FREQUENTLY ASKED QUESTIONS (FAQS) FOR MEMBERS AND ASSOCIATES OF SAICA

RELATING TO THE COMPANIES ACT, 2008

Contents

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Introduction and background

SAICA receives questions on the Companies Act, 71 of 2008 ("Companies Act") issues from SAICA members and associates and has undertaken to provide guidance on some of the issues raised.

This document includes Frequently Asked Questions documents previously released including

- Frequently Asked Questions published on "Disclosure of Directors' and Prescribed Officers Remuneration", released September 2015;
- Frequently Asked Questions on "Filing of audited annual financial statements" released 23 February 2016; and
- Frequently Asked Questions on "Application of the Owner-managed exemption" released 31 August 2018 and updated 12 September 2018.

This set of frequently asked questions is in addition to the "Updated guidance and frequently asked questions on Section 90(2) of the Companies Act, 2008, updated 17 March 2015

SAICA cannot provide a definitive or comprehensive answer as the facts of each situation are different and the appropriate conduct will have to be considered bearing these differences in mind.

Frequently asked questions relating to the Companies Act

OWNER MANAGED

1. Can a company with a trust / holding company holding all of its shares and the trustees of the trust / directors of the holding company all being directors of the company qualify for the exemption of an audit or independent review?

The Companies Act includes an exemption from independent review and audit of financial statements. Section 30(2A) states:

> *"If, with respect to a particular company, every person who is a holder of, or has a beneficial interest in, any securities issued by that company is also a director of the company, that company is exempt from the requirements in this section to have its annual financial statements audited or independently reviewed, but this exemption- (a) does not apply to the company if it falls into a class of company that is required to have its annual financial statement audited in terms of the regulations contemplated in subsection (7)(a); and (b) does not relieve the company of any requirement to have its financial statements audited or reviewed in terms of another law, or in terms of any agreement to which the company is a party."*

The owner managed exemption, whilst stating that it is applicable to audit and independent review is in actual fact only applicable to independent review of annual financial statements, as the section 30(2A)(a) specifically excludes companies that require an audit in terms of the regulations in subsection (7)(a) from applying the exemption. The exemption also does not relieve the company of any requirement to have its financial statements audited or reviewed in terms of another law, or in terms of any agreement to which the company is a party.

The exemption states that it applies in a situation where every person who is a holder or has a beneficial interest in any securities issued by that company is also a director of that company.

While the definition of person in Section 1 of the Companies Act, 2008 includes a juristic person, Section 69 clarifies that a juristic person is ineligible to be appointed as a director. For companies in which beneficial interest holders are juristic persons, for example in a group situation where the shares in a subsidiary company are held by its holding company, the holding company will be disqualified from being appointed as a director and as a result the subsidiary company will not qualify for the exemption from independent review. If a company's shares are held by another company or a trust, then the exemption stated in S30(2A) cannot apply, as the company or trust cannot be a director of the company as it is not a natural person. A trust is specifically included in the definition of "juristic person".

Therefore, where a trust / holding company is the shareholder then the owner managed exemption cannot apply as section 30(2A) states that all shareholders must be directors and as the trust / holding company cannot be a director the exemption cannot apply.

Released 31 August 2018

Updated 12 September 2018

FILING OF AUDITED ANNUAL FINANCIAL STATEMENTS

Introduction

CIPC released a notice, Notice 4 of 2016, informing directors of companies and members of close corporations that in terms of the Companies Act companies and close corporations should submit annual financial statements to the CIPC. Notice 52 of 2018[1], dated 3 August 2018 reminded companies and close corporations that annual returns must be accompanied by either financial statements or a financial accountability supplement. From 1 July 2018 annual financial statements must be submitted via iXBRL.

2. What must companies file with the CIPC?

   Section 33 of the Companies Act states that every company must file an annual return.

3. What must close corporations file with the CIPC?

   Section 15A of the Close Corporations Act, 69 of 1984 ("Close Corporations Act") states that every close corporation must file an annual return.

4. Who must file financial statements with the CIPC?

   Companies should include copies of their audited financial statements as required by section 33 of the Companies Act and Regulation No.30(2) if it is required to have such statements audited in terms of section 30(2) or in terms of the regulations contemplated in section 30(7) of the Companies Act.

   The following companies are required to have their annual financial statements audited and should therefore submit the audited financial statements:

   - any public company;
   - 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 R5 million;
   - any profit or non-profit company that compiles its financial statements internally (for example, by its financial director or one of the owners) and that has a Public Interest Score (PIS) of 100 or more;
   - any profit or non-profit company that has its financial statements compiled by an independent party (such as an external accountant) and that has a Public Interest Score (PIS) of 350 or more;
   - 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.

[1] Notice 52 of 2018

Although section 33 of the Companies Act does not apply to close corporations, it seems as if the CIPC is following the same approach for close corporations and they should therefore also submit audited financial statements, where required.

