Important notice:

1. Every effort is made to ensure that the information in this guide is correct. Nevertheless, that 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 may 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 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.

Guidance on Section 90 of the Companies Act, 2008

1. Introduction

The South African Institute of Chartered Accountants ("SAICA") and the Independent Regulatory Board for Auditors ("the IRBA") have undertaken to conduct research to determine the impact of the Senior Counsel interpretation of Section 90(2) (b) of the Companies Act, 2008 ("the Act") on Registered Auditors. However, to ensure consistency of responses to, and the overall quality of such research, this document provides guidance on the applicability of Section 90 of the Act and clarification on certain terminology used in Section 90(2) (b).

2. Background

Section 90 of the Act contains provisions applicable to an auditor engaged to perform a statutory audit of a company or a close corporation (CC). These provisions must be complied with in addition to those of the IRBA's Code of Professional Conduct for Registered Auditors (the Code).

In summary, Section 90(2) prohibits an auditor to provide audit and certain specified services to the same client.

In order to clarify whether or not the prohibitions in Section 90(2) (b) apply to the *firm* appointed as the auditor or only to the *individual* Registered Auditor appointed as the designated auditor, the SAICA and IRBA Boards jointly agreed in 2012 to approach Senior Counsel for an opinion. The Senior Counsel opinion stated that the provisions of Section 90(2) (b) regarding the disqualification from the appointment as auditor in respect of audit and certain non-audit services apply to both the *firm* appointed as auditor and the *individual* Registered Auditor.

Section 90 became effective on 1 May 2011. Although compliance with Section 90(2) (b) is not currently monitored by IRBA or the Companies and Intellectual Properties Commission ("CIPC"), Registered Auditors are nevertheless required to comply with the Code in respect of the provision of audit and other services. Extracts from the Code that are of particular relevance for purposes of this document are contained in Appendix I of the document.

3. Applicability of Section 90 to an Independent review

The provisions of Section 90 are not applicable to the independent review as defined in the Act. The only requirement as per the Companies Regulations, 2011 ("Companies Regulations") is that the independent review of the company's financial statements must not be carried out by the independent accounting professional who was involved in the preparation of the financial statements.

The practical implication of the fact that, depending on a company's Public Interest Score, the company may require an audit in one year and a review in the next year, should be considered by the company and the auditor should the auditor wish to perform certain additional services for an independent review client.

4. Scope of this document

This document provides guidance on the applicability of Section 90 of the Act and clarification on certain terminology used in Section 90(2) (b).

It does not address auditor rotation or apply to entities that are not governed by the Act, such as trusts, sectional title, estates etc.

5. Definitions of terms for the purposes of this document

For **purposes of this document**, the following terms have the meanings attributed below:

"Accounting records" - means information in written or electronic form concerning the financial affairs of a company as required in terms of this Act including, but not limited to, purchase and sales records, general and subsidiary ledgers and other documents and books used in the preparation of financial statements.[1]

[1] Companies Act, 2008

"*Accounting records*" - is defined as the records of initial accounting entries and supporting records, such as checks and records of electronic fund transfers; invoices, contracts; the general and subsidiary ledgers, journal entries and other adjustments to the financial statements that are not reflected in formal journal entries; and records such as work sheets and spreadsheets supporting cost allocations; computations; reconciliations and disclosures.[2]

"Financial statements" - A structured representation of historical financial information, including related notes, intended to communicate an entity's economic resources or obligations at a point in time in accordance with a financial reporting framework. The related notes ordinarily comprise a summary of significant accounting policies and other explanatory information. The term "financial statements" ordinarily refers to a complete set of financial statements as determined by the requirements of the applicable financial reporting framework, but it can also refer to a single financial statement. [3]

"*Financial statement*" includes-

(a) annual financial statements and provisional annual financial statements;
(b) interim or preliminary reports;
(c) group and consolidated financial statements in the case of a group of companies; and
(d) financial information in a circular, prospectus or provisional announcement of results, that an actual or prospective creditor or holder of the company's securities, or the Commission, Panel or other regulatory authority, may reasonably be expected to rely on;… [4]

Network - 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.[5]

Network firm: A firm or entity that belongs to a network[6].

