

DEPARTMENT OF TRADE, INDUSTRY AND COMPETITION**NOTICE 586 OF 2021****COMPANIES AMENDMENT BILL, 2021****INVITATION FOR THE PUBLIC TO COMMENT ON THE DRAFT COMPANIES AMENDMENT BILL, 2021**

The Minister of Trade, Industry and Competition Mr Ebrahim Patel hereby publishes the Companies Amendment Bill, 2021, for public comment.

This follows publication in September 2018 of an earlier version of the Bill in the form of the Companies Amendment Bill, 2018, for public comment. Subsequently and as a result of consideration of the public representations and consultations with affected stakeholders, changes were made to the original 2018 Bill.

The document contained in this notice contains a copy of the redrafted Bill together with information that outlines the provisions of the Bill and the rationale for the changes to existing legislation.

Interested persons may submit written comments on the proposed Companies Amendment Bill, 2021 not later than thirty (30) calendar days from the date of publication of this notice to:

DIRECTOR-GENERAL

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Or hand delivered to:

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For Attention: Mr Desmond Ramabulana

Background Note and Explanatory Memorandum on the Companies Amendment Bill

Part 1: Background of and Rationale for the Bill

1. BACKGROUND

- 1.1 This Background Note is published to set out certain proposed changes to the Companies Amendment Act, 2008. It provides the motivation for substantial changes, and seeks public comment on the proposed changes. This Amendment Bill was first published for public comment on 21 September 2018 and has been significantly revised as a result of engagement since then. For this reason, and to enable further public comment, it is published a second time, in amended form.
- 1.2 In 2011, the Companies Act, 2008 (Act No. 71 of 2008) ("the Act"), that was a result of the 2004 policy review, came into effect. It repealed the Companies Act, 1973. The Act introduced significant changes by providing inter alia 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.
- 1.3 The Act, and the Companies Regulations, 2011¹ ("the regulations"), were implemented in May 2011. The Act was subject to review after five years of implementation.
- 1.4 The Specialist Committee on Company Law ("**SCCL**") was established in 2011 in terms of section 191 of the Act to advise the Minister on any matter relating to

¹ GNR. 351 of 26 April 2011

companies law or policy. The SCCL has met regularly since its original appointment.

- 1.5 The Department of Trade, Industry and Competition undertook a review of aspects of the Companies Act in order to identify changes needed to keep up with the current trends and to close some loopholes in the Act as discovered with implementation.
- 1.6 The SCCL proposed various amendments to the Act. The SCCL considered these amendments as necessary or desirable in light of various problems experienced since the Act came into operation. Other stakeholders also proposed some amendments.
- 1.7 The original Bill was published in the Government Gazette for public comment on 21 September 2018, followed by extensive public engagement between Government and a number of interested persons and organisations. These included the following:
 - The Specialist Committee on Company Law;
 - 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;
 - Companies and Intellectual Property Commission;
 - Companies Tribunal;
 - Takeover Regulation Panel;
 - Association of Black Securities and Investment Professionals; and

- Who Owns Whom (Pty) Ltd.

- 1.8 In addition to the consultation with a range of organisations, there was also substantial discussions with the business and labour constituencies represented at the National Economic Development and Labour Council (Nedlac). Engagement at Nedlac commenced in July 2019 and concluded in June 2021. This Background Note provides an insight into the position by various constituencies in these discussions.
- 1.9 To make this Background Note clearer to members of the public, in some cases it uses less precise language than is set out in the Bill. For example, this Background Note refers in particular instances to 'shares' where the Bill refers to 'securities' (which may include debentures). As in all such cases where there is a difference between this Background Note and the Bill, the language in the Bill itself should be relied on.

2. PROVISIONS

- 2.1 As a result of the public and Nedlac consultations, and following consultation with the SCCL, a number of changes have been made to the Bill. These changes address amendments to cover the following:
- to change the definition of securities;
 - to provide for the definition of true owner;
 - to provide for the preparation, presentation and voting on companies' remuneration policy and directors' remuneration implementation report;
 - to provide for the filing of the annual financial statements, 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 differentiate where the right to gain access to companies' records may be limited;
 - to clarify when a Notice of Amendment of a Memorandum of Incorporation (MoI) takes effect;

- to empower the court to validate the irregular creation, allotment or issue of shares;
- to clarify certain aspects relating to partly paid shares;
- to exclude subsidiary companies from certain of the requirements relating to inter-group financial assistance;
- to provide for instances where a special resolution is required for the acquisition of shares by the company;
- to extend the definition of an employee share scheme to include situations where there are purchases of shares of a company;
- to provide for the circumstances under which a private company will be a regulated company in the context of affected transactions;
- to provide for circumstances where a company is unable to identify the persons who hold a beneficial interest in its securities;
- to deal with the composition of the social and ethics committee; the publication of the application for exemption from the requirement to appoint a social and ethics committee;
- to provide for the presentation and approval of the social and ethics committee report at the annual general meeting or other meetings of shareholders;
- to ensure the differentiation of duties between the chairperson of the Tribunal and its Chief Operation Officer; and
- to provide for matters connected with the above.

2.2 The more technical changes relate to the following:

- an amendment to section 16 of the Act which is designed to provide certainty as to the effective date of amendment to the company's MoI. This is a vital requirement.
- The amendment to section 26 of the Act relates to access to company records to provide clarity and promote transparency. Provision is made for the right of members of the public to inspect and copy a company's Memorandum of Incorporation and any amendments to it, the records in respect of the

company's directors, annual financial statements, securities register and the register of the disclosure of beneficial interests of the company. Further amendments relate to beneficial holders, the register of the disclosure of beneficial interest of the company and separating reports of annual meetings and annual financial statements as subsections in the Bill.

