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# LEGAL

NEWSLETTER / MAY 2018

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## LEGISLATION

### 1.1

**Legislative Decree 18 May 2018, no. 54 - “Regulations governing situations of incompatibility for judicially appointed administrators, their assistants, official receivers in bankruptcy and others involved in insolvency proceedings, pursuant to Art. 33(2)&(3) Law 17 October 2017, no. 161” Official Gazette 26/5/2018, no. 121)**

Legislative Decree 18 May 2018, no. 54, published in the Official Gazette of 26 May 2018, no. 121, which will take effect on 25 June 2018, sets out new rules governing situations of incompatibility for judicially appointed administrators, their assistants, official receivers in bankruptcy and others involved in insolvency proceedings, amending anti-mafia laws, prevention measures and the bankruptcy law.

The decree states that there is considered to be incompatibility for judicially appointed administrators, their assistants, the official receivers and others involved in insolvency proceedings in the following situations: relations of kinship, affinity, cohabitation, when these persons frequent magistrates in the court to which the magistrate who has conferred the assignment belongs. The power to supervise appointments lies with the President of the Court of Appeal.

Judicially appointed administrators and official receivers are required, upon acceptance of their appointment and in any case within two days of such appointment, to file a declaration that there are no causes of incompatibility at the court from which they received the appointment. Assistants to judicially appointed administrators are to provide the same declaration to the administrator who must, within two days of receipt, deliver it to the court.

## GUIDANCE

### 2.1

#### **CNCCEC - Document “*Rules of conduct of the board of statutory auditors of listed companies*”**

The National Council of Chartered Accountants and Accounting Experts has published a document entitled “*Rules of conduct of the board of statutory auditors of listed companies*” updating the previous version which was issued in 2015. The document contains indications for statutory auditors of companies that are admitted to trading on the market (AIM) and for unlisted public companies. The Rules refer to the General Principles applicable to boards of statutory auditors in companies with shares listed on regulated markets. Such Principles must be supplemented with regulations applicable to the organs of companies operating in supervised sectors and are to be applied proportionately according to the nature, size and effective complexity of the company’s activities.

The Council points out that the structure of the Rules has not changed significantly from the previous version. Each Rule, accompanied by applicable regulatory references, is composed of:

- *Principles*, which address the actions to be carried out by the board of statutory auditors;
- *Application criteria*, which indicate solutions and operating methods by which the actions of the board can fulfill the rules set out in the Principles;
- *Comments*, with explanatory notes in relation to the Principles and the applicable legislation.

Changes were instead made within the individual sections “*in order to adapt the contents of the Rules to the current regulatory context, with particular reference to the role that the board of statutory auditors holds in carrying out internal controls and the auditing of public interest entities.*”

The document also highlights the importance of ordinary collaboration and the continuous exchange of information with company units that perform specific tasks of internal control, with the board committees and, in particular, with the control and risk committee, if any.

The document also discusses:

- the separate section in the Rules specifically dedicated to the issues referred to in the amended art.



## GUIDANCE

- 19 Legislative Decree 39/2010, relating to reports issued by the internal audit committee and audits carried out by the statutory auditor or the auditing company;
- the introduction of the new Rule Q.1.1. relative to the auto-assessment of the board of statutory auditors. This Rule provides that the controlling organ is to undergo, under its own responsibility, a periodic internal evaluation process regarding the continuing fulfillment of the eligibility requirements of its members and the correctness and effectiveness of their operation.

## CASE LAW

### 3.1

#### **Sale and lease back - conditions for validity - Court of Cassation, Sec. I, Order 28 May 2018, no. 13305**

In its Order of 28 May 2018, no. 13305, the Court of Cassation set out the conditions for validity of the sale and lease back contract and reasons for its being considered invalid, due to violation of the principles under art. 2744 Civil Code (prohibition of forfeiture agreements). On the basis of previous judicial leanings, the Court clarified that a sale and lease back agreement must be considered void due to the violation of the prohibition of forfeiture agreements if there are a number of elements in the contract which deviate from the typical agreement form. This is the case if the asset is not instrumental to the company, the price paid is not proportionate to the market value of the property and, particularly, in the absence of a type of “*Marciano Agreement*”, by which the nullity of the contract due to illegality can be averted, as it provides a specific mechanism or procedure to value the asset, within certain timeframes and with predefined procedures, guaranteeing an impartial and objective assessment. In this way any loss of ownership would occur at the correct price, with the creditors obliged to return any surplus, thus restoring the synallagmatic balance between the relative performances.

### 3.2

#### **Company – challenging resolutions - Court of Cassation, Sec. VI, Order 22 May 2018, no. 12583**

With Order issued on 22 May 2018, no. 12583, the Court of Cassation made it clear that a dispute concerning the validity of a resolution approving the company’s financial statements cannot be assigned to arbitrators, not even, as in the case being heard, by virtue of an arbitration provision in the bylaws. This is due to the fact that in this manner the mandatory rights, protected by law, aimed at guaranteeing the clarity and precision of the financial statements in favor of the shareholders and of all those having relations with the company, are not provided.

## LEGAL NEWSLETTER | MAY 2018

LEGISLATION, MINISTERIAL GUIDANCE AND CASE LAW AT 31 MAY 2018.  
THIS NEWSLETTER IS INTENDED AS A SUMMARY OF KEY LEGAL DEVELOPMENTS AND HIGHLIGHTS MATTERS OF GENERAL INTEREST, AND THEREFORE SHOULD NOT BE USED AS A BASIS FOR DECISION-MAKING.

FOR FURTHER DETAILS AND INFORMATION, PLEASE CONTACT YOUR RELATED PARTNER OR SEND AN EMAIL TO [UFFICIOSTUDI@STUDIOPIROLA.COM](mailto:UFFICIOSTUDI@STUDIOPIROLA.COM)