

REPUBLIC OF SOUTH AFRICA

COMPANIES AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 76); explanatory
summary of Bill published in Government Gazette No. of) (The English text
is the official text of the Bill)*

(MINISTER OF TRADE AND INDUSTRY)

GENERAL EXPLANATORY NOTE:

[] Words in bold typed in square brackets indicate omissions from existing enactment

_____ Words underlined with solid line indicate insertions in existing enactments.

BILL

To amend the Companies Act, 2008, so as to change the definition of securities; to give a definition of a stakeholder; to provide for the preparation and presentation of the directors remuneration report, provide for the filing of the latest annual financial statement, the filing of the copy of the company's securities register and the copy of the register of disclosure of beneficial ownership with the Commission, to clarify when a Notice of Amendment of a Memorandum of Incorporation takes effect; to empower a court to validate the irregular creation, allotment or issue of shares; to clarify how shares which are not fully paid are to be dealt with; to exempt a company from the requirements applicable to financial assistance between a company and its subsidiaries; to amend the instances where approval of shareholders will be required for any share buybacks by the company; to extend the definition of an employee share scheme to include those where there are purchases of shares of a company; to provide for the circumstances under which a private company will be a regulated company; to deal with the composition of the social and ethics committee and its functions; and to ensure differentiation of duties between the chairperson of the Tribunal and the Chief Operation Officer thereof; and to provide for matters related thereto.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 1 of Act 71 of 2008, as amended by section 1 of Act 3 of 2011 and section 111 of Act 19 of 2012

1. Section 1 of the Companies Act, 2008 (hereinafter referred to as the principal Act), is hereby amended—

(a) by the insertion after the definition of "**Banks Act**" of the following definitions:

" 'B-BBEE Act' means the Broad-Based Black Economic Empowerment Act, 2003 (Act No.53 of 2003);

'B-BBEE Commission' means the Broad-Based Black Economic Empowerment Commission as established in terms of the B-BBEE Act;";

(b) by the substitution for the definition of "**securities**" of the following definition:

“ '**securities**' for the purposes of this Act, means any shares or debentures [**or other instruments**], irrespective of their form or title, issued or authorised to be issued by a profit company;"

(c) by the insertion after the definition of "**special resolution**" of the following definition:

“'Stakeholder' means a trusted third party who has no interest in the company or subscribing party in a form of an attorney, notary public or escrow agent;" and

(d) by the insertion after the definition of "**this Act**" of the following definition:

" 'Treasury Regulations' means any regulation made under the Public Finance Management Act, 1999 (Act No. 1 of 1999)."

Amendment of section 16 of Act 71 of 2008, as amended by section 11 of Act 3 of 2011

2. Section 16 of the principal Act is hereby amended by the substitution in subsection (9) for paragraph (b) of the following paragraph:

"(b) in any other case, **[on the later of]-**

- (i) 10 business days after receipt of the Notice of Amendment by the Commission, unless endorsed or rejected with reasons by the Commission prior to the expiry of the 10 business days period**[the date on, and time at, which the Notice of Amendment is filed]**; or
- (ii) the date, if any, set out in the Notice of Amendment, provided that such date shall not be a date prior to expiry of the 10 business days stipulated in subparagraph (b)(i)."

Amendment of section 25 of Act 71 of 2008

3. Section 25 of the principal Act is hereby amended by the substitution in subsection (2) for the words preceding paragraph (a) of the following words:

"(2) A company must file a notice, which the Commission must publish as prescribed, setting out the location or locations at which any particular records referred to in section 24 are kept or from which they are accessible if those records—".

Amendment of section 26 of Act 71 of 2008, as amended by section 17 of Act 3 of 2011

4. Section 26 of the principal Act is hereby amended—

(a) by the substitution in subsection (1) for paragraph (c) of the following paragraph:

"(c) the reports to annual meetings **[,and annual financial statements,]** as mentioned in section 24(3)(c)(i)**[and(ii)]**";

(b) by the insertion in subsection (1) after paragraph (c) of the following paragraph:

"(cA) the annual financial statements as stipulated in section 24(3)(c)(ii).";

(c) by the substitution for subsection (2) of the following subsection:

"(2) A person not contemplated in subsection (1) has a right to inspect **[or] and** copy, upon payment of no more than the prescribed maximum charges for any such inspection and any copy, the information contained in the records referred to in subsection(1)(a), (b), (d) and (e) **the securities register of a profit company, or the members register of a non-profit company that has members, or the register of directors of a company, upon payment of an amount not exceeding the prescribed maximum fee for any such inspection].";**

(d) by the substitution in subsection (4) for paragraphs (a),(b) and (c) of the following paragraphs respectively:

"(a) for a reasonable period during business hours at a location referred to in section 25(1);

(b) by direct request made to a company in the prescribed manner, either in person or through an attorney or other personal representative designated in writing; **[or]**

(c) in accordance with the Promotion of Access to Information Act, 2000 (Act 2 of 2000); or".

