

REPUBLIC OF SOUTH AFRICA

5

COMPANIES AMENDMENT BILL, 2010

10

(MINISTER OF TRADE AND INDUSTRY)

[B ##—2010]



REPUBLIEK VAN SUID-AFRIKA

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COMPANIES AMENDMENT BILL, 2010

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(MINISTER VAN HANDEL EN NYWERHEID)

[W ##—2010]

19 JULY 2010 FINAL TEXT

GENERAL EXPLANATORY NOTE

[] Words in bold type in square brackets indicate deletions from the principal Act

5 _____ Words underlined with a solid line indicate insertions into the principal Act

19 JULY 2010 FINAL TEXT

Notes to this Draft

This draft proposes amendments to the Companies Act, 2008 to—

- 5
- (a) better provide for the administration of the principal Act, and in particular to establish a proper foundation for certain necessary regulations;
- (b) continue the mechanisms established under section 335 of the Companies Act, 1973 to allow for the transfer of registration of foreign companies to the jurisdiction of the Republic;
- 10 (c) address significant errors, infelicities and ambiguities that could result in misapplication of the principal Act in a manner contrary to its underlying policy; and
- (d) correct various numbering, spelling, punctuation, reference, alignment and typographical errors in the text.

A Table of Changes is appended to the end of this Bill, setting out a complete list of all provisions of the Companies Act, 2008 affected by amendments proposed in this Bill.

19 JULY 2010 FINAL TEXT

BILL

To amend the Companies Act, 2008 (Act No. 71 of 2008, hereinafter ‘the principal Act’) to better provide for its administration, and in particular to establish a proper foundation for certain necessary regulations; to continue the mechanisms established under section 335 of the Companies Act, 1973, which allow for the transfer of registration of foreign companies to the jurisdiction of the Republic; to correct certain errors resulting in inconsistency, disharmony and ambiguity in the principal Act that could result in misapplication of the principal Act in a manner contrary to its policy; to correct various numbering, spelling, punctuation, reference, alignment, typographical and other patent errors in the text of the principal Act, and for related matters.

BE IT ENACTED BY THE PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA, AS FOLLOWS: -

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**Part 1 – General Provisions, Interpretation and Amendments affecting Chapter 1 of the
Principal Act**

1. Definition of principal Act, short title and commencement of Act

- 5
- (1) In this Act, “principal Act” means the Companies Act, 2008 (Act No. 71 of 2008).
- (2) This Act is called the Companies Amendment Act, 2010 and comes into operation on the date on which the principal Act comes into operation in terms of section 225 of that Act.

2. Amendment of definitions and expressions used in the principal Act

- 10
- (1) Section 1 of the principal Act is hereby amended—
- (a) by the insertion, immediately before the definition of “**advertisement**”, of the following:
- 15
- “**accounting records**” means information in written or electronic form concerning the financial affairs of a company as required in terms of this Act including, but not limited to, purchase and sales records, general and subsidiary ledgers and other documents and books used in the preparation of financial statements;”
- 20
- “**acquiring party**”, when used in respect of a transaction or proposed transaction, means a person who, as a result of the transaction, would directly or indirectly acquire or establish direct or indirect control or increased control over all or the greater part of a company, or all or the greater part of the assets or undertaking of a company;”
- (b) by the insertion, immediately before the definition of “**alterable provision**”, of the following:
- 25
- “**all or the greater part of the assets or undertaking**”, when used in respect of a company, means—

- (a) in the case of the company's assets, more than 50% of its gross assets at fair market value, irrespective of its liabilities; or
- (b) in the case of the company's undertaking, more than 50% of the value of its entire undertaking, at fair market value;”

5 (c) in the definition of “**amalgamation or merger**”, by the substitution, for paragraph (b), of the following:

“(b) the survival of at least one of the amalgamating or merging companies, with or without the formation of one [ore] or more new companies, and the vesting in the surviving company or companies, together with any such new company or companies, of all of the assets and liabilities that were held by any of the amalgamating or merging companies immediately before the implementation of the agreement;”

10

(d) by the insertion, immediately before the definition of “**audit**”, of the following:

15

““asset” means a resource controlled by an entity as a result of past events, and from which future economic benefits are expected to flow;”

(e) by the substitution for the definition of “audit” of the following:

““audit” has the meaning set out in the Auditing Profession Act, but does not include an “independent review” of annual financial statements, as contemplated in section 30 (2)(b)(ii)(bb);”

20

(f) by the substitution in the definition of “**auditor**”, for the expression “Auditing [Professions] Act”, of the expression “Auditing Profession Act”;

(g) by the substitution, for the definition of “**Banks Act**”, of the following:

““Banks Act” means the Banks Act, [1993 (Act No. 124 of 1993)]1990 (Act No. 94 of 1990);”

25

- (h) by the substitution in the definition of “**company**”, for the opening phrase, of the following:

“ **“company”** means a juristic person incorporated in terms of this Act, a domesticated company, or a juristic person that, immediately before the effective date—”

- (i) by the substitution, for the definition of “**convertible securities**”, of the following:

“ **“convertible[securities]”**, when used in relation to any securities of a company, means [any] securities [of a company] that may, by their terms, be converted into other securities of the company, including—

- (a) any non-voting securities issued by [a] the company and which will become voting securities—

- (i) on the happening of a designated event; or
(ii) if the holder of those securities so elects at some time after acquiring them; and

- (b) options to acquire securities to be issued by the company, irrespective of whether [or not] those securities may be voting securities, or non-voting securities contemplated in paragraph (a);”

- (j) by the insertion, immediately before the definition of “**director**”, of the following:

“ **“creditor”** means a person to whom a company is or may become obligated in terms of any liability or other obligation that would be required, in terms of section 4(2)(b)(i), to be considered by the company if it were applying the solvency and liquidity test;”

- (k) in the definition of “**distribution**”, by—

(i) the substitution, for the opening phrase of paragraph (a), of the following:

“(a) transfer by a company of money or other property of the company, other than its own shares, to or for the benefit of one or more holders of any of the shares of that company or of another company within the same group of companies, whether—”

(ii) the substitution in paragraph (a), for the opening phrase of subparagraph (iii), of the following:

“(iii) [is] as consideration for the acquisition—”

(iii) the substitution, for paragraph (c), of the following:

“(c) forgiveness or waiver by a company of a debt or other obligation owed to the company by one or more holders of any of the shares of that company or of another company within the same group of companies.”

(l) by the insertion, immediately before the definition of “**effective date**”, of the following:

““domesticated company” means a foreign company whose registration has been transferred to the Republic in terms of section 13 (5) to (9);”

(m) by the substitution, for the definition of “**group of companies**”, of the following:

““group of companies” means two or more companies that [share a holding company or subsidiary relationship] are related or inter-related as a result of one or more relationships contemplated in section 2 (1)(c)(i) or (ii);”

(n) by the substitution, for the definition of “**holding company**”, of the following:

“**holding company**”, in relation to a subsidiary, means a juristic person **[or undertaking]** that controls that subsidiary as a result of any circumstances contemplated in section 2 (2)(a) or 3 (1)(a);”

(o) by the substitution in the definition of “**inspector**”, for the expression “section 209”, of the expression “section 209(1)”;
5

(p) by the substitution, for the definition of “**inter-related**”, of the following:

““**inter-related**”, when used in respect of three or more persons, means persons who are related to one another in a linked series of relationships, such that two of the persons are related in a manner [as] contemplated in section 2 (1)(d), and one of them is related to the third in any such manner, and so forth in an unbroken series;”
10

(q) by the substitution in the definition of “**investigator**”, for the expression “section 209”, of the expression “section 209(3)”;
15

(r) by the substitution in the definition of “**knowing**”, “**knowingly**” or “**knows**”, for paragraph (a), of the following:
15

“(a) had actual knowledge of [that] the matter; or”

(s) by the insertion, immediately after the definition of “**knowing**”, “**knowingly**” or “**knows**”, of the following:
20

“**liability**” means a present obligation of an entity arising from past events, the settlement of which is expected to result in an outflow from the entity of resources embodying economic benefits;”
20

(t) by the substitution, for the definition of “**member**”, of the following:

“**member**”, when used in reference to—

(a) a close corporation, has the meaning set out in section 1 of the Close Corporations Act, 1984 (Act No. 69 of 1984); or
25

(b) a non-profit company, means a person who holds membership in, and specified rights in respect of, that non-profit company, as contemplated in Item 4 of Schedule 2; or

(c) any other entity, means a person who is a constituent part of that entity;”

5 (u) by the substitution, for the definition of “**Memorandum of Incorporation**”, of the following:

“ “**Memorandum**”, or “**Memorandum of Incorporation**”, means the document, as amended from time to time, that sets out rights, duties and responsibilities of shareholders, directors and others within and in relation to a
10 company, and other matters as contemplated in section 15, and by which—

(a) **[that sets out rights, duties and responsibilities of shareholders, directors and others within and in relation to a company, and other matters as contemplated in section 15, and]the company was**
15 **incorporated in terms of this Act, as contemplated in section 13;**

(b) **[by which]a pre-existing company was structured and governed before the**
later of the—

(i) the effective date; or**[the company was incorporated in terms of**
20 **this Act, as contemplated in section 13**

(ii) the date it was converted to a company in terms of Schedule 2;
or**[a pre-existing company was structured and governed**
before the later of the—

(aa) **the effective date; or**

(bb) **the date it was converted to a company in terms of**
Schedule 2;]

25 (c) a domesticated company is structured and governed;”

- (v) by the substitution, for the definition of “**ordinary resolution**”, of the following:

“**“ordinary resolution”** means a resolution adopted with the support of more than 50% of the voting rights exercised on the resolution, or a higher percentage as contemplated in section 65 (8)—

- (a) at a shareholders meeting; [with the support of more than 50% of the voting rights exercised on the resolution, or a higher percentage as contemplated in section 65 (8);] or
- (b) by holders of [a]the company’s securities acting other than at a meeting, as contemplated in section 60;”

- (w) by the substitution, for the definition of “**personal liability company**”, of the following:

“**“personal liability company”** means a profit company [whose Memorandum of Incorporation states that the company is a personal liability company, as contemplated] that satisfies the criteria in section 8(2)(c);”

- (x) by the substitution, for the definition of “**prescribed officer**”, of the following:

“**“prescribed officer”** means [the holder of an office] a person who, within a company, performs any function that has been designated by the Minister in terms of section 66 [(11)](10);”

- (y) by the substitution in the definition of “**private company**”, for paragraph (a), of the following:

“(a) is not a [company or a] public, personal liability, or state-owned company; and”

- (z) in the definition of “**registration certificate**” by—

(i) the insertion, at the end of paragraph (c), of the expression “or”; and

(ii) the insertion, immediately after paragraph (c), of the following:

“(d) a domesticated company, means the certificate issued to it upon the transfer of its registration to the Republic in terms of section 13 (5) to (9);”

5 (aa) by the substitution, for the definition of “**securities**”, of the following:

“**“securities”[has the meaning]means—**

(a) any share issued, or authorised to be issued, by a profit company; or

(b) anything falling within the meaning of “securities” asset out in section 1 of the Securities Services Act, 2004 (Act No. 36 of 2004)[, and includes shares held in a private company];”

10

(bb) by the insertion, immediately after the definition of “**securities**”, of the following:

“**“securities register”** means the register required to be established by a profit company in terms of section 50(1);”

15

“**“series of integrated transactions”** has the meaning set out in section 41 (4)(b);”

(cc) by the substitution, for the definition of “**special resolution**”, of the following:

“**“special resolution”** means[a resolution adopted]—

20

(a) in the case of a company, a resolution adopted with the support of at least 75% of the voting rights exercised on the resolution, or a different percentage as contemplated in section 65 (10)—

(i) at a shareholders meeting; or[, with the support of at least 75% of the voting rights exercised on the resolution, or a lowerpercentage as contemplated in section 65 (10); or]

25

(ii) by holders of [a]the company’s securities acting other than at a meeting, as contemplated in section 60; or

(b) in the case of any other juristic person, a decision by the owner or owners of that person, or by another authorized person, that requires the highest level of support in order to be adopted, in terms of the relevant law under which that juristic person was incorporated;”

5

(dd) by the substitution in the definition of “**state-owned company**”, for paragraph (a), of the following:

“(a) **[falls within the meaning of ‘state-owned enterprise’ in terms]** is listed as a public entity in Schedule 2 or 3 of the Public Finance Management Act, 1999 (Act No. 1 of 1999); or”

10

(2) The principal Act is amended by the substitution—

(a) in sections 118(1)(c)(i) and 165(8)(a) for the expression “**[interrelated]**” of the expression “inter-related”;

15

(b) in sections 28(4), 109(1)(a), ~~122(2)~~, 133(1)(c), 134(1)(c), 135(3)(a)(i), 159(1)(b), 162(5)(f) and ~~(7)(b)(i)~~, and 170(2)(b) and in Item 7(4) of Schedule 5, for the expression “**[irrespective whether]**”, of the expression “irrespective of whether”; and

(c) in the definition of ‘**material**’ in section 1, and in sections 31(2), and 165(14)(b), for the word “**[judgement]**”, of the word “judgment”.

