

FREQUENTLY ASKED QUESTIONS (FAQS)

Legal compliance considerations in a virtual environment

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Introduction and background

With the outbreak of the COVID-19 pandemic, SAICA has received numerous questions on how the changed virtual environment impacts compliance with certain legislative requirements, particularly as it relates to remote working, the signing of documents or attending meetings virtually. In response to the questions, SAICA has prepared FAQ's aimed at providing guidance on some of the issues raised, recognizing that the matters dealt with in this document remain topical and relevant to the current environment.

Frequently asked questions

Electronic Signatures

The use of electronic signatures is governed by the Electronic Communications and Transactions Act 5 of 2002 (ECT Act). The ECT Act recognises two forms of electronic signatures – electronic signatures and advanced electronic signatures.

The ECT Act defines these electronic signatures as follows:

An electronic signature is: Data attached to, incorporated in, or logically associated with other data and which is intended by the user to serve as a signature.

An advanced electronic signature: An electronic signature which results from a process which has been accredited by the South African Accreditation Authority as provided for in section 37 of the Electronic Communications and Transactions Act, 2002 (No. 25 of 2002).

Section 13(1) of the ECT Act provides that where the signature of a person is required by law and such law does not specify the type of signature, that requirement in relation to a data message¹ is met only if an advanced electronic signature is used.

It is important to note that an advanced electronic signature results from a process accredited by an Accreditation Authority².

Against this background two pertinent questions arise relating to directors signing the annual financial statements on behalf of the board and the signing of agreements.

1. Section 30(3) (c) of the Companies Act, 71 of 2008 (Companies Act) requires that the annual financial statements of a company must be approved by the board and signed by an authorised director as evidence of the board's approval thereof. Can the authorised director sign these annual financial statements electronically?

Section 30 of the Companies Act does not specify the type of signature that the authorised director must use when signing the annual financial statements. However, Section 6(12)(a) of the Companies Act inter alia states that signing may be effected in any manner with provisos as follows :

¹ A "data message" is defined in section 1 of the ECT Act as "data generated, sent, received or stored by electronic means and includes

(a) voice, where the voice is used in an automated transaction; and

(b) a stored record."

² Section 38 of the ECT states that an advanced electronic signature is accredited by an Accreditation Authority and must be uniquely linked to the user; capable of identifying the user; created using means that can be maintained under the sole control of that user; linked to the data or data message to which it relates in such a manner that any subsequent change in the data or data message is detectable; and based on the face-to-face identification of the user

"(12) If a provision of this Act requires a document to be signed or initialed-
(a) by or on behalf of a person, that signing or initially may be effected in any manner provided for in the Electronic Communications and Transactions Act;
(b) by two or more persons, it is sufficient if-
(i) all of those persons sign a single original document, in person or as contemplated in paragraph (a) ; or
(ii) each of those persons signs a separate duplicate original of the document, in person or as contemplated in paragraph (a), and in such a case, the several signed duplicate originals, when combined, constitute the entire document"

The authorised director can sign by way of an electronic signature or an advanced electronic signature. Directors must ensure that the signature applied to the annual financial statements meet the requirements of the either an electronic signature or an advanced electronic signature. Refer to the **"*Signing Conventions for Reports or Certificates, of the IRBA Code of Professional Conduct for Registered Auditors (Revised November 2018): Electronic Signatures*"** for a detailed list of examples of electronic and advanced electronic signatures.

Note: Annual financial statements are sometimes "ink signed" and electronically scanned with a copier or other device. The "ink signed" scanned annual financial statements in itself does not constitute an electronically signed document. However, in combination with a data message , such as an e mail from the approved director, the requirement of an electronic signature is met. i.e. the scanned "ink signed" annual financial statements are appended to an e-mail, from the approved director's e mail address, indicating his or her name at the bottom of the e- mail.

Acceptable signatures when documents are filed with the CIPC:

The CIPC published a notice, [Notice 1108 of 2013](#) that set out the acceptable signatures for a document that may be filed via the CIPC portal. These signatures include a fingerprint, or any other biometric measure; and one time password sent by the CIPC system to either his or her cellular telephone or e-mail address or a combination of his or her cellular telephone and e-mail address.

In concluding, the director must consider the requirements of Companies Act and the ECT Act when signing the annual financial statements as evidence of board approval thereof.

The directors are required to choose either the electronic signature or the advanced electronic signature, with more options possibly becoming available through future amendments to the ECT Act.

The directors should also consider any publications by the CIPC on what type of electronic signature is acceptable for submitting documents.

