

13 OCTOBER 2021

CORPORATE & COMMERCIAL ALERT

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The latest proposed changes to section 45 of the Companies Act

On 1 October 2021, the Department of Trade, Industry and Competition published the Draft Companies Amendment Bill (Draft Amendment Bill 2021) for public comment. The Draft Amendment Bill 2021 serves as a revision of the previous Draft Companies Amendment Bill, published on 21 September 2018, and was developed after taking into consideration comments from the public and various affected stakeholders. The Draft Amendment Bill 2021 contains a number of proposed changes which seek to amend the Companies Act 71 of 2008 (Companies Act). The amendment to section 45 of the Companies Act is of particular interest.

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The latest proposed changes to section 45 of the Companies Act

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Clause 11 of the Draft Amendment Bill 2021 proposes the following amendments to section 45:

1. Deleting the original heading of section 45 which referred to "Loans or other financial assistance to directors" and substituting it with "Financial assistance".
2. Inserting a new sub-section (2A) which states, "The provisions of this section shall not apply to the giving by a company of financial assistance to, or for the benefit of its subsidiaries".

The change in the heading reflects a more accurate representation of the section as it not only deals with financial assistance to directors, but also extends to prescribed officers and certain juristic persons.

Further, the proposed sub-section (2A) seeks to exclude compliance with section 45 where a holding company provides financial assistance to its subsidiaries. It is noted that in terms of section 3 of the Companies Act, a subsidiary does not include foreign subsidiaries. This is because section 3 only refers to South African companies.

The main intention of section 45 is to safeguard against corporate abuse by recognising that "those in control of a company's finances are in a position of power, particularly where the company provides the controllers with loans or security". Accordingly, the board may only authorise financial assistance to the relevant persons specified in section 45 if the financial assistance is pursuant to an employee share scheme or pursuant to a special resolution adopted within the previous two years. In addition, (i) the board must meet the solvency and liquidity requirements, (ii) the terms of the financial assistance must be fair and reasonable, (iii) all memorandum of incorporation requirements must be complied with, and (iv) written notice must be given to the shareholders and relevant trade unions representing the employees within specified time periods.

The latest proposed changes to section 45 of the Companies Act

...continued

It is noted, however, that where subsidiaries provide financial assistance to other subsidiaries or to their holding company, the requirements of section 45 will still apply.

Reducing compliance burden

By excluding subsidiaries from the requirements contained in section 45, the legislature has recognised that the inbuilt safeguards are not applicable when holding companies provide financial assistance to their subsidiaries, and therefore reduces the burden of legislative compliance. This is a notable change in practice as a special resolution will no longer be required in these circumstances. Compliance with solvency and liquidity will also no longer be required. It is noted, however, that where subsidiaries provide financial assistance to other subsidiaries or to their holding company, the requirements of section 45 will still apply. This is to protect against subsidiary resources being stripped away and is

similar to the position contained under section 37 of the Companies Act 61 of 1973. This section provided for certain disclosure provisions and director liability where the provision of the loan or security was "not fair to the company or failed to provide reasonable protection for its business interests".

While the new carve-out will not assist insofar as foreign subsidiaries are concerned, the Draft Amendment Bill 2021 provides a welcome change to section 45 by reducing the regulatory burden placed on companies and providing for a more efficient corporate governance which is in line with the objects and purpose of the Companies Act.

Jenni Darling and Sidasha Singh

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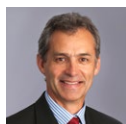


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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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