20

(3) The heading of section 2 of the principal Act is hereby amended by the deletion of the words “**[and inter-related]**”.

3. **Amendment of section 4 of Act 71 of 2008**

Section 4 of the principal Act is hereby amended by—

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

25

“(a) the assets of the company or, **[if the company is a member of a group of companies]** in the case of a holding company, the [aggregate] consolidated assets of the company, as fairly valued, equal or exceed the liabilities of the

company or, **[if the company is a member of a group of companies]** in the case of a holding company, the [aggregate] consolidated liabilities of the company, as fairly valued; and”

(b) the substitution in subsection (2), for paragraph (c), of the following:

5 “(c) unless the Memorandum of Incorporation of the company provides otherwise, **[a person]** when applying the test in respect of a distribution contemplated in paragraph (a) of the definition of ‘distribution’ in section 1, a person is not to [be regarded] include as a liability any amount that would be required, if the company were to be liquidated at the time of the distribution, to satisfy the
10 preferential rights upon liquidation of shareholders whose preferential rights upon liquidation are superior to the preferential rights upon liquidation of those receiving the distribution.”

4. Amendment of section 5 of Act 71 of 2008

Section 5 of the principal Act is hereby amended by—

15 (a) the substitution, at the end of subsection (4)(b)(i), for the expression “section 49 (4)”, of the expression “sections 30 (8) or 49 (4)”;

(b) the insertion, immediately after subsection (5), of the following:

“(6) If there is a conflict between any provision of this Act and a provision of the listing requirements of an exchange—

20 (a) the provisions of both this Act and the listing requirements apply concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second; and

(b) to the extent that it is impossible to apply and comply with one of the inconsistent provisions without contravening the second, the provisions of this Act prevail except to the extent that this Act expressly provides otherwise.”
25

5. Amendment of section 6 of Act 71 of 2008

Section 6 of the principal Act is hereby amended by—

- (a) the substitution in subsection (1), for the opening phrase, of the following:

“(1) A court, on application by the Commission, ~~or~~ Panel[,] or an exchange in respect of a company listed on that exchange, may declare any agreement, transaction, arrangement, resolution or provision of a company’s Memorandum of Incorporation or rules—”

- (b) the substitution, for subsection (7), of the following:

“(7) An unaltered electronically or mechanically generated reproduction of any document, other than a share certificate, may be substituted for the original for any purpose for which the original could be used in terms of this Act, if that reproduction satisfies any applicable prescribed requirements as to the form or manner of reproduction.”

- (c) the substitution in subsection (14), for paragraph (a), of the following:

“(a) make regulations relating to the standards of operation, accessibility, technical requirements, service quality, and fees for the use of any system contemplated in subsection ~~[13]~~(13); and”

- (d) the insertion, immediately after subsection (14), of the following:

“(15) To the extent that the specific content, or a particular effect, of any provision of a company’s Memorandum of Incorporation—

(a) is required of the company by or in terms of any applicable public regulation, or by the listing requirements of an exchange; and

(b) has the effect of negating, restricting, limiting, qualifying, extending or otherwise altering the substance or effect of an unalterable provision of the Act,

that provision of the company's Memorandum of Incorporation must not be construed as being contrary to section 15 (1)(a)."

6. Amendment of section 10 of Act 71 of 2008

Section 10 of the principal Act is hereby amended by the substitution, for subsection (2), of the following:

"(2) The following provisions of this Act, and any regulations made in respect of any such provisions, do not apply to a non-profit company:

(a) Part D of Chapter 2 – Capitalisation of profit companies.

(b) Part E of Chapter 2 – Securities registration and transfer.

(c) Section 66 (8) and (9) and section 68 – Election of directors.

~~[(c)]~~ (d) Parts B and D of Chapter 3 – Company secretaries, and audit committees, except to the extent that an obligation to appoint a company secretary, auditor or audit committee arises in terms of—

(i) a requirement in the company's Memorandum of Incorporation, as contemplated in section 34 (2); or

(ii) regulations contemplated in section 30 (7).

~~[(d)]~~ (e) Chapter 4 – Public offerings of company securities.

~~[(e)]~~ (f) Chapter 5 – Takeovers, offers and fundamental transactions, except to the extent contemplated in Item 2 of Schedule 1.

~~[(f)]~~ (g) Sections 146 (d), and 152 (3)(c) – Rights of shareholders to approve a business rescue plan, except to the extent that the non-profit company is itself a shareholder of a profit company that is engaged in business rescue proceedings.

~~[(g)]~~ (h) Section 164 – Dissenting shareholders' appraisal rights, except to the extent that the non-profit company is itself a shareholder of a profit company."

Part 2 – Amendments affecting Chapter 2 of the Principal Act**7. Amendment of section 11 of Act 71 of 2008**

Section 11 of the principal Act is hereby amended by—

5 (a) the substitution in subsection (1)(a)—

(i) for the opening phrase, of the following:

“(a) may comprise one or more words in any language, irrespective of whether **[or not]** the word or words are commonly used or contrived for the purpose, together with—”

10 (ii) for paragraph (a)(ii), of the following:

“(ii) any of the following symbols: +, &, #, @, %, =;”

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

“(2) The name of a company must—

(a) not be the same as **[, or confusingly similar to]**—

15 (i) the name of another company, domesticated company, registered external company, close corporation or co-operative **[unless the company forms part of a group of companies using similar names]**;

20 (ii) a name registered for the use of a person, other than the company itself or a person controlling the company, as a defensive name in terms of section 12 (9), or as a business name in terms of the Business Names Act, 1960 (Act No. 27 of 1960) unless the registered user of that defensive name or business name has executed the necessary documents to transfer the registration in
25 favour of the company;

- 5 (iii) a registered trade mark belonging to a person other than the company, or a mark in respect of which an application has been filed in the Republic for registration as a trade mark or a well-known trademark as contemplated in section 35 of the Trade Marks Act, 1993 (Act No. 194 of 1993) unless the registered owner of that mark has consented in writing to the use of the mark as the name of the company; or
- 10 (iv) a mark, word or expression the use of which is restricted or protected in terms of the Merchandise Marks Act, 1941 (Act No. 17 of 1941), except to the extent permitted by or in terms of that Act;
- (b) not be confusingly similar to a name, trade mark, mark, word or expression contemplated in paragraph (a) unless,
- 15 (i) in the case of names referred to in paragraph (a)(i), each company bearing any such similar name is a member of the same group of companies;
- (ii) in the case of a company name similar to a defensive name or to a business name referred to in paragraph (a)(ii), the company, or a person who controls the company, is the registered owner of that
- 20 defensive name or business name;
- (iii) in the case of a name similar to a trade mark or mark referred to in paragraph (a)(iii), the company is the registered owner of the business name, trade mark, or mark, or is authorised by the registered owner to use it; or
- 25 (iv) in the case of a name similar to a mark, word or expression referred to in paragraph (a)(iv), the use of that mark, word or expression by the company is permitted by or in terms of the Merchandise Marks Act, 1941;

5 [(b)](c)not falsely imply or suggest, or be such as would reasonably mislead a person to believe incorrectly, that the company—

- 5
- (i) is part of, or associated with, any other person or entity;
 - (ii) is an organ of state or a court, or is operated, sponsored, supported or endorsed by the State or by any organ of state or a court;
 - (iii) is owned, managed or conducted by a person or persons having any particular educational designation or who is a regulated person or entity;
 - (iv) is owned, operated, sponsored, supported or endorsed by, or enjoys the patronage of, any—
 - 10 (aa) foreign state, head of state, head of government, government or administration or any department of such a government or administration; or
 - (bb) international organisation; and

15 [(c)](d)not include any word, expression or symbol that, in isolation or in context within the rest of the name, may reasonably be considered to constitute—

- 20
- (i) propaganda for war;
 - (ii) incitement of imminent violence; or
 - (iii) advocacy of hatred based on race, ethnicity, gender or religion, or incitement to cause harm.”

(c) the substitution in subsection (3), for paragraph (b), of the following:

25 “(b) if the company’s Memorandum of Incorporation includes any provision contemplated in section 15 (2)(b) or (c)restricting or prohibiting the amendment of any particular provision of the Memorandum, the name must be immediately followed by the expression “(RF)”;

- (d) the substitution in subsection (3)(c)(ii), for the expression “[I(Pty.)]”, of the expression “Pty.”
- (e) the substitution, for subsection (4), of the following:

“(4) The Minister may prescribe—

- 5 (a) additional commonly recognised symbols for use in company names as contemplated in subsection (1)(a)(iii); and
- (b) alternative expressions, in any official language, which may be used in substitution for any expression required to follow a company’s name in terms of subsection (3).”

10 **8. Amendment of section 12 of Act 71 of 2008**

Section 12 of the principal Act is hereby amended by—

- (a) the substitution, for subsection (2), of the following:

“(2) The Commission must reserve each name as applied for in the name of the applicant, unless **the name as applied for is**—

- 15 (a) **[the registered name of another company, close corporation or co-operative;]** the applicant is prohibited, in terms of section 11(2)(a), from using the name as applied for; or
- (b) **[the name of a registered external company; or]** the name as applied for is already reserved in terms of this section.
- 20 [(c) **already registered in terms of this section.]”**

- (b) the substitution—

- (i) in subsection (3)(a), for the expression “section 11 (2)[(a) or] (b)”, of the expression “section 11 (2)(b) or (c)”; and

(ii) in subsection (3)(b), for the expression “section 11 (2)[(c)]”, of the expression “section 11 (2)(d)”;

(c) the substitution in subsection (8), for the opening phrase, of the following:

5 “(8) In considering whether a person has abused, or may be attempting to abuse, the name reservation system as contemplated in subsection (6) or (7), the Commission, Tribunal or a court may consider any relevant conduct by that person or any related or inter-related person, including—”

(d) the insertion, immediately after subsection (9), of the following:

10 “(10) The registration of a defensive name may be transferred to another person by notice in the prescribed manner and form and upon payment of the prescribed fee.”

9. Amendment of section 13 of Act 71 of 2008

Section 13 of the principal Act is hereby amended by—

(a) the substitution, for the section heading, of the following:

15 “Right to incorporate company or transfer the registration of foreign company”

(b) the substitution in subsection (1), for the opening phrase, of the following:

20 “(1) One or more persons, or an organ of state, may incorporate a profit company, and an organ of state, a juristic person, or three or more persons acting in common, may incorporate a non-profit company, by—”

(c) the substitution in subsection (2), for paragraph (a), of the following:

“(a) filed in the prescribed manner and form, together with the prescribed fee; and”

(d) the insertion, immediately after subsection (4), of the following:

“(5) Subject to subsections (6) and (7), a foreign company may apply in the prescribed manner and form, and with the prescribed application fee, to

transfer its registration to the Republic from the foreign jurisdiction in which it is registered, and thereafter exist as a company in terms of this Act as if it had been originally so incorporated and registered.

5 “(6) A foreign company may transfer its registration as contemplated in subsection (5) if—

(a) the law of the jurisdiction in which the company is registered permits such a transfer, and the company has complied with the requirements of that law in relation to the transfer;

(b) the transfer has been approved by the company’s shareholders—

10 (i) in accordance with the law of the jurisdiction in which the company is registered, if that law imposes such a requirement; or

(ii) by the equivalent of a special resolution in terms of this Act, if the law of the jurisdiction in which the company is registered does not require such shareholder approval;

15 (c) the whole or greater part of its assets and undertaking are within the Republic, other than the assets and undertaking of any subsidiary that is incorporated outside the Republic;

(d) the majority of its shareholders are resident in the Republic;

(e) the majority of its directors are or will be South African citizens; and

20 (f) immediately following the transfer of registration, the company—

(i) will satisfy the solvency and liquidity test; and

(ii) will no longer be registered in another jurisdiction.

