

COMPANIES ACT OF 2008

SECTION 45: FINANCIAL ASSISTANCE

1. INTRODUCTION

The Companies Act of 2008 specifies a number of requirements in the event of a company considering providing financial assistance to individuals such as directors and prescribed officers or to companies or entities that are related to the company such as a holding company or a subsidiary.

The purpose of this document is to provide some guidance to companies contemplating such financial assistance. It should not be regarded as a formal legal opinion and in the event of any uncertainty as to the correct application of the statutory requirements, advice should be obtained from the company's legal advisors.

2. STATUTORY REQUIREMENTS

Section 45 states that, unless a company's Memorandum of Incorporation provides otherwise, the board may authorise the company to provide direct or indirect financial assistance to a director or prescribed officer of the company or of a related or inter-related company, or to a related or inter-related company or corporation, or to a member of a related or inter-related corporation, or to a person related to any such company, corporation, director, prescribed officer or member, subject to the requirements of sections (3) and (4) having been fulfilled.

"Financial assistance" includes lending money, guaranteeing a loan or other obligation, and securing any debt or obligation. It does not include lending money in the ordinary course of business by a company whose primary business is the lending of money. It also does not include an accountable advance to meet legal expenses in relation to a matter concerning the company or anticipated expenses to be incurred by the person on behalf of the company. An amount to defray the person's expenses for removal at the company's request is also not included in the definition.

The requirements of section 45(3) and (4) as referred to above can be summarised as follows:

- A special resolution adopted by shareholders within the two years prior to the proposed financial assistance which can be either for a specific recipient or generally for a category of potential recipients.
- A board resolution approving the financial assistance in which the board confirms that it is satisfied that immediately after providing the financial assistance, the company would satisfy the solvency and liquidity test and that the terms under which the financial assistance is proposed to be given are fair and reasonable to the company.

- To the extent that the Memorandum of Incorporation of the company prescribes any conditions or restrictions relating to such financial assistance, the board must ensure that these conditions and/or restrictions have been satisfied.

Section 45(5) requires the company to notify shareholders (unless every shareholder is also a director of the company) and trade unions of the extent of financial assistance provided in terms of this section, either:

- within 30 business days after the end of the financial year; or
- within 10 business days after the board adopts such a resolution and the total value of all loans, debts, obligations or assistance contemplated in the resolution, together with any similar resolution passed during the financial year, exceeds one-tenth of 1% of the company's net worth at the time of the resolution.

3. PRACTICAL IMPLICATIONS

In order to comply with the above requirements of the Companies Act of 2008, the following steps need to be taken:

3.1 Shareholders' resolution

A **special resolution** of shareholders (i.e. a resolution to be supported by at least 75% of the voting rights exercised in respect of the said resolution) has to be passed either by way of a round robin resolution or at a duly constituted meeting of shareholders. The wording of the resolution will depend on the extent of the proposed financial assistance. Below is an example of the wording of such a resolution to provide a general authority for financial assistance to related and inter-related companies. In the event that it is proposed to also provide financial assistance to other individuals (such as directors or prescribed officers) or other entities (such as shareholders of related or inter-related companies), the wording of the shareholders' resolution needs to be adopted accordingly.

"RESOLVED, as a special resolution in terms of section 45 of the Companies Act, that the shareholders of the Company hereby approve of the Company providing, at any time and from time to time during the period of 2 (two) years commencing on the date of this special resolution, any direct or indirect financial assistance as contemplated in section 45 of the Companies Act to any 1 (one) or more related or inter-related companies or corporations of the Company and/or to any one or more juristic persons who are members of, or are related to, any such related or inter-related company or corporation, provided that –

- (a) the recipient or recipients of such financial assistance, and the form, nature and extent of such financial assistance, and the terms and conditions under which such financial assistance is provided, are determined by the board of directors of the Company from time to time;

- (b) the board of directors of the Company may not authorise the Company to provide any financial assistance pursuant to this special resolution unless the board meets all those requirements of section 45 of the Companies Act which it is required to meet in order to authorise the Company to provide such financial assistance; and
- (c) such financial assistance to a recipient thereof is, in the opinion of the board of directors of the Company, required for the purpose of meeting all or any of such recipient's operating expenses (including capital expenditure), and/or funding the growth, expansion, reorganisation or restructuring of the businesses or operations of such recipient, and/or funding such recipient for any other purpose which in the opinion of the board of directors of the Company is directly or indirectly in the interests of the Company."