5. When should companies have filed the audited financial statements?

The requirement to file audited financial statements has been in effect from 1 May 2011. The CIPC initially waived the filing of the audited financial statements, due to system issues, but the waiver lapsed on 31 March 2013. Therefore any annual returns filed after 31 March 2013 should have been accompanied by the latest approved audited financial statements (Companies Regulations, 2011, regulation 30(2)). Companies that did not submit audited financial statements, should therefore submit all outstanding audited financial statements.

6. Can a company that is not audited in terms of section 30(2) of the Companies Act or in terms of the regulations contemplated in section 30(7) of the Companies Act submit their annual financial statements to the CIPC?

Regulation 30(3) informs companies that if the company is not required in terms of the Companies Act or regulation 28 to have its annual financial statements audited then it may file a copy of its audited or reviewed statements together with its annual return. The CIPC is however of the view that if a company's annual financial statements are audited in terms of the MOI then audited annual financial statements must be submitted via iXBRL[2].

7. What must companies that are not audited file, in addition to their annual return?

Regulation 30(4) states that a company that is not required to file annual financial statements in terms of regulation 30(2) or a company that does not elect to file a copy of its audited or reviewed annual financial statements MUST file a financial accountability supplement to its annual return in Form CoR30.2

8. When should companies have filed a financial accountability supplement?

The requirement to file the financial accountability statement has been in effect from 1 May 2011. The CIPC initially waived the filing of the financial accountability statements, due to system issues, but the waiver has lapsed. Therefore, any annual returns filed should be accompanied by the completion of the financial accountability statements, where applicable.

9. What is required from companies in the Financial Accountability Supplement (CoR30.2)?

The Financial Accountability Supplement requires the following information from the company:

- Registration number and name of the entity;
- Name and identity number of the person primarily responsible for recording the day to day financial transactions and maintaining the company's financial records;
- Name and identity number of the person primarily responsible for compiling financial information and preparing reports and statements;

[2] SAICA summary in relation to identified requirements of the Companies Act

- The person, if any, who provides advice to the company concerning the maintenance of financial records;
- The name of person performing the independent review of annual financial statements, if applicable and the recognised profession as well as the practice number (if applicable) of the person performing the independent review of annual financial statements;
- Provide an indication of whether the company maintains its financial records manually or electronically in a computer-based system;
- Indicate how the company prepares bank reconciliations, balance sheets and income and expense statements, indicating whether this is monthly, quarterly, semi-annually or annually;
- If the company deals in goods, when does it carry out stocktaking;
- Does the company hold any assets in a fiduciary capacity for persons not related to the company, as contemplated in Regulation 28(2)(b); and
- Name, title, cellphone number and e-mail address of the person submitting the Financial Accountability Supplement on behalf of the company on behalf of the company.

The Financial Accountability Statement must be completed via the CIPC online transacting module.[3]

10. Why would the CIPC want the financial information submitted to them?

The CIPC is tasked in the Companies Act and Regulations with various duties in terms of compliance to financial reporting standards.

The CIPC is tasked in Regulation 30(5) to establish a system to select and review a sample of the financial accountability supplements, audited annual financial statements or independently reviewed annual financial statements with the objective of monitoring compliance with the financial record keeping and financial reporting provisions of the Companies Act and may issue compliance notices setting out requirements for compliance; and in terms of Section 187 (3) of the Companies Act:

> "*The Commission must promote the reliability of financial statements by, among other things*
>
> *(a) monitoring patterns of compliance with, and contraventions of, financial reporting standards; and*
>
> *(b) making recommendations to the Council for amendments to financial reporting standards, to secure better reliability and compliance*".

[3] Step-by-step_guide_on_how_to_file_Financial_Accountability_Supplement.pdf (cipc.co.za)

Please read Section 30, Section 33, Regulation 30 for a full understanding of what is required from companies and close corporations. Also, refer to Schedule 3 for applicability of the notice to close corporations.

Released 23 February 2016

Updated 11 March 2022

DISCLOSURE OF DIRECTORS REMUNERATION

Introduction

The Companies Act requires that certain companies must include the disclosure of directors' and prescribed officers' remuneration per individual in the company's annual financial statements. This list of frequently asked questions has been compiled to assist SAICA members with the interpretation of the Act's requirements. These frequently asked questions do not deal with disclosures as required by the financial reporting standards or the JSE Listings Requirements.

The Close Corporations Act, 58 of 1984 has also been amended to require close corporations to disclose members' remuneration. Where applicable, the reference to a company will include reference to a close corporation.

11. Which companies must disclose directors' and prescribed officers' remuneration, as required by section 30(4) of the Act, in their annual financial statements?

