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COMPANIES ACT: PERSONAL FINANCIAL INTERESTS

This is the first of a few circulars examining directors' duties under the Companies Act (the **Act**). Prior to the commencement of the Act and in terms of sections 234 to 238 of the old Companies Act, directors, managers, the managing director and the secretary of a company were obliged to disclose their direct or indirect material interests in contracts or proposed contracts which were of significance to the company's business and which had been or were to be entered into by the company. The Act has continued and expanded the disclosure obligations.

WHAT HAS TO BE DISCLOSED

The obligation under the Act is to disclose personal financial interests in matters to be considered at an upcoming board meeting or in which the company has a material interest. A personal financial interest is a direct material interest of a financial nature or to which a monetary value may be attributed. A personal financial interest is "material" if it is significant in the circumstances to a degree that it is of consequence in determining the matter or might reasonably affect a person's judgment or decision-making in the matter. The scope of potential disclosure is therefore quite wide.

WHO MUST MAKE DISCLOSURE

The directors, alternate directors, board committee members who are not directors and prescribed officers (senior managers) of a company must be alert to the need to disclose their own personal financial interests as and when the need arises. They should also be aware of matters arising in which someone related to them may have an interest. Related parties include trusts, companies and close corporations which they are able to control as well as spouses, life partners, children, siblings, aunts, uncles and parents.

In addition, if a director, alternate director, board committee member or prescribed officer is a member of a close corporation or a director of another company, personal financial interests of those entities must be disclosed when they arise in relation to the business before the board.

HOW TO MAKE DISCLOSURE

When a person obliged to make disclosure is aware of a continuing fact which will trigger the need to disclose a personal financial interest, the disclosure should be made up front in writing. The same applies to a disclosure of membership of a close corporation or directorship of a company which the first company will deal with on a regular basis.

Personal financial interests in matters coming before the board should be disclosed verbally at the start of the board meeting. Once disclosure has been made and any questions raised by other board members have been answered, the director making disclosure must leave, not take part in the consideration of the matter and not execute any document relating to the matter on behalf of the company unless expressly directed to do so by the remainder of the board.

If a person is obliged to make disclosure of something under the Act but, not being a board member, is not actually invited to the relevant board meeting, disclosure can be made in writing. If necessary the person making written disclosure can be summoned to the meeting to share further insight into the matter.

If, over the course of time, a personal financial interest in a matter which the company has a material interest in is acquired, disclosure must be made promptly to the board in whichever way is most efficient.

WHAT ABOUT A SOLE DIRECTOR?

If a company has one director and one shareholder and they are the same person, no disclosure is necessary. However, if there is one director but a different or more than one shareholder, the disclosure which would normally be made to the board must be made to the shareholders and the matter in question must be approved by the shareholders by ordinary resolution (normally a simple majority suffices) before taking any action on it.

FAILURE TO DISCLOSE

If an action is taken without the requisite disclosure of a personal financial interest, the action is open to being set aside for lack of disclosure. The cure is to have the action ratified by ordinary resolution of the shareholders once the personal financial interest has been disclosed to them. In more difficult circumstances, any interested person may apply to the High Court for an order declaring the action valid despite the lack of disclosure in terms of the Act.

The common law still imposes duties on directors even though many have been captured in the Act. In terms of the common law a director of a company may not have an interest in a contract with the company unless the director makes full disclosure of the interest to the shareholders and they approve of the contract by ordinary

resolution. If the disclosure is not made and the contract is concluded it may be cancelled by the company later and in certain instances profits earned by the director may be reclaimed by the company. Although the gap may be small, this rule continues to apply wherever a director's financial interest does not fall within the definition of "personal financial interest" in the Act.

Where it is practical to do so, disclosing interests to shareholders and obtaining their approval of the relevant transaction by resolution should be done. It could protect directors in more ways than one.

FURTHER ADVICE

Should you require advice or assistance on company law matters, please contact: Michael Jackson (031 – 536 8512 **mjackson@coxyeats.co.za**), Keren Watson (031 – 536 8518 **kwatson@coxyeats.co.za**), Simon Watson (031 – 536 8530 **swatson@coxyeats.co.za**), Jason Goodison (031 – 536 8517 **jgoodison@coxyeats.co.za**), Jenna Padoa (031 - 536 8529 **jpadoa@coxyeats.co.za**), Wade Ogilvie (031 – 536 8527 **wogilvie@coxyeats.co.za**).