Statutory audit – An audit that is required by the Act or the Companies Regulations or by a company's Memorandum of Incorporation or a CC's Association Agreement.

Voluntary audit – An audit that has been elected by the shareholders, directors or CC members by shareholders', directors' or members' resolution.

[2] 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

[3] 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

[4] Companies Act, 2008

[5] 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

[6] 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

6. Application of Section 90

The prohibitions contained in section 90 apply to all **statutory** audits of companies and CCs. Appendix II to this document contains a schematic explanation of the applicability of Section 90.

Should a company or CC decide to voluntarily have an audit performed, by a board, shareholders' or members' resolution, the provisions of section 90 do not apply.

However, in the case of a voluntary audit, the company or CC can decide whether section 90 should apply by indicating as such in the company's Memorandum of Incorporation or the CC's association agreement.

Section 90(2) (b) (v) prohibits the auditor from filling the positions contained in provisions (i) to (iv) for the previous five years. This has been interpreted as a provision applied prospectively and therefore also applies with effect from 1 May 2011. The CIPC confirmed that compliance with prohibition (v) read with (ii) and (iv) will also be extended to 1 June 2013.

- 'Prospective application' means that, on 1 May 2011, the auditor was not in contravention of the section if he had also performed the accounting/bookkeeping services since 1 May 2006 (preceding 5 years).
- However, on 1 May 2016, the auditor would be in contravention of the provision if he also supplied accounting/bookkeeping services in the previous 5 years, commencing on 1 May 2011.
- The extension for compliance with the provision should be interpreted as meaning that the auditor will no longer be in contravention of the provision on 1 May 2016, as explained above, but only on 1 June 2018, as the requirement that the services should not have been provided in the previous 5 years now only commence on 1 June 2013 (extended date for prospective compliance).

7. Terminology on which clarification is required

This document explains the meaning of the terminology used in Section 90(2) which has been **highlighted** below:

Section 90(2) of the Act provides:

*"To be appointed as an auditor of a company, whether as required by subsection (1) or as contemplated in section 34(2), a person or **firm**—*

a) ……….,
b) in addition to the prohibition contemplated in section 84(5), must not be—
i) a director or prescribed officer of the company;

ii) an employee or consultant of the company who was or has been engaged for more than one year in the ***maintenance of any of the company's financial records or the preparation of any of its financial statements;***
iii) a director, officer or employee of a person appointed as company secretary in terms of Part B of this Chapter;
iv) a person who, alone or with a partner or employees, habitually or regularly performs ***the duties of accountant or bookkeeper, or performs related secretarial work****, for the company;*
v) a person who, at any time during the five financial years immediately preceding the date of appointment, was a person contemplated in any of subparagraphs (i) to (iv); or
vi) a person related to a person contemplated in subparagraphs (i) to (v); and

c)…………

8. Guidance

a. Firm

It is our view that the reference in section 90(2) to "firm" has the same meaning as "network firm" as defined in the Code.

b. Duties of accountant and bookkeeper

The bookkeeper brings the books to the trial balance stage. An accountant may prepare the income statement and balance sheet using the trial balance and ledgers prepared by the bookkeeper.[7]

It is our view that in the context of Section 90(2), the "duties of bookkeeper" would be limited to the maintenance of financial records as set out in paragraph (c) below.

It is our view that in the context of Section 90(2) the "duties of accountant" would be limited to the preparation of financial statements as set out in paragraph (d) below.

c. Maintenance of any of the company's financial records

The Act does not define "financial records"; "accounting records" is however defined in the Act. Regulation 25 also describes what is included in company accounting records. Appendix III to this document contains an extract from Regulation 25.