- The requirement to allow persons to inspect and copy information will not apply to companies below a certain size. These are private, non-profit or personal liability companies insofar as it relates to reports of annual general meetings and annual financial statements, notices and minutes of annual general meetings, communications of shareholders' meetings and any written communications sent by the company to all holders of any class of the company's securities. The companies excluded are those where an annual financial statement is internally prepared in respect of a company with a Public Interest Score of less than 100 or an annual financial statement which is independently prepared in a company with a Public Interest Score of less than 350. The Bill also introduces a defence in instances where a prescribed officer or director, despite taking reasonable steps, is unable to provide the requested information.
- Certain requirements in section 45 regarding the provision of financial assistance by a holding company to its subsidiary are deleted. This is in recognition of the fact that the protections contained in section 45 are not required for the provision of financial assistance by a holding company to its subsidiary and gives rise to an unnecessary compliance burden.
- Certain important amendments are proposed to section 72 relating to the social and ethics committee: a procedure to exempt certain companies from the requirement to establish a social and ethics committee through an application to the Companies Tribunal; instances where the social and ethics committee is not required. The Bill provides for the minimum qualification requirements for members of the social and ethics committee. It provides for the composition of the social and ethics committees for publicly-listed, state-owned and private companies. The Bill provides for the mechanism for the appointment of the social and ethics committee as well as addressing the filling of vacancies. The

Bill clarifies the status of the social and ethics committee report and requirements relating thereto including its presentation to shareholders. The report requires approval by means of an ordinary resolution of shareholders. The Bill provides for the consequences of failing to achieve the approval of shareholders and the process to be followed. One of these consequences includes a requirement that the social and ethics committee must engage with shareholders who voted against the report and who are willing to engage on the vote. Furthermore, the Bill provides that within four months, a public company must publish a statement on its website and the Stock Exchange News Service which shall form part of the committee report. Such statement must include the steps taken to engage with the dissenting shareholders, the outcome of such engagement and the actions that will be taken by the company to address the issues raised by the dissenting shareholders. Such a statement must be presented at the next annual general meeting.

- The amendment in section 90 clarifies when a company which is required to have annual financial statements audited, is also required to appoint an auditor.
- The provisions of section 92 of the Act are amended to reduce the cooling-off period relating to auditors from 5 years to 2 years. The introduction of mandatory audit firm rotation which commences in 2023, makes this an important amendment.
- Section 118 of the Act deals with the jurisdiction of the Takeover Regulation Panel (the "Panel") in respect of private companies. The existing provisions are irrational and impractical and significantly increase the work load of the Panel. The Panel submitted that the link to section 84(1)(c) should be removed, mainly on the basis that this section and Regulation 28 refer to factors such as employment and public interest score that the Panel considered to be outside its jurisdiction.
- Section 135 of the Act contains a proposal for an amendment in respect of post-commencement finance in business rescue. Certain service providers are precluded by virtue of the statutory moratorium applicable during business rescue from recovering disbursements to third parties. This is manifestly unfair

for example to landlords who have to incur costs for utilities such as rates and taxes, electricity, water, sanitation and sewer charges. Failure to provide for these charges can lead to the failure of the business rescue process. By virtue of the proposed amendment, the amounts will be regarded as post-commencement finance and enjoy the relevant preferential ranking.

- Administrative provisions applicable to the Companies Tribunal require the amendments set out in the Bill.
- Provision is made for the judicial rectification of invalid or irregular issue of shares. This provision was contained in the prior Companies Act of 1973 and was inadvertently not carried forward into the Act.

All the changes described above in paragraph 2.2 of this document have been supported by the Nedlac parties.

- 2.3 In addition to the various changes described above, the Bill also makes provision for changes in two areas that have been the subject of extensive discussions between the business and labour constituencies, together with government representatives. These relate to the reporting of remuneration within companies and policies connected thereto; and the disclosure of the accurate holdings of the owners of beneficial interests in companies. As these matters affect significant policy issues, they are set out in greater detail in sections 3 and 4 below.

3 **REMUNERATION REPORT**

- 3.1 Excessive remuneration particularly at the highest levels of a company is a matter of great concern internationally including a number of important foreign jurisdictions. Literature internationally on this topic, as well as the inequity of significant pay gaps between the top and bottom levels of a company, abounds.

The factors giving rise to these concerns are to an extent responsible for the significant levels of inequity in society. Conventional wisdom internationally is that these levels of inequity in society are unsustainable in a post-covid world.

The concerns internationally about inequity in society is even more relevant, and has even greater resonance, in South Africa which is one of the most unequal societies in the world. In order to address these concerns, the Bill makes provision for significant augmentation in the levels of disclosure of executive remuneration. This follows international trends.

It may be observed that disclosure as a regulatory mechanism in the context of executive remuneration is indeed powerful for a number of reasons including –

- (i) it provides shareholders with an effective means of responding to dissatisfaction of excessive remuneration; and
- (ii) it has the so-called shrinking effect which induces the boards of companies and senior executives to refrain from awarding and receiving excessive remuneration for fear of the adverse reputational consequence.

3.2 During the course of discussions at Nedlac on the Bill, the matter of wage ratios and the status of remuneration reports was raised and a number of proposals were made. The discussions focused on what an appropriate package of measures would entail that provided for disclosure of information coupled with greater rights for shareholders at annual general meetings in respect of remuneration reports. Based on the outcome of the discussions with representatives of business and labour, amendments were drafted for inclusion in the Bill. The Bill requires that certain categories of companies disclose information relating to the remuneration of directors and prescribed officers and the pay gap between directors and workers in their annual financial statements and annual reports. The Bill also provides shareholders with better tools to respond to how remuneration issues are dealt with in companies.

3.3 The Bill, in section 30, provides that where remuneration and benefits are received by company directors or prescribed officers, such directors or prescribed officers must be named in the annual financial statements. This is,

however, limited to companies that are required in terms of the Act to have their annual financial statements audited. Research presented by Business Unity South Africa (BUSA) showed that it is common practice in a number of jurisdictions to require disclosure of remuneration for specified senior executives positions. This was reported to be the practice in the European Union, the United Kingdom and Australia. While disclosure of executive remuneration was mostly limited to executive directors, it has been expanded in the United Kingdom to include the CEOs and Deputy CEOs. In Australia, disclosure is in respect of executive directors and specified executives.

- 3.4 The Bill further proposes the insertion of a new section, section 30A, obliging public companies and state-owned companies to prepare and present a directors' remuneration report for approval by the board of the company. This section prescribes the format and content of the report, its presentation to shareholders at an annual general meeting and the consequences following the failure of the report to obtain the required shareholder approval .
- 3.5 A remuneration policy report should be presented at an AGM for approval by ordinary resolution. Once approved, such policy would only have to be presented every three years or whenever material changes are made thereafter. Should a remuneration policy not be approved, it must be presented at the next AGM, until approval is obtained. Changes to the policy may only be implemented once shareholders approve it.
- 3.6 In an implementation report, a company would have to publish details of the remuneration and benefits received by each director or prescribed officer. Much of these details are already required in companies' annual financial statements.
- 3.7 Companies will now also be required to publish details of their highest paid employee, their lowest paid employee, their average remuneration, their median remuneration and the gap between the top 5% highest paid and the bottom 5% lowest paid employees.

