



Frequently Asked Questions relating to the implementation of section 90(2) of the Companies Act, 2008

Please note:

- 1. Every effort is made to ensure that the information in this frequently asked questions document is correct. Nevertheless, this information is given purely as guidance to assist with particular problems relating to the subject matter of the guide and SAICA/IRBA will have no responsibility to any person for any claim of any nature whatsoever which might arise out of or relate to the contents of this guide.*
- 2. The information provided in this document does not constitute legal advice and should not be read in that context.*
- 3. Where the document suggests a particular view, such a view is based on SAICA/IRBA interpretation at that particular time, of the Companies Act and the relevant sections. Although SAICA/IRBA have consulted widely, it is possible that a different view may ultimately be followed in practice; for example, in instances where the Companies and Intellectual Property Commission provides specific guidance.*

The guide referred to in this document is the SAICA/IRBA Guidance on section 90 of the Companies Act, 2008, issued during May 2013. To view the guide, please follow the link: <https://www.saica.co.za/Technical/LegalandGovernance/CompaniesAct71of2008/AdditionalInformation/tabid/3129/language/en-ZA/Default.aspx>

Frequently asked questions released on 15 November 2013

1. To which companies does section 90 apply?

Section 90 applies to all companies and close corporations that are mandated to have an audit in terms of the Companies Act requirements. This includes:

- public companies;
- state-owned companies;
- companies or close corporations that have a public interest score above 350;
- companies that have a public interest score of between 100 and 350 and their financial statements are internally compiled; and
- companies and close corporations that have included the audit requirement in their Memorandum of Incorporation (“MOI”) or association agreement.

If a company or close corporation chooses to have an audit voluntarily by a decision of the board or members, then section 90 would not apply.

If a company or a close corporation requires an audit because of the requirements in the Estate Agency Affairs Act, No 112 of 1976 then section 90 would not apply unless the company or close corporation meets the requirements as stated in the Act regarding the public interest score, assets held in a fiduciary capacity or having the audit requirement in the MOI or association agreement.

If an attorney’s trust account requires an audit due to the rules of the various Law Societies then section 90 would not apply as the trust account is not audited based on Companies Act requirements.

2. Does section 90 apply to entities that are not companies, for example trusts, partnerships, sole proprietorships?

No, section 90 only applies to companies / close corporations that are registered under the Companies Act.

3. Does section 90 apply to close corporations?

Yes, section 90 applies to close corporations that are registered under the Close Corporations Act, as per the amendments in Schedule 3 of the Companies Act. Schedule 3 states that where the Companies Act refers to a company the reference to a close corporation must now be included.

Section 62A has been included in the Close Corporations Act, and it states the following:

- (1) *Section 34(2) of the Companies Act, read with the changes required by the context, apply to a close corporation.*
- (2) *(2) Chapter 3 of the Companies Act, read with the changes required by the context –*

- (a) Applies to a corporation that has voluntarily determined to take any action contemplated in section 34(2) of the Companies Act,; and*
- (b) Prevails over any conflicting provision of this Act, with respect to a corporation contemplated in paragraph (a).*

Section 34(2) in turn states that a private company, personal liability company, or a non-profit company is not required to comply with the extended accountability requirements in Chapter 3, except to the extent required in section 84(1)(c) or the MOI. Section 84(1)(c) then states that Chapter 3 applies to a private company, personal liability company, or a non-profit company that is required to have their annual financial statements audited in terms of the Companies Act or the regulations, provided that Parts B and D do not apply.

Therefore these sections apply to close corporations.

4. Which companies / close corporations are required to be audited in terms of the Companies Act

A company or close corporation that is mandated to have an audit in terms of the Companies Act is a public company or state-owned company, a private / non- profit or personal liability company, if their Public Interest Score is above 350 or between 100 and 349 and the Annual Financial Statements were internally compiled.

5. What is a voluntary audit?

A voluntary audit is an audit in terms of a board or directors' resolution or where the audit requirements are included in the MOI.

6. The effective date of the Companies Act was 1 May 2011. When is section 90 effective?

Section 90 is effective from 1 May 2011. The CIPC has confirmed that the section does not apply retrospectively. The effective date was extended to 1 January 2014.

7. Section 90(2)(b)(v) of the Companies Act also states that the person or firm appointed as the auditor could not have performed the prohibited services any time during the previous five years. When does the 5 years commence?

With the extension of the enforcement of section 90 from 1 May 2011 to 1 January 2014, the counting of the 5 year period has also been postponed and will commence on 1 January 2014.

In a strict sense the auditor will be disqualified from being appointed as the auditor with effect from 1 January 2014 if the auditor performed any of the prohibited services on 1 January 2014.