(e) by the substitution for subsection (5) of the following subsection :

"(5) Where a person receives a request in terms of subsection (4)(b) it must within **[14] five** business days comply with the request by providing the opportunity to inspect or copy the register or the records concerned to the person making such request;"

(f) by the deletion of subsection (6).

Amendment of section 30 of Act 71 of 2008, as amended by section 20 of Act 3 of 2011

5. Section 30 of the principal Act is hereby amended by the substitution in subsection (4) for paragraph (a) of the following paragraph:
- "(a) the remuneration, as defined in subsection (6), and benefits received by each director, or **[individual holding any prescribed office] prescribed officer** in the company, and such individual must be named subject to the Protection of Personal Information Act, 2013 (Act No. 4 of 2013);".

Insertion of section 30A in Act 71 of 2008

6. The following section is hereby inserted in the principal Act after section 30:

"Duty to prepare directors' remuneration report

- 30A.(1)** The directors of a public company or state-owned company must prepare a directors' remuneration report for each financial year of the company.
- (2) The directors' remuneration report must, in the prescribed manner, consist of the following parts:
- (a) The background statement;
 - (b) an overview of the main provisions of the company's policy on remuneration; and
 - (c) an implementation report containing details of remuneration and benefits received by each director or prescribed officer.
- (3) The directors' remuneration report must be approved by the board of the company.
- (4) The director's remuneration report of a company must be presented to the shareholders at the annual general meeting."

Amendment of section 31 of Act 71 of 2008, as amended by section 21 of Act 3 of 2011

7. Section 31 of the principal Act is hereby amended by the substitution in subsection (4) for the words preceding paragraph (a) of the following words:

"(4) It is an offence for a company, director or prescribed officer of a company, to—".

Amendment of section 33 of Act 71 of 2008, as amended by section 23 of Act 3 of 2011

8. Section 33 of the principal Act is hereby amended—

- (a) by the substitution in subsection (1) for paragraph (a) of the following paragraph:

"(a) a copy of its latest annual financial statements, for the public company, state-owned company or private company whose public interest score exceeds the limits set out in section 30(2) or regulations contemplated in section 30(7) [if it is required to have such statements audited in terms of section 30(2) or the regulations contemplated in section 30(7); and]:"; and

- (b) by the insertion in subsection (1) after paragraph (a) of the following paragraph:

"(aA) a copy of the company's securities register as required in terms of section 50;

"(aB) a copy of the register of the disclosure of beneficial interest as required in terms of section 56;"and

Insertion of section 38A in Act 71 of 2008

9. The following section is hereby inserted in the principal Act after section 38:

"Validation of irregular creation, allotment or issuing of shares

38A.(1) Where a company purports to create, allot or issue shares, by virtue of any provision of this Act, the Memorandum of Incorporation of the company, any other law or otherwise, and the creation, allotment or issuing of those shares is invalid or the terms of creation, allotment or issue are inconsistent with, or not authorised by, those provisions, a court may—

- (a) upon receipt of an application made by the company or by any party who holds an interest in the company;
 - (b) after satisfying itself that it is just and equitable to do so, make an order validating the creation, allotment or issue of these shares or confirming the terms of the creation, allotment or issue, subject to such conditions as may be imposed by the court; and
 - (c) ensure the effective date for such creation, allotment or issue of such shares is later than the date which the application is brought before the court.
- (2) After the payment of all prescribed fees by the company, the shares shall be deemed to have been validly created, allotted or issued upon the terms of the creation, allotment or issue of the shares and subject to the conditions imposed by the court."

Amendment of section 40 of Act 71 of 2008, as amended by section 28 of Act 3 of 2011

10. Section 40 of the principal Act is hereby amended –
- (a) by the substitution in subsection (5)(b) for subparagraph (ii) of the following subparagraph:
 - "(ii) cause the issued shares to be transferred to a third party, to be held **[in trust]** by the third party as a stakeholder in terms of a

stakeholder agreement but not as agent for either the company or the subscribing party, and later transferred to the subscribing party in accordance with [a trust] the stakeholder agreement.".
and

- (b) by the substitution for subsection (6) of the following subsection:
“(6) Except to the extent that a **[trust]** stakeholder agreement contemplated in subsection (5)(b) provides otherwise - ”.

Amendment of section 45 of Act 71 of 2008, as amended by section 31 of Act 3 of 2011

11. Section 45 of the principal Act is hereby amended—
- (a) by the substitution for the heading of the following heading:
"[Loans or other financial assistance to directors]Financial assistance to directors and group of companies"; and
- (b) by the insertion after subsection (2) of the following subsection:
"(2A) The provision of subsection (2) do not apply to the giving by a company of financial assistance to, or for the benefit of its subsidiary."