- 3.8 The remuneration implementation is required to be approved by ordinary resolution by shareholders at an AGM. Where this does not happen, the remuneration committee must explain at the next AGM how the concerns of shareholders have been addressed and the non-executive directors that serve on the remuneration committee shall be required to be ineligible for re-election.
- 3.9 The Bill attempts to strengthen the remuneration report provisions to provide more information to shareholders and stakeholders on the motivation for the remuneration of directors and prescribed officers, for transparency, accountability and good governance purposes.
- 3.10 The amendments proposed in the Bill are also required to tackle the injustice of excessive pay. The pay gap has been a historical challenge in South Africa and a contributor to the country's inequality. Following this amendment, the Act will allow for stronger shareholder governance on excessive director pay and for companies, shareholders and stakeholders to be aware of and, if necessary, address unsustainable pay discrepancies.
- 3.11 Based on research results presented to Government by BUSA that showed that in most countries, a distinction is made between the requirement for shareholders voting on the remuneration policy and voting on the implementation report, a similar requirement has been included in the Bill. The Bill also follows the example of many other countries where the remuneration policy is only tabled for shareholder approval every three years or when a material change is made.
- 3.12 To ensure greater transparency, the Bill requires improved disclosure of remuneration and wage differentials in companies. The issue of disclosure has become a critical theme in global corporate governance debates, and it is evident that the trend is towards greater disclosure.
- 3.13 The proposals for greater transparency and for publication of the pay gap are also in line with a number of private and other initiatives across the world. It is

noted that the King IV Report on Corporate Governance for South Africa states that “the remuneration of executive management should be fair and responsible in the context of overall employee remuneration. It should be disclosed how this has been addressed. This acknowledges the need to address the gap between the remuneration of executives and those at the lower end of the pay scale”. Disclosing executive remuneration and the pay gap can help companies and shareholders assess whether directors’ remuneration is “fair and responsible”.

- 3.14 More countries have, in recent years, introduced new or revised regulatory requirements to strengthen reporting and disclosure requirements. According to research presented by BUSA at Nedlac, Ireland and the United Kingdom, for example, introduced such requirements in response to the revised European Union’s Shareholder Rights Directive which was aimed at encouraging a higher standardised level of disclosure and greater accountability over directors’ pay. According to this research, it does not only target listed companies. In the United Kingdom, large private companies are now also required to make certain governance related disclosures in an annual report.
- 3.15 Recent years have seen significant shareholder dissatisfaction over pay and multiple instances where large numbers of shareholders have voted against remuneration reports. In the last year, the remuneration policies of several large listed companies have not received 75% shareholder support. Under current practices, except for boards committing to discuss the matter with disgruntled shareholders, shareholders do not have sufficient mechanisms to address their grievances.
- 3.16 Introducing a requirement for approval by ordinary resolution on a remuneration implementation report will entail a binding vote with consequences, should shareholders be dissatisfied. This is in line with practices seen in Australia where directors have to resign after successive votes against the remuneration report and in the United Kingdom where

successive votes that fail mean the composition of the remuneration committee changes.

- 3.17 The approach in the Bill does not go as far as the legal provisions in Australia, where the Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Act of 2011 requires that only 25% of shareholders are required to vote against the remuneration report. The Bill proposes an ordinary resolution, meaning 50% of shareholders need to vote against the remuneration report for the provisions of the Act to be triggered. In addition, unlike Australia, the Bill does not create a requirement for the entire board having to stand for re-election. This was also done to take into account concerns raised by the business representatives at Nedlac. It should be noted however that the proposed amendment is stronger than Australia as it does not require dissenting votes for two consecutive years. Unlike Australia, the process set out in the Bill is also less complicated.
- 3.18 Regarding the requirement in the Bill to disclose pay ratios, this is in line with practices seen in other jurisdictions. For instance, in August 2015, the United States' Securities and Exchange Commission adopted a rule, in terms of its Dodd-Frank Wall Street Reform and Consumer Protection Act, which requires a public company, from January 2017, to disclose the ratio of the compensation of its chief executive officer (CEO) to its employees. The Securities and Exchange Commission's objective was to provide shareholders with information they can use to evaluate a CEO's compensation.
- 3.19 A wide range of sources point to the unusually wide inequalities in remuneration in the formal sector in South Africa compared with the rest of the world. Analysis of Statistics South Africa data in the annual Labour Market Dynamics survey shows that inequality in pay contributes as much to overall income inequality as joblessness. According to PwC's regular survey of executive remuneration, the median pre-tax package for a CEO of a listed company was R5,2 million in 2020, and after-tax it was R2,8 million. That was 100 times the national minimum wage. The PwC found that the median pre-tax package for CEOs was 35 times the median pay for unskilled workers in

big business. This finding used information from the PwC wages survey, however, which indicated substantially higher wages for ordinary workers than official surveys.² According to Statistics South Africa's Labour Market Dynamics survey for 2019, the median pay for all formal workers was virtually the same as the national minimum wage, which would mean it was around 1% of the median pre-tax pay for CEOs of listed companies. For workers in companies with over 50 employees, pre-tax remuneration for CEOs was 95 times the median wage.³

3.20 This kind of inequality underpins much of the well-known workplace conflict in South Africa. The proposed publication of indicators of pay differentials will empower shareholders and other stakeholders to see trends and, where warranted, propose changes. There are complex considerations on the appropriate pay-regime that should apply in a particular company; and due note should be taken of the need to attract and retain the best skills for domestic firms. The Bill does not seek to propose what the ratios between executive and worker pay should be; instead it proposes transparency and empowers shareholder voting to be more effective than is currently the case. There is no question, however, that there is widespread public concern about existing pay practices and the current regulatory regime. As a recent Business Day editorial put it bluntly, "It is common knowledge that the wage gap in SA is a yawning one... This is mainly a product of SA's apartheid history which elevated the salaries of white executives to stratospheric levels as well as a response to a skills shortage at executive level. The market for executives is a global one and to attract skills SA has to remain competitive. And once a norm within the market has been established for executive pay it tends to reproduce itself by creating expectations."⁴

3.21 The amendments in the Bill have carried the support of BUSA and organised labour at Nedlac, with two exceptions, details of which are outlined below.