25 “(7) Despite satisfying the requirements of subsection (6), a foreign company may not transfer its registration to the Republic as contemplated in subsection (5) if—

- (a) the foreign company—
- (i) is permitted, in terms of any law or its Articles or Memorandum of Incorporation, to issue bearer shares; or
 - (ii) has issued any bearer shares that remain issued;
- (b) the foreign company is in liquidation;
- (c) a receiver or manager has been appointed, whether by a court or otherwise, in relation to the property of the foreign company;
- (d) the foreign company—
- (i) is engaged in proceedings comparable to business rescue proceedings in terms of this Act; or
 - (ii) is subject to an approved plan, or a court order, comparable to an approved business rescue plan in terms of this Act; or
 - (iii) has entered into a compromise or arrangement with a creditor, and the compromise or arrangement is in force; or
- (e) an application has been made to a court in any jurisdiction, and not fully disposed of—
- (i) to put the foreign company into liquidation, to wind it up or to have it declared insolvent;
 - (ii) for the approval of a compromise or arrangement between the foreign company and a creditor; or
 - (cc) for the appointment of a receiver or administrator in relation to any property of the foreign company.

“(8) The Minister may make regulations—

(a) prescribing forms and procedures for the consideration of applications contemplated in subsection 5;

(b) for the registration of domesticated companies as contemplated in subsections (5) to (7) and for the issuing of registration certificates to such companies; and

(c) establishing requirements for each domesticated company to bring its Memorandum of Incorporation into harmony with this Act.

“(9) Subsections (3) and (4) and section 14, each read what the changes required by the context, apply to an application in terms of subsections(5) to (7).

(10) The registration of a domesticated company in terms of subsections (5) to (9) does not—

(a) establish a new juristic person;

(b) prejudice or affect the identity of the body corporate constituted by that domesticated company, or its continuity as a juristic person;

(c) prejudice the rights of any person or affect the property, rights, liabilities or obligations of that juristic person; or

(d) render ineffective any legal proceedings by or against that juristic person.”

10. Amendment of section 14 of Act 71 of 2008

Section 14 of the principal Act is hereby amended by—

(a) the substitution in subsection (1), for the opening phrase, of the following:

“(1) As soon as practicable after accepting a Notice of Incorporation in terms of section 13(1), or an application for the domestication of a foreign company in terms of section 13 (5), the Commission must—”

(b) the substitution in subsection (2)(b), for the opening phrase, of the following:

“(b) is **[the same as the name of another company, close corporation or co-operative,]**a name that the company is prohibited, in terms of section 11(2)(a), from using, or is reserved in terms of section 12 for a person other than one of the incorporators, the Commission—”

- 5 (c) the substitution in subsection (2)(b)(i), for the expression “[~~(Pty.)~~]”, of the expression “Pty.”
- (d) the substitution—
- (i) in the opening phrase of subsection (3), for the expression “subsection ~~[(2)]~~”, of the expression “subsection (1)”.
- 10 (ii) in subsection (3)(a), for the expression “section 11 (2)~~[(a) or] (b)~~”, of the expression “section 11 (2)(b) or (c)”; and
- (ii) in subsection (3)(b), for the expression “section 11 (2)~~[(c)]~~”, of the expression “section 11 (2)(d)”;

11. Amendment of section 15 of Act 71 of 2008

15 Section 15 of the principal Act is hereby amended by—

- (a) The insertion, at the end of subsection (1)(b), of the words “, subject to section 6 (15)”
- (b) the substitution in subsection (2), for paragraph (b), of the following:

20 “(b) contain any **[special conditions applicable to the company, and any] restrictive or procedural requirement [for the amendment of any such condition]** in addition to the requirements set out in section 16, impeding the amendment of any particular provision of the Memorandum of Incorporation; or”

- (c) the substitution in subsection (4)(b), for sub-paragraph (i), of the following:

25 “(i) ~~[20]~~10 business days after the rule **[is published in terms of subsection (3)(a)]** is filed in terms of subsection (3)(b); or”

(d) the substitution, for subsection (5), of the following:

“(5) If a rule that has been **[published]**filed in terms of subsection (3) is **[not]** subsequently—

(a) ratified as contemplated in subsection (4)(c), the company must file a notice of ratification within 5 business days in the prescribed manner and form; or

(b) not ratified when put to a vote—

(i) the company must file a notice of non-ratification within 5 business days after the vote, in the prescribed manner and form; and

(ii) the company’s board may not make a substantially similar rule within the ensuing 12 months, unless it has been approved in advance by ordinary resolution[at a]of the shareholders. **[meeting.]**”

(e) the insertion, immediately after subsection (5), of the following:

“(5A) Any failure to ratify the rules of a company does not affect the validity of anything done in terms of those rules during the period that they had interim effect as provided in subsection (4)(c)(i).”

(f) the substitution in subsection (6)(c), for subparagraph (ii), of the following:

“(ii) any other person serving the company **[as a member of the audit committee or]**as a member of a committee of the board,”

12. Amendment of section 16 of Act 71 of 2008

Section 16 of the principal Act is hereby amended by—

(a) the substitution, for subsection (9), of the following:

“(9) An amendment to a Company’s Memorandum of Incorporation takes effect[**from the later of**]—

(a) **[the date on, and time at, which the Commission accepts the filing of the Notice of Amendment]**in the case of an amendment that changes the name of the company, on the date set out in the amended registration certificate issued by the Commission in terms of subsection (8), read with section 14 (1)(b)(iii); or

(b) in any other case, on the later of—

(i) 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.”

(b) the insertion, immediately after subsection (9), of the following:

“(10) If an amendment to the Memorandum of Incorporation of a personal liability company has the effect of transforming that company into any other category of company, the company must give at least 10 business days advance notice of the filing of the notice of amendment to—

(a) any professional or industry regulatory authority that has jurisdiction over the business activities carried on by the company; and

(b) any persons who—

(i) in their dealings with the company, may reasonably be considered to have acted in reliance upon the joint and several liability of any of the directors for the debts and liabilities of the company; or

(ii) may be adversely affected if the joint and several liability of any of the directors for the debts and liabilities of the company is terminated as a consequence of the amendment to the Memorandum of Incorporation.

“(11) A person who receives, or is entitled to receive, a notice in terms of subsection (10) may apply to a court in the prescribed manner and form for an order sufficient to protect the interests of that person.”

13. Amendment of section 19 of Act 71 of 2008

5 Section 19 of the principal Act is hereby amended by the substitution, for subsection (5), of the following:

“(5) A person must be regarded as having [**received**]notice and knowledge of—

- 10 (a) any provision of a company’s Memorandum of Incorporation contemplated in section 15(2)(b) or (c)if the company’s name includes the element “RF” as contemplated in section 11(3)(b), and the company’s Notice of Incorporation or a subsequent Notice of Amendment has drawn attention to the relevant provision, as contemplated in section 13(3); [or]and
- (b) the effect of subsection (3) on a personal liability company.”

14. Amendment of section 20 of Act 71 of 2008

15 Section 20 of the principal Act is hereby amended by—

- (a) the substitution in each of subsections (4) and (5), for the expression “[**may take proceedings**]” of the expression “may apply to the High Court for an appropriate order”;
- 20 (b) the substitution in subsection (6), for the expression “fraudulently or due to gross negligence”, of the expression “knowingly, wilfully, intentionally, fraudulently or due to gross negligence”;
- (c) the insertion, immediately after subsection (8), of the following:

25 “(9) If, on application by an interested person or in any proceedings in which a company is involved, a court finds that the incorporation of the company, any use of the company, or any act by or on behalf of the company, constitutes an

unconscionable abuse of the juristic personality of the company as a separate entity, the court may—

(a) declare that the company is to be deemed not to be a juristic person in respect of any right, obligation or liability of the company or of a shareholder of the company or, in the case of a non-profit company, a member of the company, or of another person specified in the declaration; and

(b) make any further order the court considers appropriate to give effect to a declaration contemplated in paragraph (a).”

10 **15. Amendment of section 23 of Act 71 of 2008**

Section 23 of the principal Act is hereby amended by—

(a) the substitution in subsection (1), for paragraph (b), of the following:

“(b) as an external profit company, **in any other case, [if, within the jurisdiction in which it was incorporated, it meets legislative or definitional requirements that are comparable to the legislative or definitional requirements of a profit company incorporated under this Act.]”**

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

“(2) For the purposes of subsection (1), and the definition of “external company” as set out in section 1, a foreign company **[is not to] must** be regarded as “conducting business, or non-profit activities, as the case may be, within the Republic” **[, unless] if** that foreign company **—[is engaged in, or has engaged in, one or more of the following activities within the Republic:]**

(a) is a party to one or more employment contracts within the Republic; or

(b) subject to subsection (2A), is engaging in a course of conduct, or has engaged in a course or pattern of activities within the Republic over a period of at least six months, such as would lead a person to reasonably

conclude that the company intended to continually engage in business or non-profit activities within the Republic.

5 “(2A) When applying subsection (2)(b), a foreign company must not be regarded as “conducting business activities, or non-profit activities, as the case may be, within the Republic” solely on the ground that the foreign company is or has engaged in one or more of the following activities:

- 10 (a) Holding a meeting or meetings within the Republic of the shareholders or board of the foreign company, or otherwise conducting any of the company’s internal affairs[**of the company**] within the Republic;
- (b) establishing or maintaining any bank or other financial accounts within the Republic;
- (c) establishing or maintaining offices or agencies within the Republic for the transfer, exchange, or registration of the foreign company’s own securities;
- 15 (d) creating or acquiring any debts within the Republic, or any mortgages or security interests in any property within the Republic;
- (e) securing or collecting any debt, or enforcing any mortgage or security interest within the Republic; or
- (f) acquiring any interest in any property within the Republic. **[; and]**

20 **[(g) entering into contracts of employment.]”**

(c) by the substitution in subsection (4), for the expression “subsection [(2)](b)(ii)”, of the expression “subsection (3)(b)(ii)”.

(d) by the substitution in subsection (6), for the expression “within [12] months”, of the expression “within six months”.

16. Amendment of section 24 of Act 71 of 2008

Section 24 of the principal Act is hereby amended by—

(a) the substitution in subsection (3), for paragraph (b), of the following:

“(b) a record of its directors, including—

5 (i) **[details of any person who has served as a director of the company, for a period of seven years after the person ceases to serve as a director]**~~all the information required in terms of subsection (5) with respect to each current director at any particular time; and~~

10 (ii) ~~with respect to each past director,~~ the information **[required by or in terms of subsection (5)]**~~complied in terms of sub-paragraph (i), which must be retained for seven years after the past director retired from the company;~~”

(b) the further substitution in subsection (3), for paragraph (d), of the following:

“(d) notice and minutes of all shareholders meetings, including—

15 (i) all resolutions adopted by them**[, for seven years after the date each such resolution was adopted];** and

 (ii) ~~any document that was made available by the company to the holders of securities in relation to each such resolution, [;]~~

~~for seven years after the date each such resolution was adopted;~~”

20 (c) the substitution, for subsection (4), of the following:

“(4) In addition to the requirements of subsection (3), every **[profit]** company must maintain—

25 (a) a securities register or its equivalent, as required by section 50**;** **and**, in the case of a profit company, or a member’s register in the case of a non-profit company that has members;

(b) the records required in terms of section 85, if that section applies to the company[.]; and

(c) the company's registration certificate."

17. Amendment of section 26 of Act 71 of 2008

5 Section 26 of the principal Act is hereby amended by—

(a) The substitution for subsections (1) to (3) of the following:

10 “(1) A person who holds or has a beneficial interest in any securities issued by a profit company[—], or who is a member of a non-profit company, has a right to inspect and copy, without any charge for any such inspection or upon payment of no more than the prescribed maximum charge for any such copy, the information contained in the following records of the company[—]:

(a) the company's Memorandum of Incorporation and any amendments to it, and any rules made by the company, as mentioned in section 24 (3)(a);

15 (b) the records respecting the company's directors, as mentioned in section 24 (3)(b).