Amendment of section 48 of Act 71 of 2008, as amended by section 32 of Act 3 of 2011

12. Section 48 of the principal Act is hereby amended by the substitution for subsection (8) of the following subsection:
"(8)(1) A decision by the board of a company as contemplated in subsection (2)(a) must be approved by a special resolution of the shareholders of the company—
- (a) if any shares are to be acquired by the company from—
- (i) a director;
- (ii) a prescribed officer of the company; or

- (iii) a person related to a director or a prescribed officer;
or
- (b) if it entails the acquisition of shares in the company, other than shares acquired as a result of —
 - (i) a pro rata offer made to all shareholders of the company or a particular class of shareholders of the company; or
 - (ii) transactions effected in the ordinary course on a recognised stock exchange on which shares of the company are traded.”.

Amendment of section 56 of Act 71 of 2008, as amended by section 36 of Act 3

- 13.** Section 56 of the principal Act is hereby amended –
- (a) by the substitution for subsection (2) of the following subsection: :
“(2) A person is regarded to have a beneficial interest in a security of a **[public]** company if the security is held *nomine officii* by another person on that first person’s behalf, or if that first person –“
 - (b) by the substitution for subsection (3) of the following subsection:
“(3) If a security of a **[public]** company is registered in the name of a person who is not a holder of the beneficial interest in all of the securities in the same company held by that person, that registered holder of security must disclose –“
 - (c) by the substitution in subsection (7) for the words preceding paragraph (a) of the following words:
“(7) **[A] Every** company **[that falls within the meaning of ‘regulated company’ as set out in section 117 (1)(i)]** must—“

Amendment of section 61 of Act 71 of 2008, as amended by section 39 of Act 3 of 2011

14. Section 61 of the principal Act is hereby amended—
- (a) by the deletion in subsection (8) of the word "and" at the end of paragraph (a)(ii);
 - (b) by the addition in subsection 8(a) of the following subparagraphs:
"(iv) a social and ethics committee report; and
(v) a remuneration report;" and
 - (c) by the deletion in subsection (8) of the word "and" at the end of paragraph (c)(i) and by the addition of the following subparagraph:
"(iii) social and ethics committee; and;"

Amendment of section 72 of Act 71 of 2008, as amended by section 47 of Act 3 of 2011

15. Section 72 of the principal Act is hereby amended—
- (a) by the insertion after subsection (3) of the following subsection:
"(3A) (a) A public company or state-owned company must appoint a social and ethics committee at each annual general meeting, unless-
 - (i) the company is a subsidiary of another company that has established a social and ethics committee; and
 - (ii) the social and ethics committee of the other company referred to in subparagraph (i) performs the functions required under this section, on behalf of the subsidiary company."
 - (b) by the substitution for subsection (5) of the following subsection:
"(5) A company that falls within a category of companies that are required in terms of this section and regulations to appoint a social and ethics committee may—

- (a) publish the intention to lodge an application for exemption with the Tribunal, in a prescribed manner; and
- (b) apply to the Tribunal in the prescribed manner and form, for an exemption from the requirement, and the Tribunal may grant such exemption if it is satisfied that—

 - (i) the company has a formal mechanism within its structures, substantially performs the functions of the social and ethics committee in terms of this section and the regulations; or
 - (ii) it is not reasonably necessary in the public interest to require the company to have a social and ethics committee, having regard to the nature and extent of the structure and activities of the company."; and
- (c) by the insertion after subsection (5) of the following subsection:

 - "(5A)(a) A social and ethics committee appointed in terms of subsection (4) must comprise of not less than three directors or prescribed officers of the company.
 - (b) Where directors are appointed in the social and ethics committee, the majority must not be involved in the day-to-day management of the company and must not have been so involved at any time during the previous financial year.
 - (c) A social and ethics committees shall not be appointed where the company is a subsidiary of another company that has established a social and ethics committee.
 - (d) The Minister may prescribe the minimum qualification requirements for members of a social and ethics committee as he or she deems necessary to ensure that any such committee, taken as a whole, comprises of persons with adequate relevant knowledge and experience to equip the committee to perform its functions.

- (e) The first members of a social and ethics committee may be appointed by—
 - (i) the incorporators of a company; or
 - (ii) the board of the company, within 40 business days after the incorporation of the company.
- (f) The board must appoint a person to fill any vacancy on the social and ethics committee within 40 business days after the vacancy arises.
- (g) The Minister may prescribe the functions that must be performed by a social and ethics committee.
- (h) A social and ethics committee must prepare a report in the prescribed manner and form, which must be externally assured in the prescribed manner.
- (i) A social and ethics committee report must be presented to shareholders at a shareholders meeting."