Approved: 30 March 2022

2. Can an auditor sign audit reports using an electronic signature?

The Independent Regulatory Board for Auditors (IRBA) issued amendments to the Code of Professional Conduct, **Final Amendments to Subsection 115, Professional Behaviour: Signing Conventions for Reports, of the IRBA Code of Professional Conduct for Registered Auditors (Revised November 2018)**. Registered auditors need to refer to the Code of Professional Conduct for Registered Auditors (Revised 2018) and any subsequent information released by the IRBA.

Approved: 30 March 2022

3. Can agreements be signed electronically?

If the signature on the agreement is not required by a particular law as set out in Section 13 of the ECT Act (discussed under question 1 above), an electronic signature will suffice. Examples of electronic signatures include:

- A “click wrap” or “click through” agreement with a digital prompt that offers the opportunity to accept or decline the agreement. Privacy and user policies on websites are common examples of this type of ordinary electronic signature.
- Using the software product of an ordinary electronic signature service provider.
- Appending a signature with an electronic pen on a tablet computer.
- Sending an agreement via an e-mail, SMS or WhatsApp from which message the identity or name of the sender is evident.

Schedule 1³ of the ECT Act specifically excludes certain sections of the ECT Act to the signing of wills and agreements for the sale of immovable property. These agreements must be “wet ink signed”.

In signing any agreement, members should consider if a law requires a particular agreement and then consider the type of signature required.

Approved: 30 March 2022

³ Wills Act, 7 of 1953: The Wills Act requires a will to be in writing, signed and witnessed. The exemptions in the ECT Act specifically refers to the fact that sections 11, 12, 13, 14, 15, 16, 18, 19 and 20 does not apply to the Wills Act. These sections refer to the legal recognition of data messages, signing of documents as well the keeping of documents as a data messages. Therefore wills cannot be signed by electronic means, and must be “wet ink signed”.

Alienation of Land Act, 68 of 1981: The exemptions in the ECT Act specifically refers to the fact that sections 12 and 13 does not apply to the Alienation of Land Act. These sections refer to the keeping of documents in writing as data messages and the signing of documents electronically. Therefore agreements for the sale of land and immovable property must be “wet ink signed”.

Bills of Exchange Act, 34 of 1964: The exemptions in the ECT Act specifically refers to the fact that sections 12 and 14 does not apply to the Bills of Exchange Act. These sections refer to the keeping of documents in writing as data messages and the retention of documents electronically.

Stamp Duties Act, 77 of 1968 - Act repealed

Virtual Meetings

4. What are the requirements for virtual company meetings such as shareholder meetings, board meetings and annual general meetings to be held virtually using the available electronic platforms?

a) Board meetings

Section 73(3) of the Companies Act determines that, unless a company's Memorandum of Incorporation provides otherwise, a meeting of the board may be conducted by electronic communication or one or more directors may participate in a meeting by electronic communication as long as the electronic communication employed enables all persons participating in that meeting to communicate concurrently with each other and reasonably effectively without an intermediary.

b) Shareholder meetings

Section 63(2) of the Companies Act determines that, unless a company's Memorandum of Incorporation provides otherwise, a shareholders meeting may be conducted by electronic communication. Section 63(2) furthermore states that one or more shareholders, or proxies for shareholders, may participate by electronic communication in all or part of a shareholders meeting that is being held in person, as long as the electronic communication employed enables all persons participating in that meeting to communicate concurrently with each other and reasonably effectively without an intermediary.

In terms of Section 63(3) of the Companies Act, if a company provides for participation in a shareholders meeting by electronic communication, the notice of the meeting must inform shareholders of the availability of that form of participation and provide any necessary information to enable shareholders or their proxies to access the available medium or means of electronic communication. Access to the medium or means of electronic communication is at the expense of the shareholder or proxy, except to the extent that the company determines otherwise.

If the company's Memorandum of Incorporation, expressly vary or prohibit the holding of shareholder by electronic communication the abovementioned provisions dealing with electronic communication in the Companies Act will not apply. To hold virtual meetings, companies should thus first review their Memorandum of Incorporation to ensure that virtual meetings are permitted. In addition Section 60 of the Companies Act permits shareholders resolutions to be adopted by means of a "round – robin" written resolution in appropriate circumstances without the need to hold a shareholders meeting. Section 74 of the Companies Act permits board decisions to be adopted by written consent of the majority of directors, given in person or by electronic communication, provided that each director has received notice of the matter,

c) Annual general meetings

The above considerations for shareholders meetings apply *mutatis mutandis* to annual general meetings. In addition, S 61 (10) determines that every shareholders' meeting of a public company must be reasonably accessible within the Republic for electronic participation by shareholders.

Approved: 30 March 2022