The Companies Act states that the annual financial statements of "each company that is required in terms of this Act to have its annual financial statements audited" must include the particulars set out in S30(4). This requirement therefore applies to:

- public companies;
- state-owned companies;
- any company that, in the ordinary course of its primary activities, 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 R5 million;
- "any non-profit company, if it was incorporated –
    - 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
    - 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 state, a state-owned company, an international entity, or a foreign state entity, or for a purpose ancillary to any such function";
- any other company that has a public interest (PI) score of 350 or more; and
- any other company that has a PI score of between 100 and 349 if the annual financial statements for that year were internally compiled.

The *SAICA summary in relation to identified requirements of the Companies Act* [4]contains a table that summarises the Act's requirements for companies to be audited and how these requirements relate to the Act's requirements for annual financial statements to disclose directors' and prescribed officers' remuneration.

12. Does a company have to disclose directors' and prescribed officers' remuneration, as set out in S30(4) of the Companies Act, in its annual financial statements, if the company does not meet any of the requirements as listed in FAQ 2 but requires an audit in terms of

    (a) the Memorandum of Incorporation (MOI) of the company; or

    (b) shareholders' resolution; or

    (c) a board of director's decision?

The requirement to disclose directors' and prescribed officers' remuneration, as set out in S30(4) of the Companies Act, applies only to those companies required to be audited in terms of the Act. Accordingly, companies that are audited voluntarily, i.e. where the requirement arises in terms of the company's MOI, a shareholders' resolution, or a decision of the board of directors, are not required to disclose directors' and prescribed officers' remuneration in their annual financial statements, as set out in S30(4) of the Act.

The CIPC released an Information Notice discussing 'voluntary audit' as it is introduced in Section 30(2) (b) of the Companies Act and then draws specific attention to Section 30(4) which addresses the disclosure of directors' remuneration. It states, among other, that "*since The Companies Act requires that a company be voluntary audited, should its Memorandum of Incorporation, a shareholders resolution, or the board of directors so determines same, this is then a requirement in terms of the Act. Hence, moving on to subsection 4, it is stated that if the Act requires this, then the audit must include the disclosure of remuneration, and other amounts (specified above) in respect of each director. All requirements relevant to a mandatory audit will then also include a 'voluntary audit' as per the afore-mentioned provisions. The criteria must remain the same for both types of audit.*

Please refer to the *SAICA Communication on CIPC Notice 38 of 2020* [5]*on voluntary audit and SAICA summary in relation to identified requirements of the Companies Act*[6] where the SAICA and CIPCs opinions are discussed.

13. Will a company comply with the requirements of S30(4) of the Act by using number or letter references when identifying directors or prescribed officers, instead of the names of its directors and prescribed officers; for example, by referring to "Director A", "Director B" and "Director C"?

Section 5 of the Act prescribes the interpretation and application of the Act. It provides that the Act must be applied in accordance with the "purposes" of the Act as contained in S7.

[4] SAICA summary in relation to identified requirements of the Companies Act
[5] SAICA Communication on CIPC Notice 38 of 2020
[6] SAICA summary in relation to identified requirements of the Companies Act

These purposes are diverse and include matters such as the encouragement of the efficient and responsible management of companies and transparency.

The Act states in S30(4)(a) that the remuneration and benefits received by **each director or individual that holds any prescribed office** in the company must be disclosed. This is interpreted as stating that the name of each director or prescribed officer must be disclosed in the annual financial statements, together with the particulars required by S30(4) in line with the concept of transparency (S7). Also note that this disclosure is on an individual basis per director or prescribed officer and not in aggregate as per the Companies Act, 1973.

14. Does the remuneration disclosure only reflect directors' and prescribed officers' in office at year end?

No, the Act states that disclosure of all remuneration and benefits paid to or receivable by the directors' and prescribed officers' of the company for services rendered as a director or prescribed officer of any company must be disclosed.

If the director or prescribed officer is not a director or prescribed officer at the end of the financial year, the director or prescribed officer still received remuneration during the financial year and the remuneration and benefits were still paid to or receivable by the directors and the prescribed officers. As such, the remuneration or benefits paid to or received by the director or prescribed officer during the financial year must be disclosed.

It is therefore SAICA's view that the disclosure should include any directors or prescribed officer who had been in office during the course of the year. The only exception to this, in SAICA's view, is S30(4)(e), which specifically only requires the disclosure of the details of service contracts of **current** directors and prescribed officers.

15. Company A is required to be audited by the Act. Must remuneration paid to or receivable by directors and prescribed officers of Company A for services rendered by these directors or prescribed officers to other companies in the same group of companies be disclosed in the annual financial statements of Company A?