² PwC. 2020. Executive Directors: Practices and Remuneration Trends Reports. 12th Edition. Page 22.

³ Calculated from Statistics South Africa. Labour Market Dynamics 2019. Electronic database.

⁴ Business Day. 2021. "Editorial: Law on wage disclosure is a step towards greater equality." 21 May.

- 3.22 First, as regards the vote on the remuneration implementation report
- 3.22.1 one option, favoured by Business, was that this should be an advisory vote, and not binding. The motivation was that a binding vote would lead to a high turnover of directors and compromise expertise;
- 3.22.2 a different option, which is favoured by Labour, is that the vote should be binding, and have the status of a special resolution (with 75% of shareholders having to approve the report), instead of by means of ordinary resolution (requiring 50% of shareholder approval).
- 3.23 Second, as regards the basis for the calculation of the ratio between the highest and lowest paid, BUSA and organised labour supported the principle of disclosure of wage differentials, including the appropriate ratio to be used, namely the remuneration of the top 5% highest paid and the top 5% lowest paid employees. There is as yet no consensus between the business and labour constituencies on the definition of 'remuneration'.
- 3.23.1 the option favoured by Business is for "on-target remuneration" of executives to be used to take away peaks and valleys caused by the payment of certain bonuses and allow for better yearly comparison;
- 3.23.2 the option favoured by Labour is for the use of executives' actual annual remuneration. It believes that the actual remuneration received by executives should be used to show the real pay gap between the highest and lowest paid employee every year.
- 3.24 As noted, both the business and labour representatives at Nedlac support the proposals in the Bill on the publication of wage ratio information, with the exception of the specific areas mentioned above. However, a concern has been expressed to Government that a potential consequence of the disclosure requirement may be greater resort to outsourcing of the lowest paid employees, simply to improve company ratios. To address this, it has been suggested that disclosure of the salaries of sub-contracted employees who

perform most or all of their work for or in the firm concerned, should also be required. The Bill has not addressed this concern. Public comment on the concern raised as well as any proposals to address and remedy the concern, would be welcome.

- 3.25 Consideration needs to be given as to whether ratios should reflect pre-tax or post-tax remuneration and public comment on this issue is also invited.
- 3.26 Comments from the public will be welcome on the overall approach to remuneration in the Bill, the various provisions proposed as well as on the issues set out in 3.23, 3.24 and 3.25 above.

4. BENEFICIAL OWNERSHIP

- 4.1 Transparency in respect of beneficial ownership reporting is becoming a matter of concern internationally. In both the United States and the European Union, efforts have been made to address the matter of the identity of the holders of the beneficial interests in a company.
- 4.2 The purposes of the Companies Act include “encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation” (section 7(b)(iii)). The access and transparency provisions in the Act help to provide oversight, including by customers, suppliers, workers, the media and the public. It allows these parties to shield themselves from risk, help identify misstatement, fraud and corruption, and assist in compliance and law enforcement. From this perspective, the Act lacks adequate provisions to allow for the establishment of the identity of true owners of companies. The Bill corrects this by providing for a definition of “true owner” and introducing several measures that companies will have to implement to establish and report their true ownership.

- 4.3 A “true owner” is defined by the proposed amendments as a natural person who has the power to direct the registered holder of a share with regard to the share or who ultimately benefits from the shareholding. In terms of the proposed definition in the amendments, only a natural person can be a true owner,. The identification of the true owner is very complex. It is part of the broader objective of identifying the holders of beneficial interests in the company. The Bill proposes several amendments to section 56 of the Act in an endeavour to identify the true owner more effectively.
- 4.4 In terms of the current Act, unless a company knows the identity of all the persons who hold a beneficial interest in its shares the company must request registered holders of shares to disclose the identity of holders for whose benefit the shares are held. The proposed amendments to Section 56 will –
- 4.4.1 place an obligation on companies to require from the registered share holder details of the identity of persons who hold beneficial interests.
 - 4.4.2 strengthen provisions requiring that companies establish and maintain a register of owners of beneficial interests in its shares.
 - 4.4.3 require companies to publish in its audited financial statements, details of all persons who alone or in the aggregate hold beneficial interests amounting to 5% or more of the total number of shares of that class.
 - 4.4.4 strengthens the provisions for registered shareholders to disclose to companies who holds beneficial interests in its shares.
- 4.5 In terms of the current Act, a company may request holders of shares to disclose the identity of the ultimate beneficial-interest holders, that is the juristic persons or nominees for whose benefit the shares are held. The Bill seeks to ensure transparency not only around this first tier of beneficial holders (or all nominee arrangements in the security register) but also to require that companies reveal the ultimate beneficial owners. This is the overall objective of these sections of the Bill.

- 4.6 The definition of “true owner” in the Bill is in line with the amended Financial Intelligence Centre Act (FICA).
- 4.7 It also aligns with that of the Financial Action Task Force (FATF), the inter-governmental body that develops and promotes policies to protect the global financial system against money laundering, terrorist financing and the financing of proliferation of weapons of mass destruction. The FATF states “beneficial owner refers to the natural person(s) who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise ultimate effective control over a legal person or arrangement.”
- 4.8 There are a multiplicity of reasons supporting legislative measures to determine the ultimate owners of beneficial interests in a company. Fraud and tax evasion can thrive when company ownership is opaque. Company ownership arrangements can be misused for illicit purposes and other crimes including money laundering (proceeds of corruption) and terrorism finance.
- 4.9 To overcome this, authorities and the public need to know not only who the registered shareholders of a company are, but also whether they hold those shares on behalf of others, and, in the case of owners that are companies or trusts, who ultimately own the beneficial interest in those shares.
- 4.10 European Union countries, among others, have made significant strides in requiring beneficial ownership data to be disclosed by companies, and making it public. Under the Fourth Anti-Money Laundering Directive of June 2017, all EU member states set up central registers of beneficial ownership. Under the Fifth Anti-Money Laundering Directive of April 2018, these were to be made public by early 2020.
- 4.11 The Group of Twenty’s (G20) Global Framework for Tracing Beneficial Ownership requires members and affiliated countries such as South Africa to encourage beneficial owner disclosure in all their legislation governing

business and investment institutions. Hence the SA Government has adopted the G20 High-Level Principles on Beneficial Ownership Transparency in October 2015 to prevent misuse of juristic persons and legal arrangements of ownership. This resulted in South Africa's action plan to align relevant legislation and to set up an Interdepartmental Task Team, in which the Department of Trade, Industry and Competition (**the dtic**) and the CIPC participate. Establishing and disclosing the true ownership of companies will increase transparency including in public procurement and allow government and the public to monitor government procurement spending.