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

20 (d) the notices and minutes of annual meetings, and communications mentioned in section 24 (3) (d) and (e), but the reference in section 24(3)(d) to shareholders meetings, and the reference in section 24(3)(e) to communications sent to holders of a company's securities, must be regarded in the case of a non-profit company as referring to a meeting of members, or communication to members, respectively; and

25 (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).

5 “(2) A person not contemplated in subsection (1) has a right to inspect 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.

10 “[~~(2)~~](3) In addition to the information rights set out in subsections[~~(1)(a)~~](1) and (2), the Memorandum of Incorporation of a company may establish additional information rights of any person, with respect to any information pertaining to the company, but no such right may negate or diminish any mandatory protection of any record [~~, as set out in~~] required by or in terms of Part 3 of the Promotion of Access to Information Act, 2000 (Act No.2 of 2000).

15 [~~(3)~~](4) A person may exercise the rights set out in subsection (1) or (2), or contemplated in subsection (3) —

(a) for a reasonable period during business hours;

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

20 (c) in accordance with the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000).”

(b) the re-numbering of subsections(4), (5) and (6) as subsection (5), (6) and (7), respectively; and

(c) the insertion in subsection (7), in both paragraphs (a) and (b), immediately after the words “this section”, of the expression “or section 31”.

25 **18. Amendment of section 27 of Act 71 of 2008**

Section 27 of the principal Act is hereby amended by the substitution, for subsection (6), of the following:

“(6) If, in a particular year, the financial year of a company ends on a Saturday, Sunday or public holiday, that financial year will be regarded **[to have ended]** as ending on the next **[following]** business day.”

19. Amendment of section 29 of Act 71 of 2008

5 Section 29 of the principal Act is hereby amended by—

(a) the substitution in subsection (1)(d), for the word “**[produced]**” of the word “published”.

(b) the substitution in subsection (5)(b), for the expression “**[consistent]** with”, of the expression “harmonious with”.

10 (c) the substitution in subsection (6)(a), for subparagraph (i), of the following:

“(i) **[do not]** fail in a material way to comply with the requirements of subsection (1); or”

20. Amendment of section 30 of Act 71 of 2008

Section 30 of the principal Act is hereby amended by—

15 (a) the substitution in subsection (2)(b), for the opening phrase, of the following:

“(b) in the case of any other profit or non-profit company—”

(b) the substitution in subsection 2 (b)(i), for the expression “as indicated by—”, of the expression “as indicated by any relevant factors, including—”;

(c) the substitution in subsection 2 (b)(ii), for clauses (aa) and (bb), of the following:

20 “(aa) audited voluntarily **[at the option of the company]**if the company’s Memorandum of Incorporation, or a shareholders resolution, so requires or if the Company’s board has so determined; or

“(bb) independently reviewed in a manner that satisfies the regulations made in terms of subsection (7), subject to subsection (2A).**[unless exempted if it is a private company and—**

(AA) **one person holds, or has all the beneficial interest in, all of the securities issued by the company; or**

(BB) **every person who is the holder of, or has a beneficial interest in, any securities issued by the company is also a director of the company unless the company has only one director, and that director is a person contemplated in section 69 (12).]**”

5

10

(d) the insertion, immediately after subsection (2), of the following:

“(2A) Except to the extent required by any other law or agreement, a private company is exempt from the requirements in this section to have its annual financial statements audited or independently reviewed, and from the requirements of subsection (3) (d), if every person who is a holder of, or has a beneficial interest in, any securities issued by the company is also a director of the company.”

15

(e) the substitution in subsection (6), for paragraph (f), of the following:

“(f) financial assistance to a director, past director or future director, or person related to any of them, for the subscription of [shares] options or securities, or the purchase of securities, as contemplated in section 44; and”

20

(f) the substitution in subsection (7)(a), for the expression “[private]companies”, of the expression “profit or non-profit companies”;

(g) the insertion, immediately after subsection (7), of the following:

“(8) Despite section 1 of the Auditing Profession Act, an independent review of a company’s annual financial statements required by this section does not constitute an audit within the meaning of that Act.”

25

21. Amendment of section 32 of Act 71 of 2008

Section 32 of the principal Act is hereby amended by the repeal of subsection (6).

22. Amendment of section 33 of Act 71 of 2008

Section 33 of the principal Act is hereby amended by the substitution in subsection (1)(a),
5 for the expression “section (30)(2)[(a)]”, of the expression “section 30(2) or the regulations contemplated in section 30 (7)”.

23. Amendment of section 34 of Act 71 of 2008

Section 34 of the principal Act is hereby amended by the substitution, for subsection (2), of the following:

10 “(2) A private company, personal liability company, or non-profit company is not required to comply with the extended accountability requirements set out in Chapter 3, except to the extent **[that the company’s Memorandum of Incorporation provides otherwise.]** required by—

(a) section 84(1)(c); or

15 (b) the company’s Memorandum of Incorporation.”

24. Amendment of section 37 of Act 71 of 2008

Section 37 of the principal Act is hereby amended by—

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

20 “(1) All of the shares of any particular class authorised by a company have preferences, rights, limitations and other terms that are identical to those of other shares of the same class[, **except to the extent that the company’s Memorandum of Incorporation provides otherwise.**”

(b) the insertion, immediately after subsection (8), of the following:

“(9) A person—

(a) acquires the rights associated with any particular securities of a company when that person’s name is entered in the company’s securities register as a person to whom those securities have been issued or transferred; and

(b) ceases to have the rights associated with any particular securities of a company when the transfer to another person, re-acquisition by the company, or surrender to the company of those securities has been entered in the company’s securities register.”

10 **25. Amendment of section 38 of Act 71 of 2008**

Section 38 of the principal Act is hereby amended by the substitution, for subsection (2), of the following:

“(2) If a company issues shares—

(a) that have not been authorised in accordance with section 36; or

(b) in excess of the number of authorised shares of any particular class,

the issuance of those shares may be retroactively authorised in accordance with section 36 within 60 business days after the date on which the shares were issued.”

20 **26. Amendment of section 40 of Act 71 of 2008**

Section 40 of the principal Act is hereby amended by—

(a) the substitution in subsection (5), for the opening phrase, of the following:

“(5) If the consideration for any shares that are issued or to be issued is in the form of an instrument such that [isnot negotiable]the value of the consideration cannot be realized by the company until a date after [at] the time the shares are to be issued, or is in the form of an agreement for future services, future benefits or future payment by the subscribing party—”

(b) the further substitution in subsection (5)(a), for sub-paragraph (i), of the following:

“(i) that the **[instrument is negotiable]** value of the consideration for any of those shares has been realized by the company; or”

27. Amendment of section 43 of Act 71 of 2008

5 Section 43 of the principal Act is hereby amended by the substitution in subsection (2), for paragraph (a), of the following:

“(a) may authorize the company to issue a secured or unsecured debt instrument at any time, except to the extent provided otherwise by **[that]** the company’s Memorandum of Incorporation; and”

10 **28. Amendment of section 44 of Act 71 of 2008**

Section 44 of the principal Act is hereby amended by—

(a) the substitution in subsection (2), for the expression “**[To]** the extent”, of the expression “Except to the extent”

(b) the substitution in subsection (6), for the opening phrase, of the following:

15 “(6) If a resolution or an agreement **[has been declared]** is void in terms of subsection (5) **[read with section 218(1),]** a director of the company is liable to the extent set out in section 77(3)(e)(iv) if the director—”

29. Amendment of section 45 of Act 71 of 2008

Section 45 of the principal Act is hereby amended by—

20 (a) the substitution in subsection (3), for paragraph (b), of the following:

“(b) the board is satisfied that—

(i) immediately after providing the financial assistance, the company would satisfy the solvency and liquidity test; and

(ii) the terms under which the financial assistance is proposed to be given are fair and reasonable to the company.”

(b) the substitution in subsection (7), for the opening phrase, of the following:

“(7) If a resolution or agreement [**has been declared**] is void in terms of subsection (6) [**read with section 218(1),**] a director of the company is liable to the extent set out in section 77(3)(e)(v) if the director—”

30. Amendment of section 48 of Act 71 of 2008

Section 48 of the principal Act is hereby amended by—

(a) the substitution in subsection (2), for the opening phrase, for paragraph (a), and for the opening phrase of paragraph (b), of the following:

“(2) Subject to subsections (3) and (8), and if the decision to do so satisfies the requirements of section 46—

(a) the board of a company may determine that the[a] company [may] will acquire a number of its own shares, [if the decision to do so satisfies the requirements of section 46]; and;

(b) the board of [any]a subsidiary [of a] company may determine that it will acquire shares of [that]its holding company, but—”

(b) the substitution in subsection (6), for the expression “the company [may]”, of the expression “the company must”; and

(c) the insertion, immediately after subsection (7), of the following:

“(8) A decision by the board of a company contemplated in subsection (2)(a)—

(a) must be approved by a special resolution of the shareholders of the company if any shares are to be acquired by the company from a director or prescribed officer of the company, or a person related to a director or prescribed officer of the company; and

(b) is subject to the requirements of sections 114 and 115 if, considered alone, or together with other transactions in an integrated series of transactions, it involves the acquisition by the company of more than 5% of the issued shares of any particular class of the company's shares.”

5 **31. Amendment of section 49 of Act 71 of 2008**

Section 49 of the principal Act is hereby amended by the substitution in subsection (6), for paragraph (b), of the following:

10 “(b) for greater certainty, transfer of ownership in those securities cannot be effected by a participant or central securities depository while they remain in certificated form unless they are held in certificated form in collective custody by the participant or central securities depository.”

32. Amendment of section 50 of Act 71 of 2008

Section 50 of the principal Act is hereby amended by the substitution, in subsection (2)(b)(iv), for clause (aa) of the following:

15 “(aa) the number of those securities issued and outstanding; [or]and”

33. Amendment of section 53 of Act 71 of 2008

Section 53 of the principal Act is hereby amended by the substitution in subsection (5), for the expression “[a] uncertificated securities register”, of the expression “[u]ncertificated securities register”.

20 **34. Amendment of section 56 of Act 71 of 2008**

Section 56 of the principal Act is hereby amended by—

(a) the substitution in subsection (3), for paragraph (b), of the following:

“(b) the identity of each person with a beneficial interest in the securities so held, the number and class of securities held for each such person with a beneficial interest, and the extent of each such beneficial interest.”

(b) the substitution in subsection (4), for paragraph (a), of the following:

5 “(a) be disclosed in writing to the company within five business days after the end of every month during which a change has occurred in the information contemplated in subsection (3), or more promptly or frequently to the extent so provided by the requirements of a central securities depository; and”

(c) the insertion, immediately after subsection (7), of the following:

10 “(8) Subsections (9) to (11) do not apply in respect of securities that are subject to the rules of a central securities depository.

“(9) A person who holds a beneficial interest in any securities may vote in a matter at a meeting of shareholders, only to the extent that—

(a) the beneficial interest includes the right to vote on the matter; and

15 (b) the person’s name is on the company’s register of disclosures as the holder of a beneficial interest, or the person holds a proxy appointment in respect to that matter from the registered holder of those securities.

“(10) The registered holder of any securities in which any person has a beneficial interest must deliver to each such person—

20 (a) a notice of any meeting of a company at which those securities may be voted on a matter, within 2 business days after receiving such a notice from the company; and

(b) a proxy appointment to the extent of that person’s beneficial interest, if the person so demands in terms of subsection (11).

25 (11) A person who has a beneficial interest in any securities that are entitled to be voted on a matter at a meeting of company’s shareholders may demand a

proxy appointment from the registered holder of those securities, to the extent of that person's beneficial interest, by delivering such a demand to the registered holder, in writing, or as required by the applicable requirements of a central securities depository."

5 **35. Amendment of section 57 of Act 71 of 2008**

Section 57 of the principal Act is hereby amended by—

- (a) the deletion from the section heading of the word "[restricted]"; and
- (b) the insertion, immediately after subsection (6), of the following:

10 "(7) For greater certainty, this section applies to the exercise of authority within a company in respect of any matter arising in terms of this Act or a company's Memorandum of Incorporation, irrespective of whether any such particular matter is expressly addressed in this Part."