3.2 Board resolution

Once the shareholders' resolution as referred to above has been approved, the board needs to pass a resolution approving the financial assistance. Once again, the wording of the resolution needs to be adopted depending on the nature of the financial assistance. An example of such a board resolution is provided below. The total amount of the financial assistance to be provided in terms of the authority needs to be included.

"WHEREAS:

- A. The board wishes to authorise the Company to provide direct or indirect financial assistance as contemplated in section 45 of the Companies Act to a maximum total amount of Rxx to any one or more related or inter-related companies or corporations of the Company and/or to any one or more juristic persons who are members of, or are related to, any such related or inter-related company or corporation.
- B. The board is satisfied that immediately after providing the financial assistance as contemplated above the Company would satisfy the solvency and liquidity test.
- C. The board is furthermore satisfied that the terms under which such financial assistance is proposed to be given are fair and reasonable to the Company and that the purpose for which such financial assistance is to be provided is in the best interest of the Company.

NOW THEREFORE IT IS RESOLVED THAT:

- 1. The Company be and is hereby authorised to provide direct or indirect financial assistance as contemplated in section 45 of the Companies Act to a maximum total amount of Rxx to any one or more related or inter-related companies or corporations of the Company and/or to any one or more juristic persons who are members of, or are related to, any such related or inter-related company or corporation.

2. Any director of the company be and is hereby authorised to do all such things and to sign all such documents as are required to give effect to the above resolution.”

3.3 Notice to shareholders and/or trade unions

As required in terms of section 45(5), formal notice of such financial assistance has to be given to shareholders and the trade unions, either:

- within 30 business days after the end of the financial year; or
- within 10 business days after the board adopts such a resolution and the total value of all loans, debts, obligations or assistance contemplated in the resolution, together with any similar resolution passed during the financial year, exceeds one-tenth of 1% of the company's net worth at the time of the resolution.

An example of such a notice is provided below. The content of the notice will obviously depend on the wording of the resolution as adopted by the board of directors.

“NOTICE IN TERMS OF SECTION 45(5) OF THE COMPANIES ACT OF 2008

1. We refer to the special resolution which was approved by the shareholders of the Company in accordance with section 45(3) of the Companies Act of 2008 pursuant to which the shareholders of the Company authorised the Company to provide financial assistance to the entities as contemplated in the said special resolution.
2. We hereby notify you that the Board of Directors of the Company has adopted a resolution to authorise direct or indirect financial assistance as contemplated in section 45 of the Companies Act to a maximum total amount of Rxx to any one or more related or inter-related companies or corporations of the Company and/or to any one or more juristic persons who are members of, or are related to, any such related or inter-related company or corporation.
3. We furthermore notify you that the total amount of financial assistance as provided in terms of the abovementioned authority as at _____ (*insert date*) amounted to Rxx.

By order of the Board

(*Insert name and designation of signatory*)”

In terms of the Companies Act, notice can be given electronically or by registered post.

4. CONCLUSION

As indicated above, the purpose of this document is to provide general guidance and should not be construed as a formal legal opinion. The content is based on what is perceived to be the requirements of the Act. However, as these requirements only became effective on 1 May 2011 and have not been tested and/or interpreted in a court of law, no guarantee can be given that the interpretation as set out above will be regarded as sufficient compliance under all circumstances. In the event of any uncertainty, it will be advisable to obtain a formal legal opinion.