Amendment of section 90 of Act 71 of 2008, as amended by section 55 of Act 3 of 2011

16. Section 90 of the principal Act is hereby amended—

(a) by the substitution for subsection (1A) of the following subsection:

"(1A) A company referred to in section 84(1)(c)(i), or a company that is required only in terms of its Memorandum of Incorporation to have its annual financial statements audited as contemplated in section 34(2) and 84(1)(c)(ii), must appoint an auditor [—

(a) in accordance with subsection (1), if the requirement to have its annual financial statements audited applies to that company when it is incorporated; or

(b) at the annual general meeting at which the requirement first applies to the company, and each annual general meeting thereafter.] at a shareholder's meeting at which the requirement first applies to the company, and annually at the shareholders meeting thereafter."; and

(b) by the substitution in subsection (2)(b) for subparagraph (v) of the following subparagraph:

"(v) a person who, at any time during the **[five]** two financial years immediately preceding the date of appointment, was a person contemplated in any of subparagraphs (i) to (iv); or;"

Amendment of section 95 of Act 71 of 2008, as amended by section 58 of Act 3 of 2011

17. Section 95 of the principal Act is hereby amended by the substitution in subsection (1)(c) for subparagraph (i) of the following subparagraph:

"(i) by means of the issue or purchase of shares in the company; or "

Amendment of section 118 of Act 71 of 2008, as amended by section 53 of Act 3 of 2011

18. Section 118 of the principal Act is hereby amended by the substitution in subsection (1)(c) for subparagraph (i) of the following subparagraph:

"(i) **[the percentage of the issued securities of that company that have been transferred, other than by transfer between or among related or inter-related persons, within the period of 24 months immediately before the date of a particular affected transaction or offer exceeds the percentage prescribed in terms of subsection (2);**

at the time of the relevant affected transaction, the private company falls within the provisions of section 84(1)(c);" or

Amendment of section 135 of Act 71 of 2008, as amended by section 86 of Act 3 of 2011

19. Section 135 of the principal Act is hereby amended—

(a) by the insertion after subsection (1) of the following subsection:

"(1A) To the extent that any amounts due to the landlord subject to a contract by the company which is placed in business rescue proceedings, the amounts not paid to the landlord during business rescue proceedings in respect of and not exceeding the aggregate for all public utility services, such as the company's share of rates and taxes, electricity, water, sanitation and sewer charges paid by the landlord to third parties during the business rescue period referred to in this section, is regarded as post-commencement financing as contemplated in section 135(1)."

(b) by the substitution in subsection (3) for the words preceding paragraph (a) of the following words:

"(3) After payment of the practitioner's remuneration and expenses referred to in section 143, post-commencement financing, and other claims arising out of the costs of the business rescue proceedings, all claims contemplated—"; and

(c) by the substitution in subsection (3)(a) for the words preceding subparagraph (i) of the following words:

"(3)(a) in subsection (1) and subsection (1A) will be treated equally, but will have preference over—".

Amendment of section 145 of Act 71 of 2008

20. Section 145 of the principal Act is hereby amended—

(a) by the deletion in subsection (4) of the word "and" at the end of paragraph (a) and by the substitution in that subsection for the full-stop of the expression "; and" at the end of paragraph (b); and

(b) by the addition in subsection (4) of the following paragraph:

"(c) a landlord referred to in section 135(1A) has a voting interest equal to the amount referred to in that section."

Amendment of section 160 of Act 71 of 2008, as amended by section 99 of Act 3 of 2011

21. Section 160 of the principal Act is hereby amended by the addition of the following subsection:

"(5)(a) Where the companies Tribunal has issued an administrative order in terms of subsection (3)(b), the administrative order must stipulate the date for compliance by the company.

(b) Where the company fails to change its name within the determined period in terms of the administrative order of the Companies Tribunal, the applicant must approach the Commission, after the expiration of the determined period, to substitute the name of the respondent with its' company's registration number followed by "Inc", "(Pty) Ltd", "Limited" or "SOC Ltd".

Amendment of section 166 of Act 71 of 2008, as amended by section 105 of Act 3 of 2011

22. Section 166 of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

"(1) As an alternative to applying for relief to a court, or filing a complaint with the Commission in terms of Part D, a person who would be entitled to apply for relief, or file a complaint in terms of this Act, may refer a matter that could be the subject of such an application or complaint for resolution by mediation, conciliation or arbitration to [—

(a)] the Companies Tribunal[;].