- 4.12 Several other amendments contained in the Bill sets out the details of the system to establish the ultimate holders of the beneficial interests in a company.
- 4.13 The current Act does not compel companies to request from holders of their shares to disclose the identity of the holders of the beneficial interests. It states that a company that suspects that shares are held for the beneficial interest of others "may" require the registered or suspected beneficial owners to declare the true state of affairs. The Bill intends to change this by closing the loophole of "don't ask, don't tell" and changing the "may" to "must", requiring companies to procure this information.
- 4.14 Following a request from the business representatives at Nedlac for the Bill to prescribe the frequency of such requests by companies, a provision has been inserted that companies must require this information from registered shareholders once every quarter, in instances where a company does not know the identity of all the persons who own beneficial interests in the company.
- 4.15 It is recognised that ultimate beneficial ownership by an individual may be held either by a single nominee or through multiple nominees holding smaller levels of shares. The distinction was made in the Bill between on the one hand, the company requesting information from shareholders and the shareholder disclosing such information to the company; and on the other hand, the

company reporting or publishing the beneficial ownership information. The Bill requires that all beneficial ownership be requested by and disclosed to the company concerned, but that the company in turn be required to report/publish shareholding information only in instances where persons in the aggregate, alone or together with other persons, own 5% or more of the beneficial interests of the shares in a class.

- 4.16 Several of the early implementers of public beneficial ownership registers, including the United Kingdom and Ukraine, adopted a 25% threshold. This has been criticised as being too high. There appears to be increasing recognition internationally that the 25% threshold level leaves many relevant beneficial owners outside of the disclosures-net.
- 4.17 According to ownership transparency advocacy groups, a lower threshold for publication of information is in line with current international trends. A number of countries have applied lower thresholds recently including Argentina (1 share or above), Senegal (2%), Nigeria (5%), Paraguay (10%), Kenya (10%) and the Cayman Islands (10%).
- 4.18 At Nedlac, there is consensus between business, labour and government on the requirement on a company to *disclose/publish* information only in instances where the threshold of 5% or more is exceeded.
- 4.19 However, there are different approaches proposed as to when the requirement on companies to *request* true ownership should apply. Two options were identified for the scope of application of the provisions.
- 4.19.1 the first option is that companies should only have to request information relating to true ownership from those shareholders with 5% or more shareholding of a company. The motivation given for this threshold is to avoid an undue burden on shareholders and firms, by only requiring meaningful levels of shareholdings to be subject to the provision of requiring the identity of the ultimate owners of the beneficial interests in those shares;

4.19.2 a second option is to make such provision applicable to all shareholding. The motivation given is to avoid shareholders fragmenting their economic interest through multiple smaller shareholdings held through nominee companies.

4.20 Comments from the public will be welcome on the overall approach to beneficial ownership in the Bill but also specifically on the threshold for requiring information as to the identity of the holders of beneficial interests in the shares.

4.21 It should be pointed out that two other matters of importance in Company Law Reform are currently being addressed by Government and the SCCL. These are worker representation on company boards and the extension of directors' duties in favour of a multiplicity of stakeholders. These issues are not addressed in the Bill and will be dealt with in a further Bill to be introduced later this year after appropriate consultation.

PART 2: CLAUSE BY CLAUSE DESCRIPTION OF THE BILL

The purpose of many of the proposed amendments is to overcome difficulties , based on the experience of practitioners, identified since the implementation of the Act and the regulations as from May 2011. It further seeks to tackle disclosure of wage differentials in companies and enhance transparency in ownership of companies' shares and financial records. Furthermore, the Bill intends to align the Act with modern international corporate trends.

The section below contains a clause by clause summary of the provisions in the Bill, with a brief explanation for each provision.

Clause 1

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

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 to the Memorandum of Incorporation, 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.

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.

Clause 4

Clause 4 of the Bill proposes an amendment to section 26 of the Act to give the right to any person to inspect and copy certain company records and excludes the application thereof to private companies, personal liability and non-profit companies that fall below a certain threshold.

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 a director or prescribed officer of the company, that director or prescribed officer must be named. It further provides for the remuneration policy and background statement of the report not to be made subject to an audit.

Clause 6

Clause 6 of the Bill proposes the insertion of section 30A into the Act by imposing the duty to prepare and present a directors' remuneration policy and remuneration report, the manner of compiling the report. The implementation report to be presented and the required approval at the company's annual general meeting and the consequences to follow where the report fails to receive the required approval at the annual general meeting.

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 prescribed officer of the company, for refusing access to financial statements and sets out the defence available to such directors or prescribed officers' of the company.

Clause 8

Clause 8 of the Bill proposes amendments to section 33 of the Act and requires companies with a public interest score that 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 of a copy of the security register and a copy of the register of disclosure of beneficial interests

with the Commission to ensure transparency and for the Commission to make the annual return available electronically to any person in a prescribed manner.

Clause 9

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

Clause 10

Clause 10 of the Bill proposes an amendment to section 40 of the Act requiring partly paid shares to be transferred to a stakeholder and held in terms of stakeholder agreement, until fully paid.

Clause 11

Clause 11 of the Bill proposes an amendment to section 45 of the Act to exclude the provisions thereof from applying to the giving of financial assistance by a holding company to its subsidiary.

Clause 12

Clause 12 of the Bill proposes an amendment to section 48 of the Act that a special resolution will not be required when a company is implementing a share-buyback by means of an offer made *pro-rata* to all shareholders including where directors, prescribed officers or person/s related to a director or prescribed officer of the company holds shares which are the subject of the offer and will also not be required in respect of transactions effected on a recognised stock exchange.

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 by the company of beneficial interests. Further it imposes an obligation on the company, where the identity of persons who hold a beneficial interest, including the true owner, is unknown, to request from the registered security holder each quarter to provide details of beneficial interest holders.

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 at the AGM and requiring the social and ethics committee report and remuneration report to be presented at the AGM.