8. Is this 5 years a rolling window?

Yes, at any date that an auditor is considered for appointment of an audit where section 90 applies, the auditor should refer back to the 5 year period prior to the appointment date, up to 1 January 2014.

Example: If you are requested to be appointed as the auditor from 1 January 2015, then you have to refer back to the 1 year from 1 January 2014 to 1 January 2015 to review whether you have performed any of the prohibited services.

Example: If you are requested to be appointed as the auditor from 1 January 2020, then you have to refer back to the 5 years from 1 January 2020 to 1 January 2015 to review whether you have performed any of the prohibited services. You will not have to refer back to 1 January 2014 as that is more than 5 years from the date of appointment.

9. The IRBA Code of Professional Conduct states in section 290 that the auditor must evaluate their independence and threats to their independence. Can this section be used to override the independence requirements of section 90 of the Companies Act?

No, the Companies Act is the overriding legislation for companies. Although the Companies Act states in section 5 that where a conflict exist between requirements of the Auditing Profession Act and the Companies Act, the Auditing Profession Act will prevail, the IRBA Code of Professional Conduct is not included in the Auditing Profession Act, which is the legislation referred to in the Companies Act.

10. Does a firm include a network firm?

A firm also includes a network firm as defined.

11. What is a network firm?

A Network firm is a firm or entity that belongs to a network. A network is defined in the IRBA Code of Professional Conduct as:

“A larger structure:

- (a) That is aimed at co-operation; and
- (b) That is clearly aimed at profit or cost sharing or shares common ownership, control or management, common quality control policies and procedures, common business strategy, the use of common brand name, or a significant part of professional resources.¹”

12. If I performed accounting work for a client and the client grows, and their Public Interest Score is now above 350 and I compile the annual financial statements, can I be appointed as the auditor?

If your client grows and now requires an audit in terms of the Companies Act requirements then you will not be allowed to be appointed as the auditor as you will be in contravention of section

¹ Glossary of terms of the Handbook of International Quality Control, Auditing, Review, Other assurance and Related Services Pronouncements – 2012 Edition Part 1 (the Glossary) adopted by the IRBA and to be applied by Registered Auditors in South Africa

90(2)(b)(ii) and (v) as you were compiling the financial statements during the previous 5 years prior to being requested to be appointed as the auditor.

13. Will there be any transitional provisions to assist auditors during this period?

There will be no transitional provisions, and compliance with the section will be monitored from 1 January 2014.

14. When I am performing an audit engagement and I identify misstatements in the financial statements either prepared internally or by another independent accounting professional, what must I do?

The auditor is allowed in terms of the Auditing Profession Act, section 44(5) to make closing entries, assist with adjusting entries or framing the financial statements without being seen as keeping the books, records or accounts of the client. The auditor can therefore suggest adjustments to the financial statements. The adjustments must be processed by the company or can be processed by the auditor with the authorisation/approval of the company.

The distinction therefore depends on authorisation/approval of the accounting entries. Also refer to the IRBA / SAICA guidance on section 90 of the Companies Act on the website.

15. Does the use of a computerised working paper system indicate that the auditor has prepared the annual financial statements?

Many auditors use a computerised system to prepare a company's annual financial statements, for example, by importing/capturing the company's trial balance into the system.

The Companies Regulations define the independent compilation of financial statements as annual financial statements that are prepared –

- (i) By an independent accounting professional;
- (ii) On the basis of financial records provided by the company; and
- (iii) In accordance with any relevant financial reporting standards.

If the auditor uses a computerised system to compile financial statements in accordance with a relevant framework and by using the company's information, the auditor would be disqualified to be appointed as the auditor

16. Company and audit committee responsibility

- a. If the company requests the auditor to perform an audit, although the auditor is in breach of section 90, can the auditor accept the engagement?**

No, the auditor must comply with the relevant legislation.

- b. Can the audit committee decide to appoint an auditor who is in breach of section 90?**

The audit committee has a duty in terms of section 94(7)(a) of the Companies Act to nominate a registered auditor for appointment who is sufficiently independent of the company. The auditor also has the responsibility to evaluate his/her independence in terms of the IRBA Code of Professional Conduct and the Companies Act, before accepting the appointment.

c. Can the shareholders decide to appoint an auditor who is in breach of section 90 of the Companies Act?

The shareholders have a duty to comply with the Companies Act. The auditor also has the responsibility to evaluate his/her independence in terms of the Code of Professional Conduct and the Companies Act, before accepting the appointment, and should inform the shareholders of the breach of section 90.

Ultimately, the responsibility to comply with Section 90 of the Companies Act is always with the auditor.

17. My client does not have anybody who can compile the AFS. From a practical perspective, can I assist the client in these circumstances?

