided by the attorneys firms is adequately provided for, then the operation of the trust account under such circumstances would clearly constitute "the ordinary course of the firms' primary activities.

As to the situation where money is paid to an attorney for or in connection with work which is not by its very nature legal work, I submit that it would be necessary to establish to what extent attorneys do in fact perform such work and thus whether such work could be regarded as part of an attorneys' practice and then is it part of their primary activity?

While I do agree that the assets held by the attorneys firms in the trust accounts on behalf of the attorneys' firms are held a fiduciary capacity, I am not convinced that the operation of the trust account, per se, is in the ordinary course of the attorneys' primary activities.

This is, also, not the intention of the legislature, as the existence of a protective statutory provision, in the form of the Attorneys Act, 1979, and the rules passed in accordance therewith, would have been clearly been accorded recognition, so as to avoid unnecessary duplication of regulatory measures.

I trust that you will find the above in order.

Regards

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CIPC