We read "financial records" referred to in Section 90(2) (b) (ii) to have the same meaning as "accounting records" as described in the Act, Regulation 25 and the Glossary.

In our view the maintenance of any of the company's financial records means preparing or changing source documents or originating data, in electronic or other form, evidencing the occurrence of a transaction.

[7] Wikipedia definition

Appendix IV to this document contains examples of services that we would or would not regard as constituting “maintenance of any of the company’s financial records”.

d. Preparation of any of its financial statements

The Act defines financial statements, but it only states what is included in the definition of financial statements. The term financial statements are also defined in the Glossary.

Appendix IV to this document contains examples of services that we would or would not regard as constituting “preparation of any of its financial statements”.

e. Related secretarial work

Section 90(2) (b) (iii) prohibits an auditor from being appointed as the company secretary.

As set out in Section 88 of the Act a company secretary’s duties include, but are not restricted to-

(a) providing the directors of the company collectively and individually with guidance as to their duties, responsibilities and powers;

(b) making the directors aware of any law relevant to or affecting the company;

(c) reporting to the company’s board any failure on the part of the company or a director to comply with the Memorandum of Incorporation or rules of the company or this Act;

(d) ensuring that minutes of all shareholders meetings, board meetings and the meetings of any committees of the directors, or of the company’s audit committee, are properly recorded in accordance with this Act;

(e) certifying in the company’s annual financial statements whether the company has filed required returns and notices in terms of this Act, and whether all such returns and notices appear to be true, correct and up to date;

(f) ensuring that a copy of the company’s annual financial statements is sent, in accordance with this Act, to every person who is entitled to it; and

(g) carrying out the functions of a person designated in terms of Section 33(3).”

From the above, we deduce that the Act imposes a governance, rather than an administrative, obligation on the company secretary.

We are therefore of the view that, in the context of Section 90(2) (b) (iv), “related secretarial work” refers to services similar to those included in the duties of the company secretary in Section 88, and excludes services of an administrative nature, such as the lodging of returns.

Appendix IV to this document contains examples of services that we would or would not regard as constituting “related secretarial work”.

9. Firm structures

It should be noted that the Code defines a network as a larger structure that is aimed at co-operation and that is clearly aimed at profit or cost sharing or shares common ownership, control or management, common quality control policies and procedures, a common business strategy, the use of a common brand-name or a significant part of professional resources.

Firms should therefore exercise caution when restructuring their business to avoid the application of Section 90(2) (b).

Two firms can enter into an agreement whereby one refers its audit clients to the second firm providing audit services in exchange to the second firm referring their accounting clients to the first firm; this would not be regarded as a breach of the Code.

10. Disclosure requirements imposed by the APA

Section 44(4) of the APA requires the auditor to state in the auditor's report that the auditor (or any other member of an audit firm where the auditor is a member of a firm) was responsible for keeping an entity's accounting records, if applicable. Section 44(5) of the APA clarifies that an auditor that is responsible for the "framing of financial statements or other documentation from existing records", i.e. the preparation of financial statements, or makes closing entries, is not responsible for "keeping the books, records or accounts" of an entity. Should an auditor therefore be responsible for preparing an entity's financial statements or for making closing entries this does not have to be stated in the audit report in terms of Section 44(4) of the APA. Section 44(4) and (5) of the APA do not in themselves permit or prohibit the provision of such services by the auditor. In order to determine whether or not such services are permissible, the auditor has to consider the provisions of the Code and the provisions of relevant legislation/regulation.

We read Section 44(4)'s reference to "records" to mean "accounting records". We therefore regard "keeping the books, records or accounts" in Section 44(4) of the APA to have the same meaning as "maintenance of financial records" in the Act.

Appendix V contains the extract of Section 44(4) and (5) of the Auditing Profession Act, 2005.