If you have been preparing your client's financial statements and the client now requires an audit in terms of the Companies Act requirements then you will not be allowed to be appointed as the auditor in future.

If you have not been preparing your client's financial statements, but the client now requires the compilation of the annual financial statements you will have to consider whether you would prefer to compile the annual financial statements or perform the audit in future. The Companies Act does not allow you to perform both functions in future.

18. Can one of our partners be responsible for the compilation of the AFS and another partner for the audit of the set of annual financial statements?

No, if your client requires an audit in terms of the Companies Act requirements then in terms of the legal opinion obtained section 90 applies to the firm appointed as the auditor as well.

19. A State Owned Company which is a public entity is audited by the Auditor General (AG). In certain cases where the AG has opted not to perform the audit and allocates the audit to the auditor [Section 4(3) of the Public Audit Act, Act No. 25 of 2004] and the auditor signs off on the audit, would section 90 apply?

Where the Auditor General allocates the audit to a private sector firm, the private sector auditor signs the audit report. These audits fall under the jurisdiction of the IRBA and Section 90 will apply.

20. Was an impact analysis conducted by the Department of Trade and Industry (DTI) before the Companies Act was implemented?

As far as we are aware an impact analysis was not done. The Companies Bill, B61 of 2008 state that various stakeholders were consulted as well as the fact that the DTI believes that funding would be required for the Companies Ombud to be created. No other impacts were identified.

- 21. If I perform VAT services to my clients (which in most instances requires the posting of transactions), will this be permitted? Many auditors will hide the accounting services behind performing VAT services on the premise that Tax related services as mentioned in Appendix IV of the guide are not classified as maintenance of financial records.**

There is a distinct difference between accounting and taxation services. Where auditors intentionally describe services in a manner which will avoid the application of Section 90, the IRBA Code of Professional Conduct will apply.

- 22. How will IRBA know if the auditor/and to what extent the auditor was involved in providing bookkeeping/compilation services?**

The IRBA will rely on the auditor's ethical standing and integrity to comply with Section 90. The IRBA will perform certain procedures during its firm and engagement inspections to detect whether both services were performed by the auditor. Although some auditors will not be subject to the IRBA's risk-based inspections approach, it should be borne in mind that random inspections will still be performed on auditors who might not fall within the particular risk classifications.

- 23. Where does the auditor need to document the fact that they considered section 90 independence before accepting the appointment as auditor?**

The auditor is responsible for completing certain processes prior to accepting a client. Quality Control for Firms that perform audits and review engagements (ISQ1) states that the firm shall establish policies and procedures for the acceptance and continuance of client relationships and specific engagements.

The International Standards on Auditing ("ISA") 200 and 220 also state that the auditor has specific responsibilities to consider independence and ethical requirements when accepting an audit engagement.

The Acceptance and Continuation of clients will therefore need to be documented in terms of ISA 230, Documentation, which should specifically include compliance with Section 90.

- 24. How will IRBA monitor auditors' compliance with the 5 year rule, will they keep a database or will it be purely dependant on the integrity of the auditors to prove compliance to inspectors (Perhaps declare it in the AFS)?**

The IRBA will rely on the integrity of the auditor, but monitor compliance as part of the inspections process.

- 25. On section 290.170 of the IRBA code, what would be seen as a breach? Conversions from one framework to another are very technical and the auditors are normally very involved in proposing the accounting entries/journals and then audit those same records? Would assisting the client with converting from one framework to another framework be seen as a breach of the code and the Companies Act?**

Providing the advice on the conversion would be technical advice. The auditor can provide technical advice, but needs to ensure that the auditor does not assume management's responsibility or prepare the financial statements.

Section 290.170 of the IRBA code states the following:

"290.170 Similarly, the client may request technical assistance from the firm on matters such as resolving account reconciliation problems or analyzing and accumulating information for regulatory reporting. In addition, the client may request technical advice on accounting issues such as the conversion of existing financial statements from one financial reporting framework to another (for example, to comply with group accounting policies or to transition to a different financial reporting framework such as International Financial Reporting Standards). Such services do not, generally, create threats to independence provided the firm does not assume a management responsibility for the client."

- 26. If the Companies Act overrides the IRBA code, will Section 290.174 (Emergency situations) fall away or can it still be used in very difficult circumstances?**

If the audit is performed as a requirement in terms of the Companies Act (statutory audit) or in terms of the company's MOI or the close corporations' association agreement then the Companies Act will apply and you will not be able to utilise the exemption in section 290.174 in any situations.

- 27. What are the implications for the auditor / audit firm if they are in breach of section 90(2)?**

The IRBA will investigate the breach in terms of a breach of the IRBA Code of Professional Conduct and institute the necessary disciplinary proceedings if required.