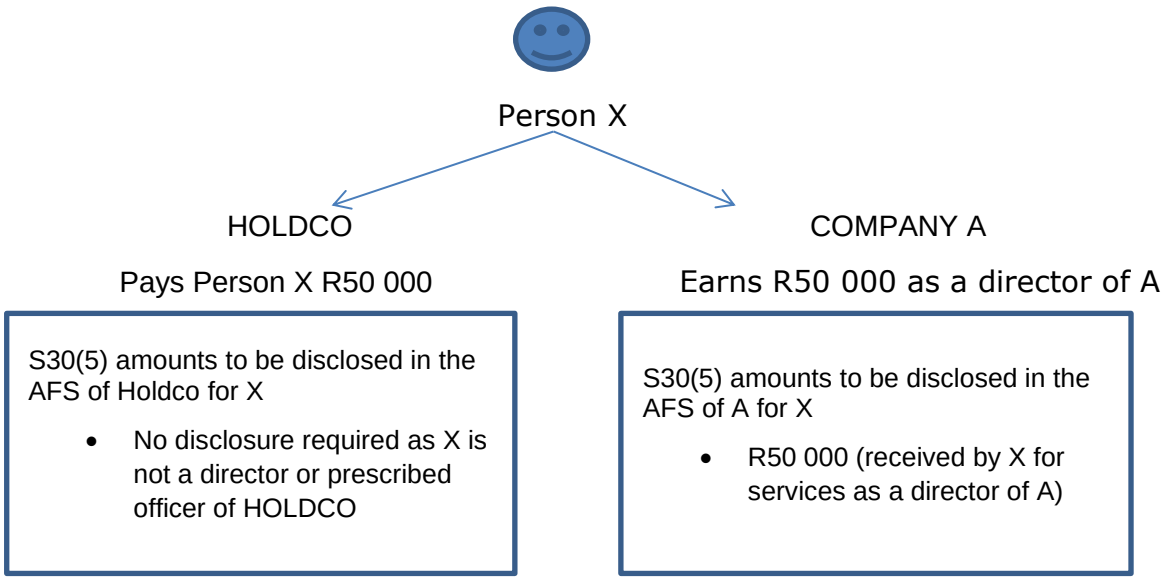
Yes, S30(5) of the Act states that the information to be disclosed under S30(4) "must satisfy the prescribed standards, and must show the amount of any remuneration or benefits paid to or receivable by persons in respect of:

- services rendered as directors or prescribed officers of the company; or
- services rendered **while being directors or prescribed officers of the company**:
    - **as directors or prescribed officers of any other company** within the same group of companies; or
    - otherwise in **connection with the carrying on of the affairs of the company or any other company** within the same group of companies." [our emphasis]

The effect of these requirements is that all remuneration paid to or receivable by directors and prescribed officers of Company A in respect of services rendered to Company A or any other company within the same group of companies must be disclosed in the annual financial statements of Company A. If a person serves as director and/or prescribed officer of more than one company in a group of companies, that person's total remuneration would be disclosed in the annual financial statements of all the companies in the group that are

required to disclose remuneration. The detail of the person's total remuneration, i.e. the split between the disclosure required by S30(5)(a) and S30(5)(b) would however differ in the various sets of annual financial statements.

16. Company A has one director, person X. Company A's holding company pays person X R50 000 for services rendered as director of Company A. Both company A and its holding company are required to be audited in terms of the Act. Person X is not a director or a prescribed officer of the holding company. In which set of annual financial statements must person X's remuneration be disclosed?



Section 30(4) of the Act requires remuneration paid to or receivable by ***directors and prescribed officers of the company*** to be disclosed in the company's annual financial statements. Section 30(5) of the Act elaborates on this requirement by requiring the disclosure in the company's annual financial statements of "the amount of any remuneration or benefits paid to or receivable by persons in respect of:

- services rendered as directors or prescribed officers of the company; or
- services rendered while being directors or prescribed officers of the company
    - as directors or prescribed officers of any other company within the same group of companies; or
    - otherwise in connection with the carrying on of the affairs of the company or any other company within the same group of companies."

The source of payment does not determine the disclosure – rather, the question is whether or not a particular director/prescribed officer received any remuneration for his/her services to the company. Accordingly, even if payment is made from a foreign source, disclosure is nevertheless required if a director/prescribed officer received the remuneration/benefit for services as director / prescribed officer of that company.