Relevance of Section 44(4) of the Auditing Profession Act to Statutory and Voluntary Audits

Statutory audit

Section 90(2) (b) of the Act prohibits an individual/firm that maintains a company's or CC's financial records from being appointed as auditor of the particular company or CC for statutory audits. The reporting requirement in Section 44(4) of the APA is thus not relevant to statutory audits of a company or CC as the provision of such services would disqualify the practitioner from being appointed as auditor of a particular company or CC.

Voluntary audit

If an auditor (or any other member of a firm where the auditor is a member of a firm) that is engaged to perform a voluntary audit of a company or CC, was responsible for keeping the company's or CC's accounting records, the auditor is required to state this responsibility in the audit report in terms of Section 44(4) of the APA. The auditor will have to specifically consider paragraphs 290.171 to 174 of the Code in determining whether or not such services are permitted. (Extracts from the Code are contained in Appendix I to this document.)

If an auditor (or a member of a firm where the auditor is a member of a firm) that is engaged to perform a voluntary audit of a company or CC, prepared the company's financial statements (having considered and complied with the provisions of the Code), the auditor is not required by Section 44(4) of the APA to state this in the auditor's report. Bear in mind, however, that Section 29(1)(e)(ii) of the Act requires the first page of a company's or CC's financial statements to bear a prominent notice indicating the name and professional designation, if any, of the individual who prepared or supervised the preparation of those financial statements.

Appendix I
Extracts from the Code of Professional Conduct for Registered Auditors

Serving as a Director or Officer of an Audit Client

290.146 If a partner or employee of the firm serves as a director or officer of an audit client, the self-review and self-interest threats created would be so significant that no safeguards could reduce the threats to an acceptable level. Accordingly, no partner or employee shall serve as a director or officer of an audit client.

290.147 The position of Company Secretary has different implications in different jurisdictions. Duties may range from administrative duties, such as personnel management and the maintenance of company records and registers, to duties as diverse as ensuring that the company complies with regulations or providing advice on corporate governance matters. Generally, this position is seen to imply a close association with the entity.

290.148 If a partner or employee of the firm serves as Company Secretary for an audit client, self-review and advocacy threats are created that would generally be so significant that no safeguards could reduce the threats to an acceptable level. Despite paragraph 290.146, when this practice is specifically permitted under local law, professional rules or practice, and provided management makes all relevant decisions, the duties and activities shall be limited to those of a routine and administrative nature, such as preparing minutes and maintaining statutory returns. In those circumstances, the significance of any threats shall be evaluated and safeguards applied when necessary to eliminate the threats or reduce them to an acceptable level.

290.149 Performing routine administrative services to support a company secretarial function or providing advice in relation to company secretarial administration matters do not generally create threats to independence, as long as client management makes all relevant decisions."

Preparing Accounting Records and Financial Statements

General Provisions

290.167 Management is responsible for the preparation and fair presentation of the financial statements in accordance with the applicable financial reporting framework. These responsibilities include:

- Originating or changing journal entries, or determining the account classifications of transactions; and
- Preparing or changing source documents or originating data, in electronic or other form, evidencing the occurrence of a transaction (for example, purchase orders, payroll time records, and customer orders).

290.168 Providing an audit client with accounting and bookkeeping services, such as preparing accounting records or financial statements, creates a self-review threat when the firm subsequently audits the financial statements.

290.169 The audit process, however, necessitates dialogue between the firm and management of the audit client, which may involve:
(a) the application of accounting standards or policies and financial statement disclosure requirements,
(b) the appropriateness of financial and accounting control and the methods used in determining the stated amounts of assets and liabilities, or
(c) proposing adjusting journal entries.

These activities are considered to be a normal part of the audit process and do not, generally, create threats to independence.

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.

