

Banking, Finance & Projects

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SOUTH AFRICA

Section 45(2A) carve-out under the Companies Amendment Acts



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Section 45(2A) carve-out under the Companies Amendment Acts

The President has signed the Companies Amendment Act 16 of 2024 and the Companies Second Amendment Act 17 of 2024 (collectively referred to as the Amendment Acts) into law. These legislative instruments introduce substantial reforms to the Companies Act 71 of 2008 (Act). The Companies Second Amendment Act is fully operational, while only select provisions of the Companies Amendment Act have commenced. The remaining provisions are expected to come into effect once the necessary updates to the Companies Regulations are finalised.

Introduction of section 45(2A)

One of the most notable changes brought about by the Amendment Acts is the insertion of subsection 45(2A), which creates a targeted exemption within the framework of section 45 of the Act. Previously, section 45 imposed procedural and substantive requirements on companies granting financial assistance to directors, prescribed officers, and related or inter-related entities. The new subsection 45(2A) stipulates that these provisions **do not** apply when a company provides financial assistance to or for the benefit of its subsidiaries.

This carve-out significantly reduces the compliance burden for intra-group financing arrangements, allowing companies to support their subsidiaries without adhering to the formalities prescribed in sections 45(3) and 45(5) of the Act, namely:

- Shareholder approval by way of a special resolution, which should be passed within the previous two years of such financial assistance being authorised.
- Board satisfaction that the company would satisfy the solvency and liquidity test (as set out in section 4 of the Act) immediately following the provision of financial assistance; and that the terms of the financial assistance are fair and reasonable.
- Written notice of financial assistance to all shareholders and any applicable trade union representing the company's employees.

As a result, subsection 45(2A) addresses this imbalance by removing administratively burdensome obligations and promoting a more agile and investor-friendly corporate environment. In our view, this amendment forms part of a broader regulatory effort to simplify corporate compliance requirements while preserving the core principles of sound governance and financial accountability.



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Scope and limitations of the section 45 amendment

The exemption under subsection 45(2A) applies specifically to financial assistance granted by a holding company to its subsidiaries and does not extend to:

- financial assistance provided by one subsidiary to another within the same group; and
- financial assistance from a subsidiary to its holding company.

This limitation exists because loans or financial support between sister subsidiaries and subsidiaries to their parent companies are not considered part of the ordinary course of business. In contrast, section 45(2A) is designed to facilitate parent companies supporting their subsidiaries, which is intended to create flexibility and ease in the normal and ordinary course of doing business. This distinction reinforces the targeted nature of the carve-out and ensures that only intra-group transactions consistent with conventional corporate structures' benefit from the relaxed compliance framework.

Implications of section 45(2A)

While the amendment enhances operational flexibility, it equally raises important considerations regarding internal governance and risk oversight. Key implications include:

Reduced procedural safeguards

By exempting financial assistance to subsidiaries from the procedural requirements of section 45 of the Act, the Amendment Acts reduce statutory safeguards that previously served as checks on intra-group transactions. Companies must therefore rely more heavily on internal controls to ensure that such assistance is both commercially sound and aligned with broader strategic objectives.

Increased director accountability

The removal of formal approval mechanisms places greater responsibility on directors to exercise sound judgment and uphold their fiduciary duties. Without the protective framework of board resolutions and solvency assessments, directors face heightened exposure to liability should financial assistance compromise the company's financial stability or stakeholder interests.

Differentiated treatment of foreign subsidiaries

The carve-out applies exclusively to subsidiaries as defined under South African law. Foreign entities, even if they function as subsidiaries within a group structure, do not benefit from the exemption and remain subject to the full compliance obligations under section 45 of the Act. This differentiation creates a dual compliance burden for multinational groups and underscores the importance of carefully assessing each entity's legal status before extending financial support.



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Practical compliance considerations

In light of the subsection 45(2A) carve-out, companies should take proactive steps to align their memoranda of incorporation (MOI) with the amended legislative framework. Companies are advised to review their MOIs to determine whether they contain provisions requiring the passing of special resolutions for financial assistance granted to subsidiaries. If such provisions were included solely to reflect the previous position under the Act, they may now be redundant and should be removed to avoid unnecessary procedural hurdles. Where these provisions serve a commercial purpose, for example, as part of a negotiated shareholder protection mechanism, they should be retained. Importantly, MOI provisions relating to financial assistance to foreign entities that would otherwise meet the definition of a subsidiary must be maintained, as the section 45 exemption does not apply to such entities. These entities remain subject to the full requirements of section 45 of the Act, including shareholder approval and solvency and liquidity assessments.

Conclusion

The section 45(2A) carve-out represents a significant shift in South Africa's corporate finance regime. By removing procedural barriers for financial assistance to subsidiaries, the Amendment Acts promote efficiency and agility within corporate groups. Nevertheless, this flexibility must be balanced with robust internal governance to mitigate risk and uphold fiduciary standards. With the Companies Second Amendment Act fully operational and select provisions of the Companies Amendment Act now in effect, stakeholders must remain vigilant and proactive in adapting to this evolving regulatory framework.

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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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