Clause 15

Clause 15 of the Bill proposes amendments to section 72 of the Act by inserting provisions for a public company or state-owned entities and categories of companies which are required in terms of this section and regulations to appoint a social and ethics committee, and who wish to apply for an exemption from such requirement to lodge an application for exemption with the Companies Tribunal, as well as the requirements for granting the exemption. It further provides for the appointment and composition of the social and ethics committee, the presentation at the AGM of the social and ethics committee report, the voting required for the approval thereof at the meeting of shareholders or annual general meeting, as the case may be, and additional requirements for the social and ethics committee, which includes an obligation to make a statement on the report and where such statement needs to be presented and published.

Clause 16

Clause 16 of the Bill proposes an amendment to section 90 of the Act as to when the appointment of an auditor must take place being annually at a shareholders meeting. It also reduces from five years to two years the cooling off period arising from an auditors involvement in aspects of the company.

Clause 17

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

Clause 18

Clause 18 of the Bill proposes the amendment of section 118 of the Act by providing a new definition of a private company for the jurisdiction of the Take-Over Regulation Panel over private companies. For this purpose a private company must have 10 or more shareholders with direct or indirect shareholding in the company and meets or exceeds the financial threshold of annual turnover or asset value which shall be determined by the Minister in consultation with the Panel. It further grants the Panel the discretion to exempt any particular transaction affecting a private company in terms of section 119(6) of the Act.

Clause 19

Clause 19 of the Bill proposes an amendment to section 135 of the Act by inserting subsection (1A), providing that any amounts due by a company under business rescue to the landlord in terms of a contract where 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 with the appropriate ranking of preferences arising therefrom.

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).

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.

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).

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.

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 it by the B-BBEE Commission.

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.

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.

Clause 28

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

Annexure

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, INDUSTRY AND COMPETITION)

[B —2021]

GENERAL EXPLANARY 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 provide for the definition of true owner; to provide for the preparation, presentation and voting on companies' remuneration policy and directors' remuneration report; to provide for the filing of the 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 differentiate where the right to gain access to companies' records may be limited; to clarify when a Notice of Amendment of a Memorandum of Incorporation takes effect; to empower the 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 exclude the holding company from the requirements relating to financial assistance; to provide for instances where a special resolution is required for acquisition of shares by the company; to extend the definition of an employee share scheme to include situations 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 provide for circumstances where a company is unable to identify the details of persons who hold a beneficial interest in its securities; to deal with the composition of the social and ethics Committee; the publication of the application for exemption from the requirement to appoint a social and ethics committee; to provide for the presentation and approval of the social and ethics committee report at the annual general meeting or shareholders' meeting as the case may be; to ensure

the differentiation of duties between the chairperson of the Tribunal and the Chief Operation Officer; and to provide for matters connected therewith.

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; and

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

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

"true owner" means a natural person, who would in all the circumstances be considered to be the ultimate and true owner of the relevant securities, whether by reason of being capable either directly or indirectly (via the intermediation of others in the chain of holders of beneficial interest in the relevant securities) of directing the registered holder with regard to the securities or because of being a person for whose benefit the securities enure or for any other reason, not limited *ejusdem generis*, which could be the registered holder itself, or if the registered holder is not the true owner

or the only true owner, would be the last person in the chain of any holders of beneficial interest in the relevant securities;”.

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 –

(a) 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 deletion in subsection (1) of the word "and" at the end of paragraph (d) and by the addition of the following paragraphs:
"e) the securities register of a profit company, or the members register of a non-profit company that has members, as mentioned in section 24(4)**[.]**and
f) the register of the disclosure of beneficial interest of the company as mentioned in section 56(7)(a)."
- (d) 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 the information contained in the records referred to in subsection(1)(a),(b),(cA),(e) and (f), upon payment of no more than the prescribed maximum charges for any such inspection and copy. **[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]**.
- (e) by the insertion after subsection (2) of the following subsection:
(2A) The right to inspect and copy information contained in the records referred to in subsection 1(c) and (d), as contemplated in subsection (2), shall not apply to a private company, non-profit company or personal liability company, wherein-
(a) an annual financial statement is internally prepared in a company with a Public Interest Score of less than 100; or

- (b) an annual financial statement is independently prepared in a company with a Public Interest Score of less than 350.”
- (f) by the substitution in subsection (4) for paragraphs (a) of the following paragraph:
“(a) for a reasonable period during business hours at a location referred to in section 25(1);”;
- (g) 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]** 10 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;”;
- (h) by the deletion of subsection (6).
- (i) by the substitution in subsection (9) for the words preceding paragraph (a) of the following words:
“(9) It is an offence for a company, director or prescribed officer of a company, to-”;
- (j) by the insertion after subsection (9) of the following subsection:
“(9A)(a) Notwithstanding the provisions of subsection (9), a director or prescribed officer of the company shall not be guilty of an offence if he or she shows that he or she took all reasonable steps to secure the company’s compliance with the requirements of section 26 and section 31 of this Act.
(b) It is a legal defence for such an offence to show that he acted reasonably and that in the circumstance the default was excusable.”

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 –
- (a) 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:".
- (b) by the insertion after subsection (4) of the following subsection:
- "(4A) Where any provisions of the directors' remuneration report as contemplated in section 30A becomes subject to audit in terms of this section, nothing will require any company policies or the background statement of the remuneration report to be made subject to such audit."

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 and present the company's remuneration policy and the remuneration report**
- 30A.(1)** A public company or state-owned company must prepare and present the remuneration policy for directors and prescribed officers for approval by ordinary resolution, at the annual general meeting.
- (2) The remuneration policy as contemplated in subsection (1) must be presented thereafter for approval by ordinary resolution at the annual general meeting and every three years or whenever any material change to the remuneration policy is made.
- (3) The remuneration report must, in the prescribed manner, consist of the following parts:
- (a) background statement;

- (b) the company's remuneration policy as contemplated in subsection (1), which must be set out in a separate part of the remuneration report;
 - (c) an implementation report containing details of remuneration and benefits received by each director or prescribed officer as required in terms of section 30(4), (5) and (6) of this Act;
 - (d) the total remuneration including all salary, benefits (including employer contributions to benefit funds), short-term incentives (bonuses) and long-term incentives such as share options and any other type of long-term incentive awards which has been settled in the year under review of the employee of the company with the highest total remuneration, be it the chief executive officer or any other prescribed officer in the company as may be specified in terms of section 30(4) and (6) of this Act;
 - (e) the total remuneration, including all salary, benefits (including employer contributions to benefit funds) and incentives (bonuses), as recorded in the company's payroll record, of the employee as defined by section 213 of the Labour Relations Act, 1995 (Act No. 66 of 1995) of the company, with the lowest total remuneration in the company; and
 - (f) the average remuneration of all employees, median remuneration of all employees and the remuneration gap reflecting the ratio between the total remuneration of the top 5% highest paid employees and the total remuneration of the bottom 5% lowest paid employees of the company.
- (4) The remuneration report must be –
- (a) approved by the board of the company;
 - (b) presented to the shareholders at the annual general meeting;
and
 - (c) voted by the shareholders for approval as contemplated in subsection (6).
- (5) The voting on the remuneration report as contemplated in subsection (4) shall constitute the voting on the remuneration policy as

contemplated in subsection (1) and (2) and the implementation report as contemplated in subsection (6).