36. Amendment of section 58 of Act 71 of 2008

Section 58 of the principal Act is hereby amended by—

- 15 (a) the substitution, for subsection (1), of the following:

"(1) At any time, a shareholder of a company may appoint any individual, including an individual who is not a shareholder of that company, as a proxy to—

- 20 (a) participate in, and speak and vote at, a shareholders meeting on behalf of the shareholder; or
- (b) give or withhold written consent on behalf of the shareholder to a decision contemplated in section 60[.],

25 **[provided that the shareholder may appoint more than one proxy to exercise voting rights attached to different shares held by the shareholder.]"**

(b) the substitution in subsection (3), for paragraph (a), of the following:

“(a) a shareholder of that company may appoint two or more persons concurrently as proxies, and may appoint more than one proxy to exercise voting rights attached to different securities held by the shareholder;”

5 **37. Amendment of section 61 of Act 71 of 2008**

Section 61 of the principal Act is hereby amended by the substitution in subsection (3), for paragraph (b), of the following:

“(b) in aggregate, demands for substantially the same purpose are made and signed by the holders, as of the earliest time specified in any of those demands, of at least 10% of the voting rights entitled to be exercised in relation to the matter proposed to be considered at the meeting.”

10 **38. Amendment of section 62 of Act 71 of 2008**

Section 62 of the principal Act is hereby amended by the substitution, for subsection (7), of the following:

15 “(7) A shareholder who is present at a meeting—

(a) is regarded [to have] as having received or waived notice of the meeting; and

(b) has a right to—

(i) allege a material defect in the form of notice for a particular item on the agenda for the meeting; and

(ii) participate in the determination whether to waive the requirements for notice, or ratify a defective notice; and

20 (c) except to the extent set out in paragraph (b), is regarded as having waived any right based on an actual or alleged defect in the notice of the meeting.

[is regarded to have waived any right based on an actual or alleged defect in the notice of the meeting.]”

39. Amendment of section 63 of Act 71 of 2008

Section 63 of the principal Act is hereby amended by—

5 (a) the substitution, for subsection (2), of the following:

“(2) Unless prohibited by its Memorandum of Incorporation, a company may provide for—

(a) a shareholders meeting to be conducted entirely by electronic communication; or

10 (b) one or more shareholders, or proxies for shareholders, to participate by electronic communication in all or part of a shareholders meeting that is being held in person, **[so long as the electronic communication employed ordinarily enables all persons participating in that meeting to communicate concurrently with each other without an intermediary, and to participate reasonably effectively in the**

15 **meeting.]**

so long as the electronic communication employed ordinarily enables all persons participating in that meeting to communicate concurrently with each other without an intermediary, and to participate reasonably effectively in the

20 meeting.”

(b) the substitution, for subsections (4) and (5), of the following:

“(4) **[Any person present and entitled to exercise voting rights must on a show of hands have only one vote, irrespective of the number of shares he or she holds or represents]** At a meeting of shareholders, voting may be either by

25 show of hands, or by polling.

“(5) **[On a poll at any meeting of a company, any member including his or her proxy, must be entitled to exercise all the voting rights attached to the**

shares held or represented by that person]If voting is by show of hands, any person present and entitled to exercise voting rights has one vote, irrespective of the number of voting rights that person would otherwise be entitled to exercise.”

5 (c) the insertion, immediately after subsection (5), of the following:

“(6) If voting on a particular matter is by polling, any person who is present at the meeting, whether as a shareholder or as proxy for a shareholder, has the number of votes determined in accordance with the voting rights associated with the securities held by that shareholder.

10 “(7) Despite any provision of a company’s Memorandum of Incorporation or agreement to the contrary, a polled vote must be held on any particular matter to be voted on at a meeting if a demand for such a vote is made by—

(a) at least five persons having the right to vote on that matter, either as a shareholder or a proxy representing a shareholder; or

15 (b) a person who is, or persons who together are, entitled, as a shareholder or proxy representing a shareholder, to exercise at least 10% of the voting rights entitled to be voted on that matter.”

40. Amendment of section 64 of Act 71 of 2008

Section 64 of the principal Act is hereby amended by—

20 (a) the substitution in subsection (8), for the expression “[**members of the company**]”, of the expression “shareholders, or in the case of a non-profit company, the members of the company”.

(b) the substitution in subsection (11), for paragraph (a), of the following:

“(a) may be either—

25 (i) to a fixed time and place; or

(ii) until further notice, **[as agreed at the meeting; and]**

as agreed at the meeting; and”

41. Amendment of section 65 of Act 71 of 2008

Section 65 of the principal Act is hereby amended by—

5 (a) the substitution, for subsection (4), of the following:

“(4) A proposed resolution is not subject to the requirements of section 6 (4), but must be—

(a) expressed with sufficient clarity and specificity; and

10 (b) accompanied by sufficient information or explanatory material **[to enable a shareholder who is entitled to vote on the resolution to determine whether to participate in the meeting and to seek to influence the outcome of the vote on the resolution]**

15 to enable a shareholder who is entitled to vote on the resolution to determine whether to participate in the meeting and to seek to influence the outcome of the vote on the resolution.”

(b) the substitution in each of subsection (10) (a) and (b), for the word “[lower]”, of the word “different”.

(c) the substitution in each of subsections (8) and (10), for the closing phrase, of the following:

20 “provided that there must at all times be a margin of at least 10 percentage points between the **[requirements]**highest established requirement for approval of an ordinary resolution on any matter, and the lowest established requirement for approval of a special resolution[,] on any matter.”

(d) the substitution, for subsection (11), of the following:

25 “(11) A special resolution is required to—

- 5
- (a) amend the company's Memorandum of Incorporation to the extent required by section 16 (1)(c) and section 36 (2)(a);
- (b) **[approve the voluntary winding up of the company, as contemplated in section 80 (1); or]** ratify a consolidated revision of a company's Memorandum of Incorporation, as contemplated in section 18(1)(b);
- (c) **[approve any proposed fundamental transaction, to the extent required by Part A of Chapter 5.]** ratify actions by the company or directors in excess of their authority, as contemplated in section 20(2);
- 10 (d) approve an issue of shares or grant of rights in the circumstances contemplated in section 41 (1);
- (e) authorise the board to grant financial assistance in the circumstances contemplated in section 44 (3)(a)(ii) or 45 (3)(a)(ii);
- (f) authorise the basis for compensation to directors of a profit company, as required by section 66 (9);
- 15 (g) approve the voluntary winding up of the company, as contemplated in section 80 (1);
- (h) approve an application to transfer the registration of the company to a foreign jurisdiction as contemplated in section 82 (5); or
- 20 (i) approve any proposed fundamental transaction, to the extent required by Part A of Chapter 5."

42. Amendment of section 66 of Act 71 of 2008

Section 66 of the principal Act is hereby amended by—

- (a) the substitution, for subsection (2), of the following:

“(2) The board of a company must comprise—

- (a) in the case of a private company, or a personal liability company, at least one director; or
- (b) in the case of a public company, or a non-profit company, at least three directors[.]

5 in addition to the minimum number of directors that the company must have to satisfy any requirement, whether in terms of this Act or its Memorandum of Incorporation, to appoint an audit committee, or a social and ethics committee as contemplated in section 72 (4).”

- (b) the substitution in subsection (7), for the opening phrase, of the following:

10 “(7) A person becomes entitled to serve as a director of a company when that person—”

43. Amendment of section 68 of Act 71 of 2008

Section 68 of the principal Act is hereby amended by—

- (a) the substitution, for the section heading, of the following:

15 “Election of directors of profit companies”;

- (b) the substitution in subsection (1), for the expression “director of a company”, of the expression “director of a profit company”;

- (c) the substitution in subsection (2), for the expression “Unless [**the**] company’s”, of the expressions “Unless a profit company’s”; and

20 (d) the substitution in subsection (3), for the expression “of a company”, of the expression “of a profit company”.

44. Amendment of section 69 of Act 71 of 2008

Section 69 of the principal Act is hereby amended by—

- (a) the substitution, for subsection (4), of the following:

“(4) A person who becomes ineligible or disqualified while serving as a director of a company ceases to be entitled to continue to act as a director, subject to section 70 (2).”

(b) the substitution, for subsection (12), of the following:

“(12) Despite being disqualified in terms of subsection (8)(b)(iii) or (iv), as a consequence of a single conviction or loss of office as the case may be, a person may act as a director of a private company if all of the [shares] issued securities of that company are held by that disqualified person alone, or by—

(a) that disqualified person; and

(b) persons related to that disqualified person, and each such person has consented in writing to that person being a director of the company. [.]

but the right of that person to be a director in terms of this subsection terminates automatically upon any subsequent conviction or loss of office contemplated in subsection (8)(b)(iii) or (iv).”

15 **45. Amendment of section 72 of Act 71 of 2008**

Section 72 of the principal Act is hereby amended by—

(a) the substitution, for subsection (4), of the following:

“(4) The Minister [may], by regulation, may prescribe—

(a) [that a company or] a category of companies that must each have a social and ethics committee, if it is desirable in the public interest, having regard to—

[(a)(i)[its] annual turnover;

[(b)(ii)[the size of its] workforce; or

[(c)(iii) the nature and extent of [its]the activities of such companies[.];

(b) the functions to be performed by social and ethics committees required by this subsection; and

(c) rules governing the composition and conduct of social and ethics committees.”

(b) the insertion, immediately following subsection (4), of the following:

5 “(5) A company that falls within a 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 in the prescribed manner and form for an exemption from that requirement, and the Tribunal may grant such an exemption if it is satisfied that –

10 (a) the company is required in terms of other legislation to have, and does have, some form of formal mechanism within its structures that substantially performs the function that would otherwise be performed by the social and ethics committee in terms of this section and the regulations; or

15 (b) 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 activities of the company.

“(6) An exemption granted in terms of subsection (5) is valid for 5 years, or such shorter period as the Tribunal may determine at the time of granting the exemption, unless set aside by the Tribunal in terms of subsection (7).

20 “(7) The Commission, on its own initiative or on request by a shareholder, or a person who was granted standing by the Tribunal at the hearing of the exemption application, may apply to the Tribunal to set aside an exemption only on the grounds that the basis on which the exemption was granted no longer applies.

“(8) A social and ethics committee of a company is entitled to –

25 (a) require from any director or prescribed officer of the company any information or explanation necessary for the performance of the committee’s functions;

(b) request from any employee of the company any information or explanation necessary for the performance of the committee's functions;

(c) attend any general shareholders meeting;

(d) receive all notices of and other communications relating to any general shareholders meeting; and

(e) be heard at any general shareholders meeting contemplated in this paragraph on any part of the business of the meeting that concerns the committee's functions.

“(9) A company must pay all the expenses reasonably incurred by its social and ethics committee including, if the social and ethics committee considers it appropriate, the costs or the fees of any consultant or specialist engaged by the social and ethics committee in the performance of its functions.

“(10) Section 84 (6) and (7), read with the changes required by the context, apply with respect to a company that fails to appoint a social and ethics committee, as required by this section and the regulations.”

46. Amendment of section 75 of Act 71 of 2008

Section 75 of the principal Act is hereby amended by—

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

“(1) In this section[, “director” includes an alternate director and]—

(a) “director” includes—

(i) an alternate director;

(ii) a prescribed officer; [or] and

(iii) a person who is a member of a committee of the board of a company[,or of the audit committee of a company]

irrespective of whether[**or not**] the person is also a member of the company's board[.]; and

(b) “related person” when used in reference to a director, has the meaning set out in section 1, but also includes a second company of which the director or a related person is also a director, or a close corporation of which the director or a related person is a member.”

(b) the substitution, for subsections (7) and (8), of the following:

“(7) A decision by the board, or a transaction or agreement approved by the board, or by a company as contemplated in subsection (3), is valid despite any personal financial interest of a director or person related to the director, only if [it]—

(a) it was approved following disclosure of that interest in the manner contemplated in this section; or

(b) despite having been approved without disclosure of that interest, it—

(i) has subsequently been ratified by an ordinary resolution of the shareholders following disclosure of that interest; or

(ii) has been declared to be valid by a court in terms of subsection (8).

“(8) A court, on application by any interested person, may declare valid a transaction or agreement that had been approved by the board, or shareholders as the case may be, despite the failure of the director to satisfy the disclosure requirements of this section.”