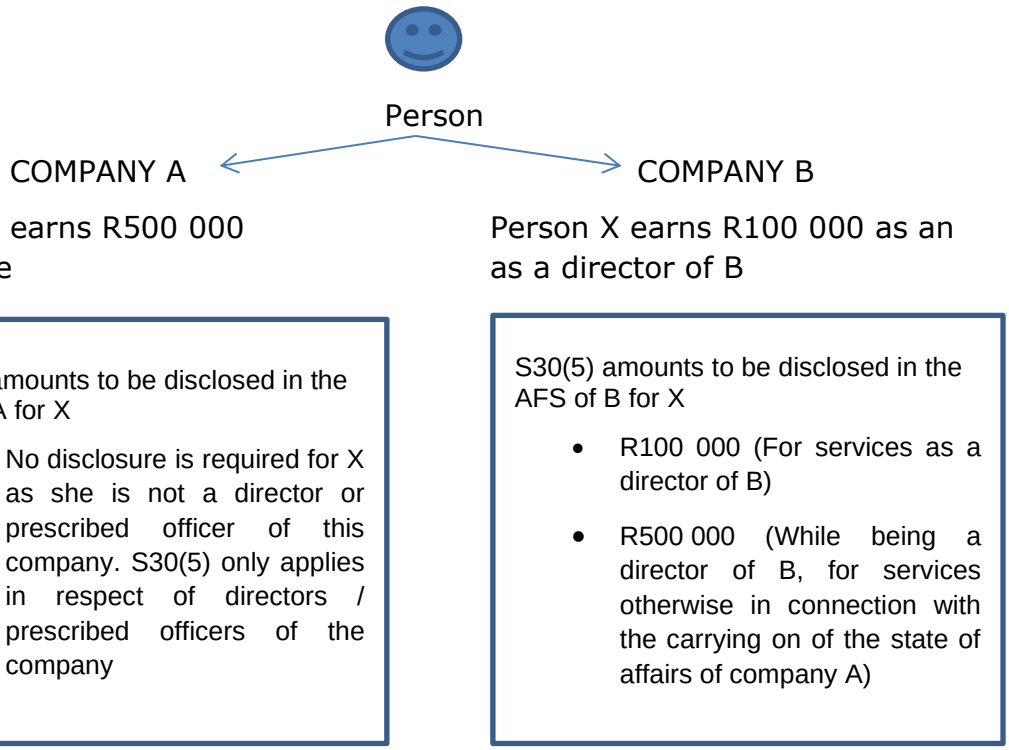
Therefore, there will be circumstances where the amount recognised as an expense in a company's Statement of Comprehensive Income does not agree with the amounts disclosed in its annual financial statements in terms of S30(4) of the Act.

17. What does "in connection with the carrying on of the affairs of the company or any other company within the same group" mean?

"***Carrying on of the affairs"*** as referred to in S30(5)(b)(ii) has a broad meaning and extends to services provided in the director/prescribed officer's capacity as an employee. If a person is a director of a company (that is required to be audited by the Act) in a group of companies and the same person is also an employee of another company in the group, the company where the person is a director will have to disclose in its annual financial statements the person's remuneration received as director of the company ***and*** the salary earned as an employee of the other company within the same group of companies (i.e., for the carrying on of the affairs of the company).

Example:

South African Companies A and B are in the same group of companies. Both companies are required to be audited in terms of the Act. Person X is an employee of A for which she earns R500 000. Person X is not a director or prescribed officer of A. Person X is a director of Company B where she receives R100 000. We assume that Person X does not provide any other services in the group.



18. Section 30(5) of the Act refers to all companies "within the same group of companies". Does a "group of companies" refer only to the company in question and its own subsidiaries or does the term extend to the entire group of companies of which the company in question forms a part?

The Act defines a "group of companies" as meaning: "a holding company and all of its subsidiaries". A "group of companies" therefore consists of every holding company (as defined in the Act) and every subsidiary (as defined in the Act) of that holding company.