- (6) The implementation report and the remuneration policy shall be construed as separate documents with separate voting requirements which shall be approved by ordinary resolution.
- (7) Where the remuneration policy is not approved by ordinary resolution, it must be presented at the next annual general meeting or at the shareholders' meeting called for this purpose, until the approval of the remuneration policy is obtained.
- (8) Any changes to the remuneration policy may be implemented once the approval of the shareholders is obtained, by ordinary resolution in terms of subsection (7).
- (9) Where the implementation report is not approved by ordinary resolution as contemplated in subsection (6) –
- (a) the remuneration committee or the directors' committee responsible for remuneration matters of the company shall, in the following annual general meeting, present an explanation on the manner in which the shareholders' concerns have been taken into account; and
- (b) the non-executive directors that serve on the directors' committee responsible for remuneration shall be required to stand down for re-election every year of such rejection of the implementation report."

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 –
- (a) 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 the following subsection:

(1) Every company must file an annual return with the Commission in the prescribed form with the prescribed fee, and within prescribed period after the end of the anniversary of the date of its incorporation, including in that return-

"(a) a copy of its annual financial statements pertaining to the last financial year, or the financial year just prior to the last financial year if the filing date of the annual return is less than six months following the end of the last financial year and the annual financial statement of the last financial year have not been prepared as required by section 30(1), 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 as 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

(b) any other prescribed information."

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

"(1A) The Commission shall make the annual return contemplated in subsection (1) available electronically to any person as prescribed."

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, where 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; and

(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.

(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 as may be 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 stakeholder [third party], to be held [in trust] in terms of a stakeholder agreement, and later transferred to the subscribing party in accordance with [a trust agreement] the stakeholder agreement."

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

- (c) by the insertion after section 5 of the following subsection:

“(5A) for the purposes of subsection (5) and (6),

(a) **‘Stakeholder’** means a trusted third party who has no interest in the company or the subscribing party who may be in the form of an attorney, notary public or escrow agent;

(b) **‘stakeholder agreement’** means a contract or an arrangement or understanding between the stakeholder and the company.”.

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”;

- (b) by the insertion after subsection (2) of the following subsection of the following subsection:

“(2A) The provisions of this section shall not apply to the giving by a company of financial assistance to, or for the benefit of its subsidiaries.”.

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) 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 of the company;
 - (ii) a prescribed officer of the company; or
 - (iii) a person related to a director of the company 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 by the company to all shareholders of the company or a particular class of shareholders of the company, notwithstanding that the *pro rata* offer made to all shareholders may also include shareholders who are one or more of the persons referred to in paragraph (a) above; or
 - (ii) transactions effected on a recognised stock exchange on which the 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 and subsequent sub-paragraph:

“(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-

- (a) is married in community of property to a person who has a beneficial interest in that security;
- (b) is the parent of a minor child who has a beneficial interest in that security;
- (c) acts in terms of an agreement with another person who has a beneficial interest in that security, and the agreement is in respect of the co-operation between them for the acquisition,

disposal or any other matter relating to a beneficial interest in that security;

- (d) is the holding company that has a beneficial interest in that security;
- (e) is entitled to exercise or control the exercise of the majority of the voting rights at the general meetings of a juristic person that has a beneficial interest in that security; **[or]**
- (f) gives directions or instructions to a juristic person that has a beneficial interest in that security, and its directors or the trustees are accustomed to act in accordance with that person's directions and instructions; or
- (g) otherwise holds a beneficial interest.”.

- (b) by the insertion after subsection (2) of the following subsection:

“(2A) For the purposes of subsections (3) to (7), a person is also regarded to have a beneficial interest in a security, if that person is a true owner in terms of this Act.”.

- (c) 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 or who is the only holder of the beneficial interest in **[all of the securities]** that security in the same company held by that person, that registered holder of security must disclose -”.

- (d) by the substitution for subsection (4) of the following subsection:

“(4) The information required in terms of subsection (3) must -
(a) be disclosed in writing to the company on registration, and within five business days after the end of every month during which a change has occurred in the information as contemplated in subsection (3), or more promptly or frequently to the extent so

provided by the requirements of a central securities depository;
and

(b) otherwise be provided on payment of a prescribed fee charged by the registered holder of securities on demand by the company.”.

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

“(5) **[A company that knows or has reasonable cause to believe that any of its securities are held by one person for the beneficial interest of another, by notice in writing, may require either of those persons to]** Unless a company knows the identity of all the persons who hold a beneficial interest in its securities directly or indirectly, the company must each quarter of the year require the registered holder of any of its securities of which any beneficial interest holder is in doubt, and any person which it has any cause to believe is a beneficial interest holder, including the true owner, to –

(a) confirm **[or deny that fact]** whether the registered holder is the holder of the beneficial interest in the securities of the company, if not, provide details of all the beneficial interest holders in the securities and the extent of their holding during the preceding quarter and any preceding period for which the details are not known by the company;”.

(f) by the substitution in subsection (6) for the following subsection:

“(6) The information required in terms of subsection (5) must be provided not later than 10 business days after receipt of the notice from the company.”.

(g) by the substitution in subsection (7) for the following subsection:

“(7) **[A]** Every company **[that falls within the meaning of ‘regulated company’ as set out in section 117 (1)(i)]** must—

- (a) establish and maintain a register of the disclosures made in terms of this section; and
- (b) publish in its annual financial statement, if it is required to have such statements audited in terms of section 30(2), a list of persons who in aggregate, alone or together with another person hold beneficial interests amounting 5% or more of the total number of securities of that class, issued by the company or any such percentage as may be prescribed by the Minister [equal to or in excess of 5% of the total number of securities of that class issued by the company with the extent of those beneficial interests].”.