[(b) an accredited entity, as defined in subsection (3); or

(c) any other person.]";

(b) by the substitution for subsection (2) of the following subsection:

"(2) if the Companies Tribunal,**[or an accredited entity,]** to whom a matter is referred for **[alternative dispute resolution]**

mediation or conciliation, concludes that either party to the conciliation or [,] mediation **[or arbitration]** is not participating in that process in good faith, or that there is no reasonable probability of the parties resolving their dispute through that process, the Companies Tribunal **[or accredited entity]** must issue a certificate of non-resolution in the prescribed form **[stating that the process has failed]."**;

(c) by the insertion after subsection (2) of the following subsection:

"(2A)(a) Where the Companies Tribunal has issued a certificate of non-resolution stating that the mediation or conciliation process in terms of this Act has failed, the affected person may refer the matter further to the Companies Tribunal for arbitration.

(b) In the event of arbitration, the arbitrator's award shall be final and binding on the parties."; and

(d) by the deletion of subsections (3), (4) and (5).

Amendment of section 167 of Act 71 of 2008

23. Section 167 of the principal Act is hereby amended by the substitution in subsection (1) for the words preceding paragraph (a) of the following words:

"[If the] The Companies Tribunal [, or an entity accredited in terms of section 166,] has resolved, or assisted parties in resolving, a dispute in terms of this Part the Tribunal **[or accredited entity]** may—".

Amendment of section 194 of Act 71 of 2008, as amended by section 112 of Act 3 of 2011

24. Section 194 of the principal Act is hereby amended by the insertion after subsection (1) of the following subsection:

- "(1A) (a) The chairperson of the Tribunal is the accounting authority of the Tribunal and is responsible for—
- (i) the control and management of the Tribunal;
 - (ii) the effectiveness and efficiency of the Tribunal;
 - (iii) all the income and expenditure of the Tribunal;
 - (iv) all assets and the discharge of liabilities of the Tribunal;
and
 - (v) the proper diligent implementation of the Public Finance Management Act, 1999 (Act No. 1 of 1999), with respect to the Tribunal.
- (b) The chairperson may appoint—
- (i) a Chief Operating Officer for a period of 5 years, who may be reappointed for a further period of 5 years.
 - (ii) one or more senior managers, under such terms and conditions as determined by the chairperson.
- (c) The Chief Operating Officer is responsible to perform as the Chief Operating Officer of the Tribunal, subject to—
- (i) this Act and its regulations;
 - (ii) the Public Finance Management Act, 1999 (Act No. 1 of 1999), and the Treasury Regulations; and
 - (iii) the policies and directions of the Tribunal.
- (d) The Chief Operating Officer is responsible for appointing such other employees as may be required for the proper functioning of the Tribunal.
- (e) The chairperson must, in consultation with the Minister, determine the remuneration, allowances, benefits and conditions of appointment of—
- (i) the Chief Operating Officer; and
 - (ii) each member of the Tribunal."

Amendment of section 195 of Act 71 of 2008, as amended by section 113 of Act 3 of 2011

25. Section 195 of the principal Act is hereby amended—
- (a) by the deletion in subsection (1) of the word "and" at the end of paragraph (b);
 - (b) by the substitution in subsection (1) for the full stop of a semi-colon at the end of paragraph (c); and
 - (c) by the addition in subsection (1) of the following paragraphs:
 - "(d) conciliate, mediate, arbitrate or adjudicate on any administrative matters affecting any person in terms of this Act as may be referred to it in the prescribed manner by the B-BBEE Commission in terms of the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003); and
 - (e) make an appropriate order."

Amendment of section 204 of Act 71 of 2008

26. Section 204 of the principal Act is hereby amended by-
- (a) the substitution in subsection (1) for paragraph (a) of the following paragraph:
 - "(1) The Financial Reporting Standard Council must—
 - (a) receive and consider and relevant information relating to the reliability of, and compliance with, financial reporting standards and adapt international reporting standards for local circumstances through the issue of financial reporting pronouncements (FRP's) and consider information from the Commission as contemplated in section 187(3)(b).". and
 - (b) by the insertion of the following subsection:

“(2) For the purposes of this section 204, financial reporting pronouncements may be issued by the Financial Reporting Council and published in the Government Gazette from time to time in relation to international reporting standards which require adaptation for local circumstances, provided such pronouncements are not in conflict with the International Financial Reporting Standards or the International Financial Reporting Standards for Small Medium Enterprises.”.

Amendment of arrangement of sections of Act 71 of 2008

27. The arrangement of sections of the principal Act is hereby amended—

(a) by the insertion after item 30 of the following item:

"30A. Duty to prepare director's remuneration report";

(b) by the insertion after item 38 of the following item:

"38A. Validation of irregular creation, allotment or issuing of shares";

(c) by the substitution for item 45 of the following item:

"45. [Loans or other financial assistance to directors] Financial assistance to directors and group of companies"; and

(d) by the substitution for Part C of the following heading:

"[Voluntary] Resolution of disputes (ss 166 -167).