47. Amendment of section 77 of Act 71 of 2008

Section 77 of the principal Act is hereby amended by—

(a) the substitution in subsection (3), for paragraph (d), of the following:

“(d) signed, consented to, or authorised, the publication of—

- (i) any financial statements that were false or misleading in a material respect; or
- (ii) a prospectus, or a written statement contemplated in section 101, that contained—

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(aa) an ‘untrue statement’ as defined and described in section 95; or

(bb) a statement to the effect that a person had consented to be a director of the company, when no such consent had been given,

[despite knowing that the statement was false, misleading or untrue, as the case may be, but the provisions of section 104 (3), read with the changes required by the context, apply to limit the liability of a director in terms of this paragraph; or]

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despite knowing that the statement was false, misleading or untrue, as the case may be, but the provisions of section 104 (3), read with the changes required by the context, apply to limit the liability of a director in terms of this paragraph; or”

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(b) the substitution in subsection (3)(e)—

(i) for sub-paragraphs (iv) and (v), of the following:

“(iv) the provision of financial assistance to any person contemplated in section 44 for the acquisition of securities of the company, despite knowing that the provision of financial assistance was inconsistent with section 44 or the company’s Memorandum of Incorporation[, **to the extent that the resolution or agreement has been declared void in terms of section 44 (5), read with section 218 (1)**];

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“(v) the provision of financial assistance to a director for a purpose contemplated in section 45, despite knowing that the provision of financial assistance was inconsistent with that section or the company’s Memorandum of Incorporation[, **to the extent that the resolution or**

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agreement has been declared void in terms of section 45 (6), read with section 218 (1)];”

(ii) for sub-paragraph (viii), of the following:

“(viii) an allotment by the company, despite knowing that the allotment was contrary to any provision of Chapter 4[, **to the extent that the allotment or an acceptance is declared void under section 109 (1) read with section 218 (1)].”**

48. Amendment of section 78 of Act 71 of 2008

Section 78 of the principal Act is hereby amended by—

(a) the substitution, for subsection (3), of the following:

“(3) Subject to subsection (3A), [A] a company may not directly or indirectly pay any fine that may be imposed on a director of the company, or on a director of a related company, as a consequence of that director having been convicted of an offence in terms of any national legislation.

“(3A) Subsection (3) does not apply to a private or personal liability company if—

(a) a single individual is the sole shareholder and sole director of that company; or

(b) two or more related individuals are the only shareholders of that company, and there are no directors of the company other than one or more of those individuals.”

(b) the substitution in subsection (6), for both instances of the word “[willful]”, of the word “wilful”; and

(c) the substitution in subsection (7)(b), for the opening phrase, of the following:

“(b) the company against any contingency including, but not limited to—”

49. Amendment of section 82 of Act 71 of 2008

Section 82 of the principal Act is hereby amended by—

- (a) the substitution in subsection (3)(a), for the opening phrase, of the following:

“(a) the company has transferred its registration to a foreign jurisdiction in terms of subsection (5), or—“

- (b) the insertion, immediately after subsection (4), of the following:

“(5) A company may apply to be deregistered upon the transfer of its registration to a foreign jurisdiction, if—

(a) the shareholders have adopted a special resolution approving such an application and transfer of registration, and

(b) the company has satisfied the prescribed requirements for doing so.

“(6) The Minister may prescribe criteria and procedural requirements that must be satisfied by a company before it may be de-registered in terms of subsection (5).”

50. Amendment of section 83 of Act 71 of 2008

Section 83 of the principal Act is hereby amended by the substitution, for subsection (1), of the following:

“(1) A company is dissolved as of the date its name is removed from the companies register unless the reason for the removal is that the company’s registration has been transferred to a foreign jurisdiction, as contemplated in section 82 (5).”

Part 3 – Amendments affecting Chapter 3 of the Principal Act**51. Amendment of section 84 of Act 71 of 2008**

Section 84 of the principal Act is hereby amended by—

- 5 (a) the substitution in subsection (1), for paragraph (a), of the following:
- “(a) every public company, subject to **[subsection (2) and section 5**
(6)and 94(1);”
- (b) the substitution in subsection (1), for paragraph (c), of the following:
- “(c) a private company, a personal liability company or a non-profit company[,
10 **only to the extent contemplated in section 34 (2) or as otherwise required**
by this Act to have its financial statements audited]—
- (i) if the company is required by this Act or the regulations to have its
annual financial statements audited every year; or
- (ii) otherwise, only to the extent that the company’s Memorandum of
15 Incorporation so requires, as contemplated in section 34 (2).”
- (c) the repeal of subsection (2);
- (d) the substitution in subsection (6), for the opening phrase, of the following:
- “(6) If the board of a **[public company or state owned]** company fails to make an
20 appointment **[contemplated in subsection (4) in accordance with]**as required
by this Part—”

52. Substitution of section 86 of Act 71 of 2008

The principal Act is hereby amended by the substitution, for section 86, of the following:

“Mandatory Appointment of Company Secretary

“86 (1) A public company or state-owned must appoint **[a person knowledgeable or experienced in relevant laws as]** a company secretary.

“(2) Every company secretary **[must be a permanent resident of the Republic, and must remain so while serving in that capacity,]** irrespective of whether the appointment is made as required by subsection (1) **[, or voluntarily] or in terms of a requirement in a company’s Memorandum of Incorporation, as contemplated in section 34 (2) and 84 (1)(c)(ii), must—**

(a) have the requisite knowledge of, or experience with, relevant laws; and

(b) be a permanent resident of the Republic, and remain so while serving in that capacity.

“(3) The first company secretary of a public company or state-owned company may be appointed by —

(a) the incorporators of the company; or

(b) within 40 business days after the incorporation of the company, by either –

(i) the directors of the company; or

(ii) an ordinary resolution of the holders of the company’s securities.

“(4) The first company secretary of a company that is required only in terms of its Memorandum of Incorporation to appoint a company secretary as contemplated in section 34 (2) and 84 (1)(c)(ii), must be appointed—

(a) in accordance with subsection (3), if the requirement to appoint a company secretary applies to that company when it is incorporated; or

(b) within 40 business after the date on which the requirement first applies to the company, by either—

(i) the directors of the company; or

(ii) an ordinary resolution of the holders of the company’s securities.

“[(4)](5) Within 60 business days after a vacancy arises in the office of company secretary, the board must fill the vacancy by appointing a person whom the directors consider to have the requisite knowledge and experience.”

53. Amendment of section 90 of Act 71 of 2008

5 Section 90 of the principal Act is hereby amended by the insertion, immediately after subsection (1), of the following:

“(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—

- 10 (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.

54. Amendment of section 91 of Act 71 of 2008

15 Section 91 of the principal Act is hereby amended by the insertion, immediately after subsection (5), of the following:

“(6) Section 89, read with the changes required by the context, applies with respect to an auditor of a company, but a reference in that section to a “company secretary” must be regarded as referring to the company’s auditor.”

20 **55. Amendment of section 94 of Act 71 of 2008**

Section 94 of the principal Act is hereby amended by—

- (a) the substitution in subsection (2), for the opening phrase, of the following:

“(2) At each annual general meeting, a public company, [or] state-owned company [,] or other company that [has voluntarily determined to have an audit committee] is required only by its Memorandum of Incorporation to

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have an audit committee as contemplated in section 34 (2) and 84 (1)(c)(ii), must elect an audit committee comprising at least 3 members, unless—”

(b) the substitution in subsection (8)(a), for sub-paragraph (ii), of the following:

5 “(ii) for rendering other services to the company, to the extent permitted in terms of subsection [(6)](7) (d);”

(c) the substitution, for subsection (9), of the following:

10 “(9) Nothing in this section precludes the appointment by a [public] company at its annual general meeting of an auditor other than one nominated by the audit committee, but if such an auditor is appointed, the appointment is valid only if the audit committee is satisfied that the proposed auditor is independent of the company.”

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Part 4 – Amendments affecting Chapter 4 of the Principal Act**56. Amendment of section 95 of Act 71 of 2008**

Section 95 of the principal Act is hereby amended by—

- 5 (a) the substitution in subsection (1), for paragraph (i), of the following:
- “(i) **“primary offering”** means an offer to the public, made by or on behalf of a company, of securities to be issued by that company, or by another company—
- [(aa) (i) within a group of companies of which the first company is a member;
- or
- 10 [(bb) (ii) with [whom] which the first company proposes to [merge]be amalgamated or to merge.]; or]
- [(cc) **into which the first company proposes to be amalgamated.]”**
- (b) the insertion, immediately after subsection (6), of the following:
- “(7) The Minister may make regulations—
- 15 (a) establishing general or specific requirements respecting the form and content of rights offers, letters of allocation and prospectuses;
- (b) prescribing the manner and form to be followed in filing and publishing of rights offers, letters of allocation and prospectuses; and
- 20 (c) in respect of related or ancillary matters concerning the offering of company securities.”

57. Amendment of section 97 of Act 71 of 2008

Section 97 of the principal Act is hereby amended by—

- (a) the substitution in subsection (1), for the opening phrase, of the following:

“(1) An employee share scheme qualifies for exemptions contemplated in sections 41 (2)(d), 44 [(2)(c)(i)](3)(a)(i) or 45[(2)(c)(i)] (3)(a)(i) [of] otherwise contemplated in this Chapter, if—”

(b) the substitution in subsection (2), for paragraphs (c) and (d), of the following:

5 “(c) must ensure that copies of the documents containing the information referred to in paragraph (b) are filed within 20 business days after the employee share scheme has been established; and

10 “(d) must file a certificate within 60 business days after the end of each financial year, certifying that the compliance officer has complied with the obligations in terms of this section during the past financial year.”

58. Amendment of section 98 of Act 71 of 2008

Section 98 of the principal Act is hereby amended by the substitution in subsection (3), for paragraph (a) and (b), of the following:

15 “(a) that satisfies the requirements of subsection (2)(a) and (b) is not required to be filed, or registered with an exchange; [and] or

20 (b) that does not satisfy all of the requirements set out in subsection (2)(a) and (b) will, despite any statement to the contrary contained in the advertisement, be regarded as having been intended to be a prospectus[,] issued by the person responsible for publishing or disseminating the advertisement, and is subject to every provision of this Act relating to such a prospectus.[, if it does not include the statements required by subsection (2) (a), despite any statement to the contrary contained in the advertisement.]”

59. Amendment of section 100 of Act 71 of 2008

Section 100 of the principal Act is hereby amended by—

25 (a) the substitution in subsection (2), for the opening phrase, of the following:

“(2) Every prospectus is~~[Subject]~~subject to the requirements and provisions of sections 102 to 111, ~~[a prospectus]~~and, in addition, must—”

(b) the substitution in subsection (13)(c), for the opening phrase, of the following:

“(c) the court, on an application in terms of paragraph (b)(ii), may make any order that is just and equitable in the circumstances[,] including, but not limited to, an order—;”

60. Amendment of section 101 of Act 71 of 2008

Section 101 of the principal Act is hereby amended by the substitution in subsection (6)(d), for sub-paragraph (vii), of the following:

“(vii) whether or not the securities are listed ~~on an exchange, or~~ permission to deal in those securities has been granted by an exchange, ~~other than that referred to in subsection (1), and[,]—~~

(aa) if so, [which] a statement naming that exchange[, and]; or

(bb) if not, a statement that they are not so listed and that no such permission has been granted;”

61. Amendment of section 102 of Act 71 of 2008

Section 102 of the principal Act is hereby amended by—

(a) the substitution in subsection (1), for the opening phrase, of the following:

“(1) In any prospectus relating to securities of a company, a person must not—”

(b) the substitution in subsection (1)(a), for sub-paragraph (ii), of the following:

“(ii) the prescribed return reflecting the relevant particulars in regard to that second person[,] has been filed; or”

(c) the substitution in subsection (2), for paragraph (b), of the following:

“(b) [to] the use of that person’s name in the prospectus.”