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."
- (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;"

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 substitution for subsection (5) of the following subsection:

"(5) A company that falls within the category of companies that are required in terms of this section and the regulations to appoint a social

and ethics committee may apply to the Tribunal for exemption from that requirement in the following manner —

- (a) the company must publish the intention to lodge an application for exemption with the Tribunal, in the prescribed manner;
- (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 which 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

(b) by the insertion after subsection (5) of the following subsection:

“(5A) A social and ethics committee shall not be required where —

- (a) the company is a subsidiary of another company that has a social and ethics committee, the existing social and ethics committee will perform the functions required by this section on behalf of the subsidiary company; or
- (b) it has been exempted by the Tribunal in terms of subsection (5) and (6).”.

(c) by the insertion after subsection (5A) of the following subsection:

“(5B) The Minister may prescribe the minimum qualification requirements for members of the social and ethics committee as he or she may deem necessary to ensure that any such committee, taken as a whole, comprises persons with adequate relevant knowledge and experience to equip the committee to perform its functions.”.

(d) by the insertion of the following subsections after subsection (7).

“(8) The social and ethics committee of a company must comprise not less than three directors and may in addition include prescribed officers, provided that

(a) in the case of a public company and state-owned company the majority of the directors are not involved in the day-to-day management of the business of the company, and must not have been so involved at any time during the previous three financial years; and

(b) in the case of any other company, not being a public company or state-owned company, must consist of not less than three directors or prescribed officers provided that at least one of the directors must not be involved in the day to day management of the business of the company and must not have been so involved within the previous three financial years.”.

(e) by the insertion of a subsection (9) after subsection (8) -

“(9) A board of a company that is required to have a social and ethics committee that-

(a) exists on the effective date, must appoint the first members of committee within 12 months after-

(i) the effective date; or

(ii) the determination by the Tribunal of the company’s application, if any and the Tribunal has not granted the company an exemption;

(b) is incorporated on or after the effective date, must constitute a social and ethics committee and appoint its first members within one year after -

(i) its date of incorporation, in the case of a state-owned company;

(ii) the date it first became a listed public company, in such a case;

or

(iii) the date the company first met the criteria set out in subparagraph (1(c), in any other case.”.

(f) by the insertion of a subsection (10) after subsection (9) :-

“(10) Thereafter:-

(a) at each annual general meeting of a public company or state-owned company, such company, elect a social and ethics committee; or

(b) by a board of the company where such company is any other company, not being a public company or state-owned company, required to have a social and ethics committee.”.

(g) by the insertion of subsection (11) after subsection (10) -

(11) Where a vacancy arises in the social and ethics committee, the board must appoint a person to fill such vacancy within 40 days after the vacancy arises.”.

(h) by the re-numbering of subsection (8) as subsection (12) -

(i) by the insertion after subsection (12) of the following subsection:

“13(a) A social and ethics committee must present a social and ethics committee report in the prescribed manner and form describing how the committee performed its functions in terms of this Act and regulations.

(b) A social and ethics report presented by the social and ethics committee in terms of subsection (13)(a) must contain the additional information in the form of a statement that -

(i) the social and ethics committee has fulfilled its mandate in the manner prescribed; and

(ii) there has not been an instance of material non-compliance where there has been one or more instances of non-compliance, where such fact has been disclosed.

(c) The social and ethics committee must present its report-

- (i) in the case of a public company or state-owned company at its next annual general meeting; and
- (ii) in the case of any other company, annually at the shareholders' meeting or with a resolution as contemplated in section 60(1).
- (d) The social and ethics committee report presented to shareholders as contemplated in sub-paragraph (c) shall be approved by an ordinary resolution.
- (e) Where the social and ethics committee report fails to meet the approval in terms of sub-paragraph (d), the social and ethics committee shall-
 - (i) engage with the shareholders who voted against the report and who are willing to engage on the vote; and
 - (ii) within a period of four months after the meeting at which the report was rejected publish a statement on its website, and Stock Exchange News Service in the case of public companies, which statement shall also form part of the committee report contemplated in subsection 13(a), setting out in such a statement-
 - (aa) the steps that were taken to engage with the dissenting shareholders;
 - (bb) the outcome of such engagement; and
 - (cc) the actions that will be taken by the company to address the issues raised by the dissenting shareholders.
 - (iii) such a statement to be presented at the next annual general meeting as part of the committee report as contemplated in subsection (13)(a)."
- (i) by the numbering of subsection 9 as subsection (14).
- (k) by the numbering of subsection (10) as subsection (15).

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 —

- (a) 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);**

it has ten or more shareholders with a direct or indirect shareholding in the company and meets or exceeds the financial threshold of annual turnover or asset value determined in terms of section 118(2), provided that the Panel may exempt any particular transaction affecting a private company in terms of section 119(6);"; or

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

"(2) The Minister, **[after consulting]** in consultation with the Panel, **[may prescribe a minimum percentage, being not less than 10%, of the issued securities of a private company which, if transferred within a 24-month period as contemplated in subsection (1)(c)(i), would bring that company and its securities within the application of this Part, Part C, and the Takeover Regulations in terms of that subsection.] must determine the financial thresholds based on the annual turnover or asset value of the company in the Republic, in general or in relation to specific industries, for purposes of determining or identifying the private companies to which the provisions of this Chapter 5, Part B and Part C apply."**

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, are not paid to the landlord during business rescue proceedings, in respect of and not exceeding the aggregate for all

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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 insertion of the amendment after subsection (3)(a) of the following subsections:

"(3)(b) in subsection (1A) will rank below the claims contemplated in subsection (1), but ahead of all the secured and unsecured claims against the company; and

(c) in subsection (2) will have preference in the order in which they were incurred over all unsecured claims against the company."

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)(ii), 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 may 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 –

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

"If 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;

- (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) Financial Reporting Standard Council must-
- (a) receive and consider the 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 Standards 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 Standard or the International Financial Reporting Standards for Small Medium-sized Entities."

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 directors' 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;; and
- (d) by the substitution for Part C of the following heading:
"**[Voluntary]** Resolution of disputes (Sections 166 -167)."

Short title and commencement

28. This Act is called the Companies Amendment Act, 2021, and comes into operation on a date to be fixed by the President by proclamation in the *Gazette*.