Short title and commencement

28. This Act is called the Companies Amendment Act, 2019, and comes into operation on a date to be fixed by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE COMPANIES AMENDMENT BILL, 2019

1. BACKGROUND

1.1 In 2011, the Companies Act, 2008 (Act No. 71 of 2008) or ("the Act"), that was a result of the 2004 policy review, came into effect and repealed the Companies Act, 1973. The Act, introduced significant changes by providing for business rescue, simplification of registration, social and ethics committees for public companies, corporate governance including financial accountability and provisions relating to shareholder activism. The Act provides for the establishment of institutions, such as the Companies and Intellectual Property Commission ("the Commission"), Companies Tribunal ("the Tribunal"), Specialist Committee in Company Law, Financial Reporting Standards Council and Takeover Regulations Panel.

1.2 The Act, and the Companies Regulations, 2011¹ ("the Regulations"), were implemented in May 2011. The Act was destined for review after five years of implementation.

1.3 As a result of the monitoring of the implementation of the Act in the past five years, the Department of Trade and Industry, with the assistance and advice of the established institutions, has compiled and hereby recommend the proposed changes to keep up with the current trends and also close some loopholes in the Act as discovered during the implementation period. The proposed amendments in the Companies Amendment Bill, 2019 ("the Bill"), do not represent changes to the original policy.

2. OBJECTIVES OF THE BILL

The universal purpose of the proposed amendments is to review all problematic areas identified since the implementation of the Act and the Regulations as

¹ GNR. 351 of 26 April 2011

from May 2011. Furthermore, the Bill intends to align the Act with modern international corporate trends.

3. OVERVIEW OF THE BILL

3.1 Clause 1

Clause 1 of the Bill inserts the definitions of "B-BBEE Act", "B-BBEE Commission", "stakeholder" and "Treasury Regulations" into section 1 of the Act, to enhance the interpretation of the principal Act. Furthermore the clause proposes amendment to the definition of securities to include only shares and debentures for the purposes of the Companies Act.

3.2 Clause 2

Clause 2 of the Bill proposes an amendment to section 16 of the Act by requiring that a Notice of Amendment will take effect 10 business days after receipt of the Notice of Amendment, if the Commission, after the expiry of the 10 business days, has not endorsed the Notice of Amendment or has failed to deliver a rejection of the Notice of Amendment to the company with reasons.

3.3 Clause 3

Clause 3 of the Bill proposes an amendment to section 25 of the Act by requiring the Commission to publish the notice filed by the company in a prescribed manner.

3.4 Clause 4

Clause 4 of the Bill proposes an amendment to section 26 of the Act requiring clarification by advancing access to information in accordance with the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000),

3.5 Clause 5

Clause 5 of the Bill proposes an amendment to section 30 of the Act and provides that where remuneration and benefits are received by each director and prescribed officer, the director and prescribed officer who received the remuneration and benefits must be named.

3.6 Clause 6

Clause 6 of the Bill proposes the insertion of section 30A into the Act by imposing the duty to prepare a director's remuneration report and the manner of compiling the report and the presentation thereof.

3.7 Clause 7

Clause 7 of the Bill proposes an amendment to section 31 of the Act by extending the existing statutory offence to a director or an officer of the company, for refusing access to financial statements.

3.8 Clause 8

Clause 8 of the Bill proposes amendments to section 33 of the Act and requires the companies with public interest score which exceeds the limit set out in the Act, to file with their annual returns, a copy of the company's latest financial statements. It further proposes the filing by every company a copy of the security register and a copy of the register of disclosure of beneficial interest with the Commission to ensure transparency

3.9 Clause 9

Clause 9 of the Bill proposes the insertion of section 38A into the Act by giving the court the power to validate the creation, allotment or issue of shares which are otherwise invalid, upon application before the court by a company or any person who holds an interest in the company.

3.10 Clause 10

Clause 10 of the Bill proposes an amendment to section 40 of the Act requiring issued shares transferred to a third party to be held by a stakeholder in terms of the stakeholder agreement.

3.11 Clause 11

Clause 11 of the Bill proposes an amendment of section 45 of the Act and proposes that the provision of financial assistance by a company to its subsidiary does not need the adoption of a special resolution.

3.12 Clause 12

Clause 12 of the Bill proposes an amendment to section 48 of the Act requiring that no special resolution has to be adopted when the company is implementing a *pro rata* share-buyback where the shareholders affected are also the directors, prescribed officers or person/s related to the director or prescribed officer of the company.

3.13 Clause 13

Clause 13 of the Bill proposes amendments to section 56 of the Act by providing for the establishment and maintaining of a register of disclosure and publication of annual financial statements not to be limited only to regulated companies but to all companies.

3.14 Clause 14

Clause 14 of the Bill proposes amendments to section 61 of the Act by providing for the appointment of the social and ethics committee and requiring the social and ethics committee report and remuneration report to be presented at the shareholders meeting.