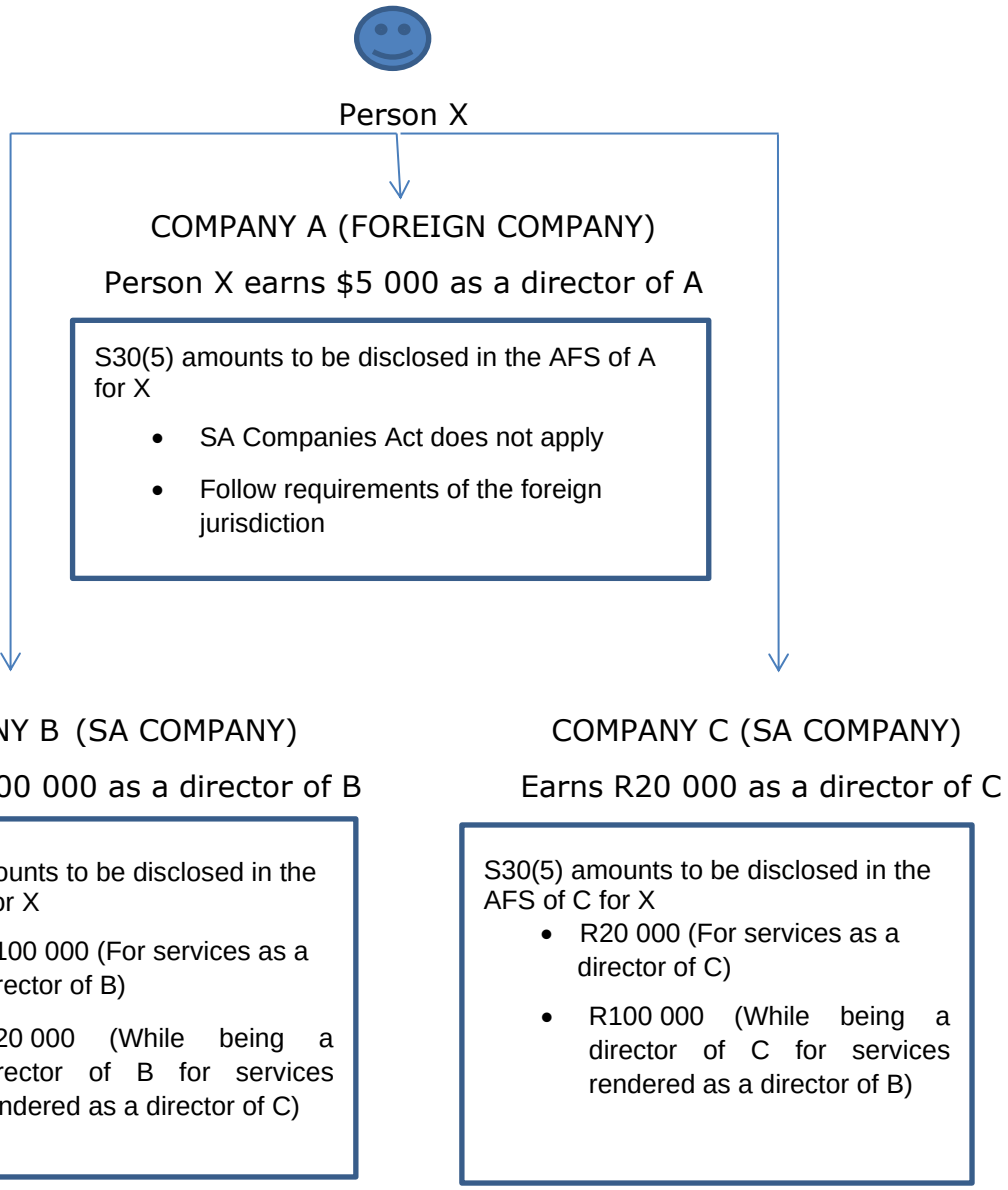
Consider, for example, a holding company with one subsidiary. The “group of companies” will consist of the holding company and its subsidiary. The subsidiary will thus be part of a “group of companies” even though the subsidiary itself has no subsidiaries. For purposes of S30(5), services rendered to every company in the same group of companies therefore includes the holding company, all subsidiaries and fellow subsidiaries (thus looking upward, downward and sideways in the group structure).

Refer to FAQ 20 for further guidance on what constitutes a “holding company”.

19. Should remuneration received by directors and prescribed officers for their services to trusts and foreign companies also be disclosed?

No, the Act requires the company to disclose all amounts payable to or received by its directors and prescribed officers in respect of services rendered as directors or prescribed officers of the company. Amounts in respect of services rendered as directors or prescribed officers of any other **company** within the same group of companies or otherwise in connection with the carrying on of affairs of the company or any other **company** within the same group of companies are also required to be disclosed. In terms of the Act, a “company” is defined as a juristic person incorporated in terms of the previous or current Companies Act and would include South African companies only. Therefore, any amounts paid to directors and prescribed officers in respect of services rendered to a trust or a foreign company within the group would not be disclosed, since trusts and foreign companies are not “companies” as defined by the Act.

20. South African Companies B and C (both public companies) are subsidiaries of a foreign company, Company A. Companies B and C are required to be audited in terms of the Act. Person X is a director of Company A, Company B and of Company C, where he receives $5 000, R100 000, R20 000 for services rendered to the respective companies. Should the remuneration of R20 000 received by person X for services rendered to Company C be disclosed in the annual financial statements of Company B?



The Act defines a "company" as a juristic person incorporated in terms of this Act, a domesticated company, or a juristic person that, immediately before the effective date was registered in terms of the Companies Act, 1973 (Act No. 61 of 1973) …". A holding company is defined in the Act as follows: "in relation to a subsidiary, means a juristic person that controls that subsidiary as a result of any circumstances contemplated in section 2(2)(a) or 3(1)(a)". A foreign company would qualify as a "holding company" even though it does not meet the definition of "company" in the Act.

Fellow subsidiaries B and C are therefore "within the same group of companies" even though their holding company is not a South African company. The remuneration earned by the person in question for services rendered to Company C should thus be disclosed in the annual financial statements of Company B and vice versa.

Remuneration received in respect of Company A need not be disclosed in the annual financial statements of the South African subsidiaries as company A is a foreign company and accordingly not a "company" as defined in the Act. Refer to FAQ 10.

21. Would it be acceptable for a company to include the disclosure required by S30(4) of the Act in the directors' report, as opposed to in the notes to the financial statements?

Section 30(4) of the Act requires the company's **annual financial statements** to include particulars regarding directors' and prescribed officers' remuneration. The annual financial statements include the directors' report. Although SAICA recommends that the disclosure required by S30(4) be made in the notes to the financial statements, it is permissible for the directors to include the disclosure required by S30(4) in the directors' report. However, the auditor remains responsible for auditing the directors' and prescribed officers' remuneration disclosure.