62. Amendment of section 104 of Act 71 of 2008

Section 104 of the principal Act is hereby amended by—

(a) the substitution in subsection (1)(d), for subparagraph (i), of the following:

5 “(i) authorised the issue of the prospectus[,] or, under this Act, is regarded as having authorised the issue of [that]the prospectus; or”

(b) the substitution in subsection (3), for paragraph (d), of the following:

10 “(d) that person consented to become a director of the company, but subsequently withdrew that consent before the issue of the prospectus, and [that] it was issued without that person’s consent;”

63. Amendment of section 105 of Act 71 of 2008

Section 105 of the principal Act is hereby amended by the substitution, for subsection (1), of the following:

15 “(1) If a person has consented to the use of their name, or the inclusion of any material in a prospectus, as contemplated in this Chapter, that consent does not make the person liable as one who has authorised the issue of the prospectus under section 104 (1)(d), either—

[**(a) that consent does not make the person liable as one who has authorised the issue of the prospectus under section 104 (1)(d), either—**]

20 [(i)](a) to compensate persons purchasing on the faith of the prospectus, except in respect of any untrue statement purporting to be made by that person as an expert; or

[(ii)](b) to indemnify any person against liability under section 104 (6).”

64. Amendment of section 108 of Act 71 of 2008

Section 108 of the principal Act is hereby amended by the substitution in subsection (7), for the expression “with interest [at 6% per year]”, of the expression “with interest in accordance with the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975)”.

5 65. Amendment of section 109 of Act 71 of 2008

Section 109 of the principal Act is hereby amended by the substitution in subsection (1), for paragraph (b), of the following:

“(b) every director of the company concerned and, if the offeror is a company, every director of that company, is liable to the extent set out in section 77 (3)(e)(vii), if the allotment or acceptance is declared void under paragraph (a).”

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Part 5 – Amendments affecting Chapter 5 of the Principal Act**66. Amendment of section 112 of Act 71 of 2008**

Section 112 of the principal Act is hereby amended by—

- 5 (a) the substitution in subsection (3), for paragraph (a), of the following:
- “(a) be delivered within the prescribed time, and in the prescribed manner, to each shareholder of the company, subject to section 62 read with any changes required by the context;”
- (b) the substitution, for subsections (4) and (5), of the following:
- 10 “(4) Any part of the undertaking or assets of a company to be disposed of, as contemplated in this section, must be given its fair market value, as calculated in the prescribed manner, as at the date of the proposal, [in accordance with the financial reporting standards] which date must be determined in the prescribed manner.
- 15 “(5) A resolution contemplated in subsection (2)(a) is effective only to the extent that it authorises [or ratifies] a specific transaction.”

67. Amendment of section 114 of Act 71 of 2008

Section 114 of the principal Act is hereby amended by—

- (a) the substitution in subsection (1), for the opening phrase, of the following:
- 20 “(1) Unless it is in liquidation[,], or in the course of business rescue proceedings in terms of Chapter 6, the board of a company[,], may propose and, subject to subsection (4) and approval in terms of this Part, may implement any arrangement between the company and holders of any class of its securities[, including a reorganisation of the share capital of the company] by way of,
- 25 among other things—”

(b) the substitution in subsection (2), for the opening phrase, of the following:

“(2) The company[, **or the offeror contemplated in subsection (1), if any,**] must retain an independent expert, who meets the following requirements, to compile a report as required by subsection (3):”

5 (c) the substitution in subsection (3), for paragraph (e), of the following:

“(e) state any material interest of any director of the company or trustee for security holders[, **and state the effect of the arrangement on those interests and persons**];”

(d) the insertion, immediately after subsection (3), of the following:

10 “(4) Section 48 applies to a proposed arrangement contemplated in this section to the extent that the arrangement would result in any re-acquisition by a company of any of its previously issued securities.”

68. Amendment of section 115 of Act 71 of 2008

Section 115 of the principal Act is hereby amended by—

15 (a) the substitution in subsection (1), for paragraph (b), of the following:

“(b) to the extent that Parts B and C of this Chapter, and the Takeover Regulations, apply to a company that proposes to—

(i) dispose of all or the greater part of **[the]its** assets or undertaking;

(ii) amalgamate or merge with another company; or

20 (iii) implement a scheme of arrangement, **[the Panel has issued a compliance notice in respect of the transaction, in terms of section 119 (4)(b), or exempted the transaction in terms of section 119 (6).]**

25 the Takeover Regulation Panel has issued a compliance certificate in respect of the transaction, in terms of section 119 (4)(b), or exempted the transaction in terms of section 119 (6).”

(b) the substitution in subsection (2)(b), for sub-paragraph (iii), of the following:

“(iii) having regard to the consolidated financial statements of the holding company, the disposal by the subsidiary [**substantially**] constitutes a disposal of all or the greater part of the assets or undertaking of the holding company; and”

5 (c) the substitution in subsection (3), for paragraphs (a) and (b), of the following:

“(a) the resolution was opposed by at least 15% of the voting rights that were exercised on that resolution[,] and, within five business days after the vote, any person who voted against the resolution requires the company to seek court approval; or

10 “(b) the court, on an application within 10 business days after the vote by any person who voted against the resolution, grants that person leave, in terms of subsection (6), to apply to a court for a review of the transaction in accordance with subsection (7).”

(d) the substitution, for subsection (4), of the following:

15 “(4) For the purposes of subsections (2) and (3), any voting rights controlled by an acquiring party, a person related to an acquiring party, or a person acting in concert with either of them, must not be included in calculating the percentage of voting rights—

20 (a) required to be present [in satisfaction of the], or actually present, in determining whether the applicable quorum requirements are satisfied;
or

(b) required to be voted in support of a resolution, or actually voted in support of the resolution.

(e) the insertion, immediately after subsection (4), of the following:

25 “(4A) In subsection (4), ‘act in concert’ has the meaning set out in section 117(1)(b).”

(f) the substitution in subsection (5), for paragraph (a), of the following:

“(a) within 10 business days after the vote, apply to the court for approval, and bear the costs of that application; or”

69. Amendment of section 116 of Act 71 of 2008

5 Section 116 of the principal Act is hereby amended by—

(a) the substitution in subsection (1), for the opening phrase, of the following:

“(1) Subject to subsection (2), after a resolution approving an amalgamation or merger has been adopted by each company that is a party to the agreement [, **and the transaction has satisfied all of the applicable requirements set out in section 115**]—”

(b) the substitution in subsection (3), for the opening phrase, of the following:

“(3) A notice of amalgamation or merger must be filed after the transaction has satisfied all the applicable requirements set out in section 115, and—”

(c) the substitution in subsection (6)(b), for sub-paragraphs (ii) and (iii), of the following:

“(ii) civil, ~~criminal~~ or administrative action or proceeding pending by or against an amalgamating or merging company, and any such proceeding may continue to be prosecuted by or against any [**of the**] amalgamated or merged company; or

“(iii) ~~conviction~~ against, or ruling, order or judgment in favour of or against, an amalgamating or merging company, and any such ruling, order or [**judgement**] judgment may be enforced by or against any [**of the**] amalgamated or merged[,] company.”

(d) the substitution, for subsection (7), of the following:

“(7) When an amalgamation or merger agreement has been implemented—

(a) the property of each amalgamating or merging company becomes property of the newly amalgamated, or surviving merged, company or companies; and

(b) each newly amalgamated, or surviving merged, company is liable for all of the obligations of every amalgamating or merging company, **[subject to subsection (8), the requirements of section 113 (1), and any provision of the amalgamation or merger agreement, or any other agreement]**.

in accordance with the provisions of the amalgamation or merger agreement, or any other relevant agreement, but in any case subject to the requirement that each amalgamated or merged company must satisfy the solvency and liquidity test, and subject to subsection (8), if it is applicable.

70. Amendment of section 119 of Act 71 of 2008

Section 119 of the principal Act is hereby amended by—

(a) the substitution in subsection (4), for paragraph (b), of the following:

“(b) issue **[clearance notices]** compliance certificates, if the Panel is satisfied that the offer or transaction satisfies the requirements of this Part, Part C and the Takeover Regulations; and”

(b) the substitution in subsection (5), for the opening phrase, of the following:

“(5) To the extent necessary to ensure compliance with this Part, Part C and the Takeover Regulations, and to fulfil the purposes contemplated in subsection (1), a compliance **[order]** notice contemplated in subsection (4)**[(b)](c)** may, among other things—”

71. Amendment of section 121 of Act 71 of 2008

Section 121 of the principal Act is hereby amended by the substitution in paragraph (b), for subparagraph (i), of the following:

“(i) issued a **[clearancenotice]**compliance certificate with respect to the transaction; or”

72. Amendment of section 122 of Act 71 of 2008

Section 122 of the principal Act is hereby amended by the substitution in subsection (1), for the opening phrase, of the following:

5 “(1) A person must notify a regulated company in the prescribed manner and form
within three business days after that person—”

73. Amendment of section 123 of Act 71 of 2008

Section 123 of the principal Act is hereby amended by—

(a) the substitution in subsection (2)(a), for sub-paragraphs (i) and (ii), of the following:

10 “(i) a regulated company reacquires any of its voting securities as contemplated in
section 48 or in terms of a scheme of arrangement contemplated in section
114; or

15 “(ii) a person acting alone has, or two or more related or inter-related persons, or
two or more persons acting in concert, have, acquired a beneficial interest in
voting rights attached to any [voting] securities issued by a regulated
company; and”

(b) the substitution in subsection (2), for paragraph (b), of the following:

20 “(b) before that acquisition a person was, or persons contemplated in paragraph
(a)(ii) together were, able to exercise less than **[the prescribed percentage]**
50% of all the voting rights attached to securities of that company; and”

(c) the substitution in subsection (3), for the opening phrase, of the following:

“(3) Within one business day after the date of **[a completed]**an acquisition
contemplated in subsection (2), the person or persons in whom the prescribed
percentage, or more, of the voting **[securities]** rights beneficially vests must

give notice in the prescribed manner to the holders of the remaining securities, including in that notice—”

74. Amendment of section 124 of Act 71 of 2008

Section 124 of the principal Act is hereby amended by the substitution, for subsection (6),
5 of the following:

“(6) An instrument of transfer contemplated in subsection (5) is not required for any securities for which a ~~[securities]~~share warrant is for the time being outstanding.”

75. Amendment of section 125 of Act 71 of 2008

Section 125 of the principal Act is hereby amended by—

10 (a) the substitution, for subsection (2), of the following:

“(2) If ~~[a person makes an offer]~~—

15 (a) ~~[for any securities of]~~ a regulated company that has more than one class of ~~[securities]~~ issued securities reacquires any of its voting securities of a particular class or one or more particular classes, as contemplated in section 48 or in terms of a scheme of arrangement contemplated in section 114 and, as a result, a person or a number of related persons hold securities of the company entitling the person or persons to exercise more than the prescribed percentage of the general voting rights associated with all the issued securities of the company; ~~[and]~~or

20 (b) a person acting alone, or two or more persons acting in concert, make an offer for any securities of a regulated company that has more than one class of issued securities, which if accepted ~~[that]~~ could result in ~~[the]~~ a person, ~~[together with any]~~ or a number of related or inter-related persons ~~[or person acting in concert with any of them,]~~ holding securities of the company entitling the persons or persons to exercise
25 more than the prescribed percentage of the general voting rights ~~[of]~~ associated with all issued securities of the company,

that person or those persons acting in concert must make a comparable offer [must be made for] to acquire securities of each class of issued securities of that company.”

(b) the substitution in subsection (3)(b), for sub-paragraph (ii), of the following:

5 “(ii) the offer being approved by the independent holders of **[more than 50% of the general voting rights of all]** issued securities of **[the company]** that class, if all such independent holders, in aggregate, control more than 50% of the general voting rights of all issued securities of that class;”

(c) the substitution in subsection (3), for paragraph (d), of the following:

10 “(d) if the offer could result in the person, together with any related or inter-related person or person acting in concert with any of them, holding securities of the company entitling the persons or persons to exercise more than **[50%]** the prescribed percentage of the general voting rights of all issued securities of the company, include a specific and prominent notice that the offer could result in

15 such circumstances. [—]

[(i) include a specific and prominent notice that the offer could result in circumstances contemplated above; and

(ii) include a specific statement setting out the extent to which the person or persons referred to above will be free to acquire further securities

20 **in the company without making a general offer, if the offer succeeds to the extent contemplated above.]”**

Part 6 – Amendments affecting Chapter 6 of the Principal Act**76. Amendment of Title of Part A of Chapter Six of Act 71 of 2008**

Chapter 6 of the principal Act is hereby amended by the substitution immediately after the
5 Title of the Chapter, for the Part heading, of the following:

“Part A”

77. Amendment of section 128 of Act 71 of 2008

Section 128 of the principal Act is hereby amended by—

- 10 (a) the substitution in subsection (1)(f)(i), for the expression “[**fall**] due”, of the expression “become due”; and
- (b) the substitution, for subsection (2), of the following:

“(2) For the purpose of subsection (1)[**(f)**](g), an employee of a company is not related to that company solely as a result of being a member of a trade union that holds [**shares**] securities of that company.”