3.15 Clause 15

Clause 15 of the Bill proposes amendments to section 72 of the Act by inserting subsections (3A) and (5A) requiring a social and ethics committee for a public company or state-owned entities and categories of companies which are required in terms of this section to appoint a social and ethics committee, to lodge an application for exemption with the Companies Tribunal, together with the requirements for granting the exemption. It further provides for the composition for the social and ethics committee.

3.16 Clause 16

Clause 16 of the Bill proposes an amendment to section 90 of the Act requiring the appointment of an auditor to be done annually at a shareholders meeting and reduces the period of disqualification from five years to two years.

3.17 **Clause 17**

Clause 17 of the Bill proposes the amendment of section 95 of the Act by requiring that the employee share scheme must include the purchase of shares in the company.

3.18 **Clause 18**

Clause 18 of the Bill proposes the amendment of section 118 of the Act by providing the test to be applied to categorise private companies to which Takeover Regulations shall be applicable. The test is applied to a company that meets or exceeds the financial threshold of annual turnover or assets value. The Minister, in consultation with the Panel determines the threshold and assets value.

3.19 **Clause 19**

Clause 19 of the Bill proposes an amendment of section 135 of the Act by inserting subsection (1A), providing that any amounts due by the company under business rescue to the landlord in terms of a contract which the landlord has paid to any third party during the business rescue proceedings in respect of public utility services, company's share of rates and taxes, electricity and water, sanitation and sewer charges, will be regarded as post-commencement financing.

3.20 **Clause 20**

Clause 20 of the Bill proposes amendments to section 145 of the Act by determining the voting interest of the landlord to be equal to the amount referred to in section 135(1A).

3.21 **Clause 21**

Clause 21 of the Bill proposes amendments to section 160 of the Act by providing that the Companies Tribunal must stipulate the date in the administration order for the company to comply with, before the applicant can approach the Commission to change the name.

3.22 **Clauses 22 and 23**

Clause 22 of the Bill amends section 166 of the Act by providing that if the Tribunal has issued a certificate stating that a mediation process has failed, an affected person may refer the matter to arbitration. Clause 23 of the Bill proposes consequential amendments to section 167 of the Act by deleting certain obsolete provisions in section 167(1).

3.23 **Clause 24**

Clause 24 of the Bill proposes amendments to section 194 of the Act by inserting subsection (1A) conferring certain powers on the chairperson of the Tribunal, for the appointment of the Chief Operations Officer and conferring certain responsibilities thereto.

3.24 **Clause 25**

Clause 25 of the Bill proposes amendments to section 195 of the Act by giving the Tribunal the power to conciliate arbitrate or adjudicate administrative matters affecting the company in terms of the Act as may be referred to by the B-BBEE Commission.

3.25 **Clause 26**

Clause 26 of the Bill proposes amendments to section 204 of the Act by giving the Financial Reporting Standards Council the power to issue financial reporting pronouncements.

3.26 **Clauses 27**

Clause 27 of the Bill proposes an amendment to the arrangement of sections in the principal Act by virtue of the insertion of new provisions into the principal Act.

3.27 **Clause 28**

Clause 28 provides for the title and commencement of the Bill.

4. DEPARTMENTS/BODIES/PERSONS CONSULTED

The following stakeholders were consulted:

- South African Institute of Chartered Accountants;
- Banking Association of South Africa;
- South African Institute of Professional Accountants;
- South African Property Owners Association;
- Strate;
- Johannesburg Stock Exchange;
- The Institute of Directors in Southern Africa;
- Independent Regulatory Board for Auditors;
- Amabhungane;
- Helen Suzman Foundation;
- B-BBEE Commission;
- the Commission;
- Companies Tribunal;
- Takeover Regulation Panel;
- Association of Black Securities and Investment Professionals; and
- Who Owns Whom (Pty) Ltd.

5. IMPLICATIONS FOR PROVINCES

None

6. FINANCIAL IMPLICATIONS FOR STATE

To be accommodated within the existing budget.

7. PARLIAMENTARY PROCEDURE

7.1 The Constitution prescribes the procedure for the classification of Bills. A Bill must be correctly classified so that it does not become inconsistent with the Constitution.

7.2 The Bill has been considered against the provisions of the Constitution relating to the tagging of Bills and against the functional areas listed in

Schedule 4 (functional areas of concurrent national and provincial legislative competence) and Schedule 5 (functional areas of exclusive provincial legislative competence) to the Constitution.