Audit Clients that are Not Public Interest Entities
290.171 The firm may provide services related to the preparation of accounting records and financial statements to an audit client that is not a public interest entity where the services are of a routine or mechanical nature, so long as any self-review threat created is reduced to an acceptable level. Examples of such services include:

- Providing payroll services based on client-originated data;
- Recording transactions for which the client has determined or approved the appropriate account classification;
- Posting transactions coded by the client to the general ledger;
- Posting client-approved entries to the trial balance; and
- Preparing financial statements based on information in the trial balance.

In all cases, the significance of any threat created shall be evaluated and safeguards applied when necessary to eliminate the threat or reduce it to an acceptable level. Examples of such safeguards include:

- Arranging for such services to be performed by an individual who is not a member of the audit team; or
- If such services are performed by a member of the audit team, using a partner or senior staff member with appropriate expertise who is not a member of the audit team to review the work performed.

Audit Clients that are Public Interest Entities
General Provisions
290.172 Except in emergency situations, a firm shall not provide to an audit client that is a public interest entity accounting and bookkeeping services, including payroll services, or prepare financial statements on which the firm will express an opinion or financial information which forms the basis of the financial statements.

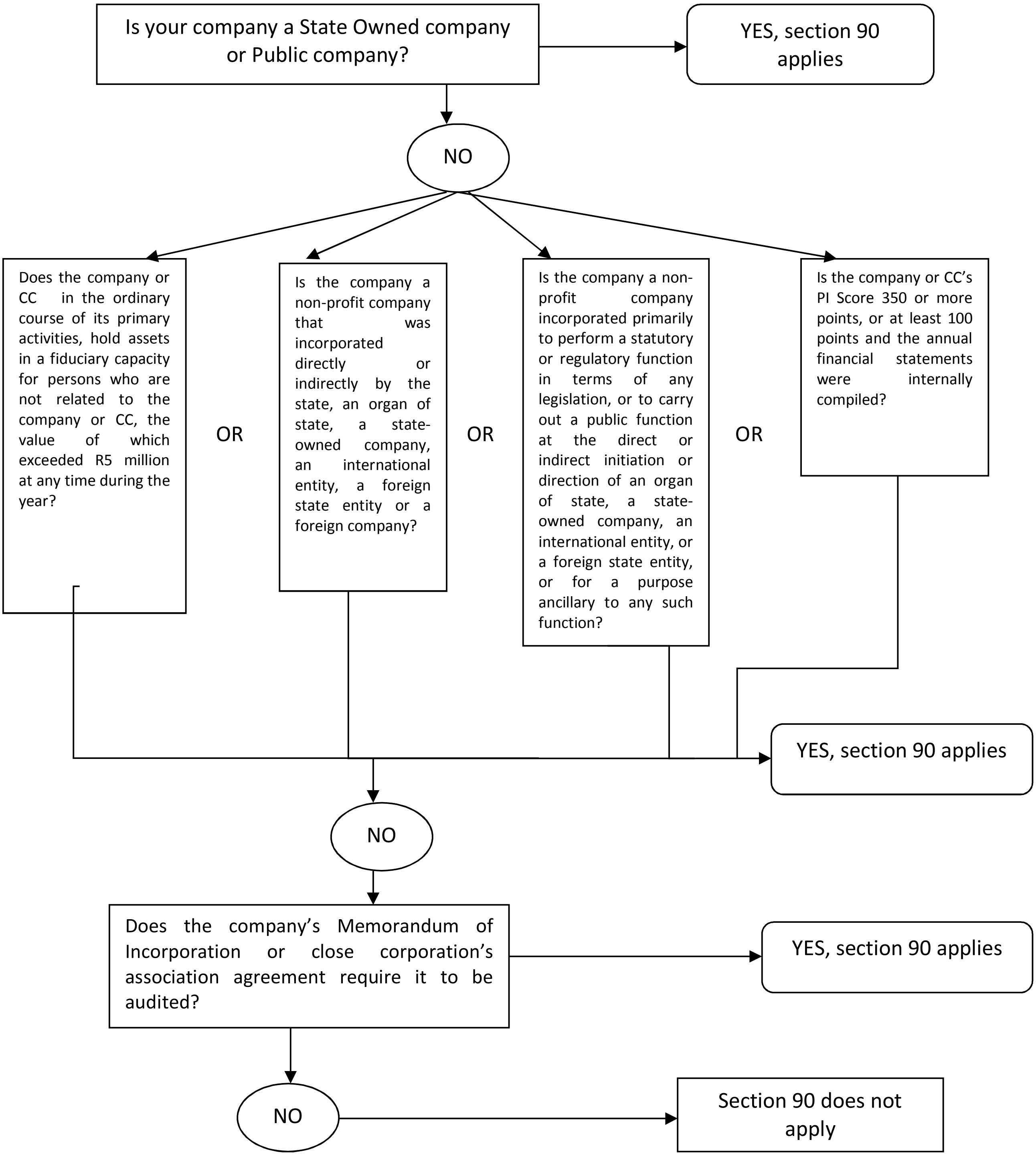
290.173 Despite paragraph 290.172, a firm may provide accounting and bookkeeping services, including payroll services and the preparation of financial statements or other financial information, of a routine or mechanical nature for divisions or related entities of an audit client that is a public interest entity if the personnel providing the services are not members of the audit team and:

- The divisions or related entities for which the service is provided are collectively immaterial to the financial statements on which the *registered auditor* will express an opinion; or
- The services relate to matters that are collectively immaterial to the financial statements of the division or related entity.

Emergency Situations
290.174 Accounting and bookkeeping services, which would otherwise not be permitted under this section, may be provided to audit clients in emergency or other unusual situations when it is impractical for the audit client to make other arrangements.

This may be the case when:
(a) only the firm has the resources and necessary knowledge of the client's systems and procedures to assist the client in the timely preparation of its accounting records and financial statements, and
(b) a restriction on the firm's ability to provide the services would result in significant difficulties for the client (for example, as might result from a failure to meet regulatory reporting requirements).

Appendix II
When does Section 90 apply?



Appendix III
Extract from Regulation 25 - Company financial year and financial records

25(3) To the extent necessary for a particular company to comply with section 28(1), read with section 29(1), the accounting records of that company must include -

(a) a record of the company's assets and liabilities including, but not limited to -

(i) a record of the company's non-current assets, showing for each such asset or, in the case of a group of relatively minor assets, each such group of assets -

(aa) the date the company acquired it, and the acquisition cost;

(bb) the date the company re-valued it, if applicable, and the amount of the revaluation and, if it was re-valued after the Act took effect, the basis of, and reason for, the re-valuation; and

(cc) the date the company disposed of or retired it, once it has been disposed of or retired, and the value of the consideration, if any, received for it and, if it was disposed of after the Act took effect, the name of the person to whom it was transferred;

(ii) a record of any loan by the company to a shareholder, director, prescribed officer or employee of the company, or to a person related to any of them, including the amount borrowed, the interest rate, the terms of re-payment, and material details of any breach, default or renegotiation of any such loan; and

(iii) a record of any liabilities and obligations of the company including, but not limited to -

(aa) a record of any loan to the company from a shareholder, director, prescribed officer or employee of the company, or from a person related to any of them, including the amount borrowed, the interest rate, and the terms of re-payment, and material details of any breach, default or re-negotiation of any such loan; and

(bb) a record of any guarantee, suretyship or indemnity granted by the company in respect of an obligation to a third party incurred by a shareholder, director, prescribed officer or employee of the company, or by a person related to any of them, including the amount secured, the interest rate, the terms of re-payment, the expiry date, and the circumstances in which the company may be called upon to honour the guarantee, suretyship or indemnity;

(b) a record of any property held by the company -

(i) in a fiduciary capacity; or

(ii) in any capacity or manner contemplated in section 65(2) of the Consumer Protection Act, 2008 (Act No. 68 of 2008);