Released September 2015

Updated 11 March 2022

LEGAL PRACTITIONERS

22. Should a legal practitioner that is incorporated as a company and has for a short period held assets of more than R5 million in a fiduciary capacity have to have the incorporated company's annual financial statements audited in terms of Regulation 28 of the Companies Act Regulations?

Example

- The auditor's client, a legal practitioner in an Incorporated company, has never held more than R3 million in a fiduciary capacity for persons who are not related to the company.
- In the last financial year the legal practitioner facilitated a payment on behalf of a client
- The legal practitioner's client paid R5.8 million into the legal practitioner's trust account on 16 January and the money was paid out on 1 February.
- The trust therefore exceeded R5 million at a certain time during the year, although this was only for a few days.
- Does the legal practitioner meet the requirements for his/her business accounts[7] to be audited?

Answer

The Companies Act 2008 (the Companies Act), states that the annual financial statements of "each company that is required in terms of this Act to have its annual financial statements audited" must include the particulars set out in Section 30(4). This requirement applies to:

[7] The South African Legal Practice Council Rules issued in terms of sections 95(1), 95(3) and 109(2) of the Legal Practice Act 28 of 2014 require an audit engagement to be undertaken on the compliance of the legal practitioner's trust accounts with the Act and the Rules. Rule 54.20 states, "A firm shall at its expense once in each calendar year or at such other times as the Council may require, appoint an auditor to discharge the duties assigned to the auditor in terms of these rules, provided that…:"

- public companies;
- state-owned companies;
- any company that, *in the ordinary course of its primary activities*, 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 R5 million;
- "any non-profit company, if it was incorporated –
    - 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
    - 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 state, a state-owned company, an international entity, or a foreign state entity, or for a purpose ancillary to any such function";
- any other company that has a public interest (PI) score of 350 or more; and
- any other company that has a PI score of at least 100 if the annual financial statements for that year were internally compiled.

The Companies Act is silent on the definition of "fiduciary capacity" however the SAICA Companies Act guide section 7.7.2.3 – 7.7.2.4 states the following:

"Assets held in a fiduciary capacity must be held in the ordinary course of the company's primary business, not incidental to it, on behalf of third parties not related to the company. Fiduciary capacity implies decision-making capability over the application of the assets and that the third parties have the right to reclaim the assets. These assets may be financial or non-financial assets.

Whether a company holds assets in the ordinary course of its primary activities depends on the nature of the company, viz., whether the activity is part of the core business or is incidental to it. Incidental activities will not be included in a company's primary activities, for example the holding of deposits. The first step is to determine what the primary activities of the business are. The second step is to determine what comprises the activities in the ordinary course of the primary activities. If any of the activities in steps 1 and 2 involve the taking of deposits, then the criterion of holding assets in a fiduciary capacity on behalf of an unrelated party could potentially apply.

With regards to ordinary course of primary activities and incidental activities SAICA is of the view that legal practitioners having a trust account is in the ordinary course of the primary activities.

Every legal practitioner referred to in section 84(1) of the Legal Practice Act (LPA) must operate a trust account. Every trust account practice must keep a trust account at a bank with which the Legal Practitioners' Fidelity Fund has made an arrangement as provided for in section 63(1)(g) of the Legal Practice Act and must deposit therein, as soon as possible after receipt thereof, money held by the practice on behalf of any person. The keeping of a trust account is a peremptory requirement for a legal practice as set out in the LPA and the holding of fiduciary assets by a legal practitioner in a trust account practice forms part and parcel of its primary activities and the holding of assets in a

fiduciary capacity can hardly be regarded as incidental in the context of Regulation 28 of the Companies Act.

Conclusion:

The Companies Regulations refer to the aggregate value of such assets held at any time during the financial year exceeding R5 million, therefore the company's financial statements will be required to be audited if the assets held exceeded R5 million at any stage.

The CIPC published a withdrawal[8] of a previously published non-binding opinion, dated 30 October 2019 in which they stated that all categories of companies which, in the ordinary course of their primary activities holds assets in a fiduciary capacity for persons who are not related to them, the value of which exceeded R5 million in the preceding financial year must have their annual financial statements audited and such companies include legal practitioners.

Released 31 May 2022

AUDITOR ROTATION

23. Where an audit partner is the engagement partner and signs the audit report for 20x1 and 20x2 and moves to another firm and is then requested to sign off the audit report for 20x3, would this constitute a break in appointment in terms of section 92 of the Companies Act?

Example

- Partner A employed by Firm 1 signs off audit report for 20x1 and 20X2.
- Partner A moves to Firm 2. Audit client appoints Firm 2.
- Partner A is appointed as the engagement partner (now employed by Firm 2). The 20X3 financial year's financial statements are to be signed under Firm 2.
- When Partner A left, Firm 1 may have appointed another engagement partner (Partner B). However, no reports were completed in this period.