- 7.3 The established test for classification of a Bill is that any Bill whose provisions in substantial measure fall within a functional area listed in Schedule 4 to the Constitution must be classified in terms of that Schedule. The process is concerned with the question of how the Bill should be considered by the provinces and in the National Council of Provinces. Furthermore, how a Bill must be considered by the provincial legislatures depends on whether it affects the provinces. The more the Bill affects the interests, concerns and capacities of the provinces, the more say the provinces should have on the contents of the Bill.
- 7.4 Therefore the issue to be determined is whether the proposed provisions of the Bill, in substantial measure, fall within a functional area listed in Schedule 4 to the Constitution.
- 7.5 The Bill seeks to provide that in the event of an amendment to a company's Memorandum of Incorporation, the Notice of Amendment will take effect 10 business days after receipt of the Notice of Amendment, if the Commission, after the expiry of the 10 business days, has not endorsed the Notice of Amendment or has failed to deliver a rejection of the Notice of Amendment to the company with reasons.
- 7.6 The Bill provides for the manner (to be prescribed in the regulations) in which the Commission must publish the notice filed by a company in which the company sets out the location or locations at which any particular company records are kept or from which they are accessible, and also provides clarification pertaining to access a company's financial records and information. The audited annual financial statements of each company that must include particulars showing the remuneration and benefits received by each director, must now include the remuneration and benefits received by a prescribed officer. The Bill proposes the insertion of section 30A into the Act

by imposing the duty to prepare a director's remuneration report and the manner of compiling the report and the presentation thereof. The Bill extends the existing statutory offence for refusing access to financial statements to a director and an officer of a company, and the Bill further requires the company to also file a copy of the company's securities register in the company's annual return.

- 7.7 The Bill seeks to insert section 38A into the Act in order to give a court the power to validate the creation, allotment or issue of shares which are otherwise invalid, upon application by a company or an interested party. The Bill requires issued shares transferred to a third party to be held by a stakeholder in terms of the stakeholder agreement. In respect of financial assistance to directors and a group of companies, the Bill proposes that the provision of financial assistance of a company to its subsidiary should not need the adoption of a special resolution. Furthermore, no special resolution has to be adopted when the company is implementing a pro rata share-buyback where the shareholders affected are also the directors of the company.
- 7.8 The Bill provides for the appointment of a social and ethics committee and requires that the committee must prepare and present its report at the shareholders meeting. In respect of exemption from the appointment of a social and ethics committee, a company must apply for exemptions to the Tribunal in a prescribed manner. The Bill requires a social and ethics committee for a public company and a state-owned company and also provides for the composition of the social and ethics committee.
- 7.9 The Bill provides for the appointment of an auditor at a shareholders meeting as per requirement and thereafter annually at the shareholders meeting; that an employee share scheme must include the purchase of shares in the company, in addition to the issue of shares; and that the Takeover Regulations (made by the Minister in terms of sections 120 and 223 of the Act) apply to an affected transaction or offer involving a profit company or its securities, if a company is a private company, a personal liability company or

a non-profit company in accordance with section 84(1)(c) of the Act, at the time of the relevant affected transaction.

- 7.10 The Bill provides that any amounts due by the company under business rescue to any owner of the property in terms of a contract which the owner of the property has paid to any third party during the business rescue proceedings, will be regarded as post-commencement financing and that the owner of specified property has a voting interest in business rescue proceedings. The Bill further provides that an applicant may approach the Commission to substitute the name of the respondent where the company fails to change the name in terms of an administration order of the Tribunal.
- 7.11 In respect of disputes concerning the reservation or registration of company names, the Bill provides that if the Tribunal has issued a certificate stating that a mediation process has failed, an affected person may refer the matter to arbitration. The Bill provides that if a court imposes an administrative fine on a company, the court may impose a fine in respect of the respondent's revenue, instead of the turnover, for the period during which the company failed to comply with a compliance notice.
- 7.12 The Bill confers more responsibilities on the Tribunal and, amongst other things, provides that the chairperson of the Tribunal is the accounting authority of the Tribunal and is responsible for—
- the proper control and management of the Tribunal;
 - the effectiveness and efficiency of the Tribunal;
 - all the income and expenditure of the Tribunal;
 - all assets and the discharge of liabilities of the Tribunal; and
 - the proper and diligent implementation of the Public Finance Management Act, 1999 (Act No.1 of 1999).
- 7.13 The Bill seeks to give the Companies Tribunal the power to adjudicate cases referred to it by the B-BBEE Commission established in terms of the Broad-Based Black Economic Empowerment Act, 2003 (Act No.53 of 2003).

- 7.14 The Bill provides that the Financial Reporting Standards Council must receive and consider any relevant information relating to the reliability of, and compliance with, financial reporting standards and adopt international reporting standards for local circumstances through the issue of financial reporting pronouncements.
- 7.15 The provisions of the Bill have been carefully examined to establish whether, in substantial measure, they fall within any of the functional areas listed in Schedule 4 to the Constitution.
- 7.16 In our view the subject matter of the Bill falls within a functional area listed in Schedule 4, namely "Trade". We are therefore of the opinion that this Bill must be dealt with in accordance with the procedure set out in section 76 of the Constitution.
- 7.17 It is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.