(c) a record of the company's revenue and expenditures, including-

(i) daily records of all money received and paid out, in sufficient detail to enable the nature of the transactions and, except in the case of cash transactions, the names of the parties to the transactions to be identified;

(ii) daily records of all goods purchased or sold on credit, and services received or rendered on credit, in sufficient detail to enable the nature of those goods or services and the parties to the transactions to be identified; and

(iii) statements of every account maintained in a financial institution in the name of the company, or in any name under which the company carries on its activities, together with vouchers or other supporting documents for all transactions recorded on any such statement; and

(d) if the company trades in goods, a record of inventory and stock in trade, statements of the annual stocktaking, and records to enable the value of stock at the end of the financial year to be determined.

(4) In addition to the requirements set out above, a non-profit company must maintain adequate records of all revenue received from donations, grants, and member's fees, or in terms of any funding contracts or arrangements with any party.

Appendix IV
Classification of terms

a. Maintenance of any of the company's financial records

Examples of activities that would be classified as maintenance of financial records
- Assisting clients with outsourced payroll systems
- Maintenance of fixed asset registers
- Compilation of purchase orders
- Preparing time records for payroll
- Compilation of customer orders

Examples of activities that would not be classified as maintenance of financial records
- Where a company or CC's records are located at the offices of the company's or CC's auditor, this does not equate to the "maintenance of financial records" by the auditor
- Completion of Compensation Commission forms
- Completion of tax computations and other tax services such as completion of VAT returns, income tax returns, provisional tax returns, and returns for the Unemployment Insurance Fund (UIF) and the Skills Development Levy (SDL)
- Suggesting adjusting journal entries as a result of audit findings

b. Preparation of any of its financial statements

Examples of activities that would be classified as preparation of financial statements
- The preparation of the Statement of Financial Performance (income statement), Statement of Financial position (balance sheet), cash flow statement and Notes to the financial statements.
- Preparing notes to the financial statements
- Converting financial information from a trial balance or a reporting package to financial statements
- Using an automated system (software) to produce financial statements
- Posting journal entries to ensure compliance with IFRS

Examples of activities that would not be classified as preparation of financial statements
- Should the auditor provide adjusting journal entries or suggest improvements to the financial statements it is not seen as preparing the financial statements provided the client takes responsibility for those journal entries. In this regard also refer to the Code sections 290.169 and 290.170 (refer to Appendix I to this document)
- Suggesting adjusting journal entries as a result of audit findings

c. Related secretarial work

Examples of activities that would be classified as related secretarial work
- Providing continuous advice on compliance with legislation
- Being appointed as the company secretary

Examples of activities that would not be classified as related secretarial work

- Taking minutes of directors', shareholders' or members' meetings
- Drafting shareholders', directors' or members' resolutions on instruction from the directors, members or company secretary.
- Completion of CIPC forms and filing those forms
- Providing ad-hoc advice to the company secretary / directors with regard to secretarial matters, e.g. the maintenance of statutory books and records, or the submission of forms with CIPC
- Maintenance of statutory books and records
- Keeping of the share register
- Corresponding with the CIPC on behalf of a client in terms of specific instructions received from the company secretary/directors/other client representatives to bring resolutions to outstanding matters
- Providing ad-hoc advice on legislation

Appendix V
Section 44 of Auditing Profession Act, 2005

Section 44 of the Auditing Profession Act, 2005 states the following:

"(4) If a registered auditor or, where the registered auditor is a member of a firm, any other member of that firm was responsible for keeping the books, records or accounts of an entity, the registered auditor must, in reporting on anything in connection with the business or financial affairs of the entity, indicate that the registered auditor or that other member of the firm was responsible for keeping those accounting records.

(5) For the purposes of subsection (4), a person must not be regarded as responsible for keeping the books, records or accounts of an entity by reason only of that person making closing entries, assisting with any adjusting entries or framing any financial statements or other document from existing records."