Answer

Section 92(1) of the Companies Act states that the same individual may not serve as the auditor or designated auditor of a company for more than 5 consecutive years. Section 92(2) then states that if an individual has served as the auditor or designated auditor for two or more consecutive years and then ceases to be the auditor, that person may not be appointed as the auditor until after the expiry of at least two further financial years.

[8] Withdrawal of non-binding opinion issues pertaining to Regulation 28(2)(a) of the Companies Act

The Companies Act states that an auditor "*has the meaning as set out in the Auditing Profession Act*", which in turn is defined as "*An individual or firm registered as an auditor with the Regulatory Board".*

Section 92 does not refer to firms, but rather the individual appointed as the auditor or designated auditor.

A technical interpretation reveals that the auditor (Partner A in the example) could continue to be the individual auditor until the 5 year period ends. Technically no interruption in appointment of the individual auditor's appointment occurred in the absence of an amended CoR 44. S92 is not dependent on the affiliation of the individual with a specific audit firm. However, although the scenario may not constitute non-compliance with Section 92, a technical interpretation disregards the amended affiliation of the individual with a specific audit firm. The surrounding circumstances of each case should be considered. Individual auditors and firms are required to be transparent and seek legal advice where uncertainty exists. Where a technical interpretation results in the circumvention of the law or ethical considerations, a conservative interpretation is prudent

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AUDITOR APPOINTMENT

24. Should a company submit a CoR 44 form (Notice of Change of Auditor or Company Secretary) to the CIPC for the appointment of an auditor when the annual financial statements are voluntarily audited by shareholder resolution?

Answer

Section 85(1) and (3), read with section 34(2), requires that companies who appoint an auditor, irrespective of whether the company is required to appoint an auditor by that section or voluntarily appoints an auditor as contemplated in section 34(2), must maintain a record and submit a notice to the CIPC. This notice is filed using the CoR 44 form.

Section 34(2) however, states that a company is not required to comply with the extended accountability requirements set out in Chapter 3, except to the extent contemplated in section 84(1)(c) or as required by the MOI.

Section 84(1)(c) furthermore requires that Chapter 3 applies to a company that is required by the Act to have its annual financial statements audited, with the exclusion of the appointment of a company secretary or audit committee, or as required in the MOI.

Accordingly, where a voluntary audit by shareholder resolution or board decision is performed a CoR 44 form is not required to be submitted to CIPC.

In order to formally record the appointment, SAICA however recommends that the CoR 44 form be submitted even for a voluntary audit by shareholder resolution or board decision. This is discussed more fully in SAICA's Guide to the Companies Act[9], section 10.3.1.18:

[9] SAICA Companies Act Guide

The appointment of an auditor must be lodged with the CIPC via the Form CoR 44 – Notice of change in auditor or company secretary and, if the auditor is a firm, a designated auditor must be identified on the form. The CIPC will not process the appointment of an auditor until the resignation of the previous auditor has been lodged on a CoR 44 form. Where a private, personal liability or non-profit company voluntarily elects (i.e., is not required in terms of the Act, Regulations or its MOI) to have its financial statements audited, it is not required to lodge the CoR 44 form with the CIPC in terms of S85(3). However, it is recommended that this is done.

Failure to lodge the CoR 44 form for the appointment of the auditor for any company does not invalidate the auditor's statutory appointment as the lodging of this form is considered to be administrative in nature.

25. When does the resignation of the registered auditor become effective? Seemingly the CIPC only changes the appointed auditor when the new auditor has been appointed, even though the incumbent auditor has already resigned.

Section 91 of the Companies Act states that the resignation of the auditor is effective when the notice is filed. The filing of this notice is however the responsibility of the company (client of the auditor) as set out in Section 85(3) of the Companies Act.

On appointment of the company auditor the CIPC is notified of such an appointment. The company lodges the Form CoR44 with the CIPC. Where the auditor ceases to perform an audit because for example the company subsequently qualifies for an independent review, no mechanism exists to record the change of auditor with the CIPC, i.e. to amend the status from "auditor" to "independent reviewer". In other cases the auditor may have resigned but the client has not populated the resignation of the auditor on the eServices portal. This could lead to a mismatch between the CIPC records of the auditor's status and the true status of the auditor. The CIPC records could incorrectly reflect the details of the auditor who has in actual fact ceased to be the auditor as a result of resignation or otherwise.

The unintended consequence is that creditors and other external parties may rely on the incorrect information or the CIPC may even contact the auditor for specific information relating to the audit.

CIPC released Notice 2 of 2022[10] indicating that they are aware of the matter.

Where an auditor has resigned or ceased to be the auditor and becomes aware that the CoR44 has not been filed at the CIPC by the company (client of the auditor), it is recommended that the auditor submit a complaint to the CIPC. The complaint of an alleged contravention of the Companies Act is submitted by completing a form CoR135.1, and sending it to CoR135.1complaints@cipc.co.za.

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[10] Notice 2 of 2022