78. Amendment of section 129 of Act 71 of 2008

15 Section 129 of the principal Act is hereby amended by the substitution, for subsection (7), of the following:

20 “(7) If the board of a company has reasonable grounds to believe that the company is financially distressed, but the board has not adopted a resolution contemplated in this section, the board must deliver a written notice to each affected person, setting out the criteria referred to in section 128 (1)[**(e)**](f) that are applicable to the company, and its reasons for not adopting a resolution contemplated in this section.”

79. Amendment of section 132 of Act 71 of 2008

Section 132 of the principal Act is hereby amended by the substitution in subsection (1)(b), for the expression “[a] person”, of the expression “an affected person”.

80. Amendment of section 134 of Act 71 of 2008

5 Section 134 of the principal Act is hereby amended by the insertion, immediately after the section number, of the following: “(1)”.

81. Amendment of section 135 of Act 71 of 2008

Section 135 of the principal Act is hereby amended by the substitution in subsection (3), for the opening phrase, of the following:

10 “(3) After payment of the practitioner’s remuneration and [~~costs~~]expenses referred to in section 143, and other claims arising out of the costs of the business rescue proceedings, all claims contemplated—”

82. Amendment of section 136 of Act 71 of 2008

Section 136 of the principal Act is hereby amended by—

15 (a) the substitution, for subsection (2), of the following:

“(2) Subject to subsection (2A), [~~sections 35A and 35B of the Insolvency Act, 1936 (Act No. 24 of 1936)]and despite any provision of an agreement to the contrary, during business rescue proceedings, the practitioner may—[cancel or]~~

20 (a) entirely, partially or conditionally~~[cancel or]~~ suspend, for the duration of the business rescue proceedings,~~[entirely, partially or conditionally]~~ any obligation of the company that—

(i) arises under~~[any provision of]~~ an agreement to which the company [~~is~~]was a party at the commencement of the business

rescue **[period] proceedings[, other than an agreement of employment]; and**

(ii) would otherwise become due during those proceedings; or

(b) apply urgently to a court to entirely, partially or conditionally cancel, on any terms that are just and reasonable in the circumstances, any agreement to which the company is a party.”

(b) the insertion, immediately after subsection (2), of the following:

“(2A) When acting in terms of subsection (2)—

(a) a business rescue practitioner must not suspend any provision of—

(i) an employment contract; or

(ii) an agreement to which section 35A or 35B of the Insolvency Act, 1936 (Act No. 24 of 1936) applies;

(b) a court may not cancel any provision of an employment contract, except as contemplated in subsection (1); and

(c) if a business practitioner suspends a provision of an agreement relating to security granted by the company, that provision nevertheless continues to apply for the purposes of section 134, with respect to any proposed disposal of property by the company.”

83. Substitution for section 138 of Act 71 of 2008

The principal Act is hereby amended by the substitution, for section 138, of the following:

“Qualifications of practitioners

“138. (1) A person may be appointed as the business rescue practitioner of a company only if the person—

(a) is a member in good standing of—

(i) a legal, accounting or business management profession that is subject to regulation by a regulatory authority; or

(ii) has been [prescribed] licensed as such by the [Minister] Commission in terms of subsection (2);

5

(b) is not subject to an order of probation in terms of section 162 (7);

(c) would not be disqualified from acting as a director of the company in terms of section 69 (8);

10

(d) does not have any other relationship with the company such as would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship; and

(e) is not related to a person who has a relationship contemplated in paragraph (d).

“(2) For the purposes of subsection (1)(a)(ii), [The Minister] the Commission may [designate one] license any qualified person [or association within the Republic to regulate the practice of persons] to practice as a practitioner[s] in terms of this [Act] Chapter, and may suspend or withdraw any such licence in the prescribed manner. [if that person or association—]—

15

[(a) is committed to achieving the purposes of this Chapter;

(b) functions predominantly to promote sound principles and good practice of business turnaround or rescue; and]

20

(c) has sufficient human, financial and operational resources, and adequate administrative procedures and safeguards, to enable it to function efficiently and to effectively carry out its functions in terms of this Chapter, or presents to the Minister a credible plan to acquire or develop those resources.]

25

“(3) The Minister may make regulations prescribing—

(a) **[impose reasonable conditions upon a person or association designated by the Minister in terms of subsection (2), with respect to the carrying out of its functions and powers in terms of this Chapter; and]**standards and procedures to be followed by the Commission in carrying out its licencing functions and powers in terms of this section; and

(b) **[make regulationsprescribing]**minimum qualifications for a person to practice as a business rescue practitioner, including different minimum qualifications for different categories of companies. [—

[(i) minimum qualifications for admission of a person to the practice of a business rescue practitioner; and

[(ii) procedures to be followed by a person or association designated by the Minister in terms of subsection (2) in carrying out its functions and powers in terms of this Chapter.]”

84. Amendment of section 139 of Act 71 of 2008

Section 139 of the principal Act is hereby amended by the substitution in subsection (2), for paragraph (a), of the following:

“(a) **[I]**incompetence or failure to perform the duties of a business rescue practitioner of the particular company;”

85. Amendment of section 142 of Act 71 of 2008

Section 142 of the principal Act is hereby amended by—

(a) the substitution in subsection (3), for paragraph (a), of the following:

“(a) **[A]**any material transactions **[involved]**involving the company or the assets of the company, and occurring within 12 months immediately before the business rescue proceedings began;”

(b) the substitution in subsection (3), for paragraph (b), of the following:

“(b) any court, arbitration or administrative proceedings, including pending enforcement proceedings, involving the company;”

86. Amendment of section 143 of Act 71 of 2008

Section 143 of the principal Act is hereby amended by the substitution in subsection (4), for paragraph (b), of the following:

“(b) **[that]** the remuneration provided for in the agreement is egregiously unreasonable having regard to the financial circumstances of the company.”

87. Amendment of section 144 of Act 71 of 2008

Section 144 of the principal Act is hereby amended by—

(a) the substitution in subsection (3), for paragraph (a), of the following:

“(a) notice, which must be given in the prescribed manner and form to employees at their workplace, and served at the head office of the relevant trade union, of each court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings [and such notice must be given to employees at their workplace and served at the head office of the relevant trade union].”

(b) the substitution in subsection (3), for paragraph (f), of the following:

“(f) vote with creditors on a motion to approve a proposed business plan, to the extent that the employee is a creditor, as contemplated in subsection [(1)](2); and”

88. Amendment of section 151 of Act 71 of 2008

Section 151 of the principal Act is hereby amended by the substitution, for subsection (1), of the following:

“(1) Within 10 business days after publishing a business rescue plan in terms of section 150,[T]the practitioner must convene and preside over a meeting of creditors and any

other holders of a voting interest, called for the purpose of considering the **[proposed rescue] plan [within 10 business days after the publication of that plan in terms of section 150].**”

89. Amendment of section 152 of Act 71 of 2008

5 Section 152 of the principal Act is hereby amended by—

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

“(a) introduce the proposed business plan for consideration by the creditors[,] and, if applicable, by the shareholders;”

(b) the substitution in subsection (6), for paragraph (b), of the following:

10 “(b) if the business rescue plan was approved by the shareholders of the company, as contemplated in subsection (3)(c), the practitioner may amend the company’s Memorandum of Incorporation to authorise, and determine the preferences, rights, limitations and other terms of, any securities that are not otherwise authorised, but are contemplated to be issued in terms of the
15 business rescue plan, despite any provision of section 16, 36 or 37 to the contrary.”

90. Amendment of section 153 of Act 71 of 2008

Section 153 of the principal Act is hereby amended by the insertion, immediately after subsection (6), of the following:

20 (7) On an application contemplated in subsection (1)(a)(ii), or (1)(b)(i)(bb), a court may order that the vote on a business rescue plan be set aside if the court is satisfied that it is reasonable and just to do so, having regard to—

(a) the interests represented by the person or persons who voted against the proposed business rescue plan;

25 (b) the provision, if any, made in the proposed business rescue plan with respect to the interests of that person or those persons; and

-
- (c) a fair and reasonable estimate of the return to that person, or those persons, if the company were to be liquidated.

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Part 7 – Amendments affecting Chapter 7 of the Principal Act**91. Amendment of section 159 of Act 71 of 2008**

Section 159 of the principal Act is hereby amended by—

- 5 (a) the substitution in subsection (3)(b), for the opening phrase, of the following:
- “(b) the person making the disclosure reasonably believed at the time of the disclosure that the information showed or tended to show that a company or external company, or a director or prescribed officer of a company acting in that capacity, **[has]had**”
- 10 (b) the further substitution in subsection (3)(b), for sub-paragraph (ii), of the following:
- “(ii) failed or **[is]was** failing to comply with any statutory obligation to which the company **[is]wassubject;**”
- (c) the further substitution in subsection (3)(b), for sub-paragraph (iii), of the following:
- 15 “(iii) engaged in conduct that **[has]hadendangered,** or **[is]was** likely to endanger, the health or safety of any individual, or had harmed or was likely to harm **[damage]** the environment;”
- (d) the substitution in subsection (5), for paragraph (b), of the following:
- 20 “(b) directly or indirectly makes an express or implied threat, whether conditional or unconditional, to cause any detriment to the first person or to another person, and—
- (i) intends the first person to fear that the threat will be carried out; or
- (ii) is reckless as to causing the first person to fear that the threat will be carried out, **[irrespective of whether the first person actually feared that the threat would be carried out.]**

irrespective of whether the first person actually fears or feared that the threat will or would be carried out.”

- (e) the substitution in subsection (7), for the opening phrase, of the following:

“(7) A public company **[and]**or a state-owned company must directly or indirectly—
—”

92. Amendment of section 160 of Act 71 of 2008

Section 160 of the principal Act is hereby amended by—

- (a) the substitution, for subsection (1), of the following:

“(1) A person to whom a notice is delivered in terms of **[section 12(3) or section 14 (3)]**this Act with respect to an application for reservation of a name, registration of a defensive name, application to transfer the reservation of a name or the registration of a defensive name, or the registration of a company’s name, or any other person with an interest in the name of a company, may apply to the Companies Tribunal in the prescribed manner and form for a determination whether the name, or the reservation, registration or use of the name, or the transfer of any such reservation or registration of a name, satisfies the requirements of [section 11]this Act.

- (b) the substitution in subsection (3), for paragraph (a), of the following:

“(a) must make a determination whether the name, or the reservation, registration or use of the name, or the transfer of the reservation or registration of the name, satisfies the requirements of [section 11]this Act; and”

- (c) the further substitution in subsection (3)(b), for subparagraph (i), of the following:

“(i) the Commission to—

(aa) reserve a contested name, or register a particular defensive name that had been contested, for the applicant [in terms of section 12];

(bb) register **[the contested]**~~a~~ name[,] or amended name that had been contested as the name of a company;**[or]**

(cc) cancel [a] the reservation of a name, or the registration of a defensive name,**[granted in terms of section 12, if the reserved name has not been used by the person entitled to it];** or

(dd) transfer, or cancel the transfer of, the reservation of a name, or the registration of a defensive name; or”

93. Amendment of section 161 of Act 71 of 2008

Section 161 of the principal Act is hereby amended by the substitution in subsection (2), for the opening phrase, of the following:

“(2) The right to apply to a court in terms of this section is in addition to any other remedy available to a holder of a ~~[companies]~~ company’s securities—”

94. Amendment of section 162 of Act 71 of 2008

Section 162 (2) of the principal Act is hereby amended by the substitution in the opening phrase, for the expression “**[a]** order”, of the expression “an order”.

95. Amendment of section 163 of Act 71 of 2008

Section 163 of the principal Act is hereby amended by the repeal of subsection (4).

96. Amendment of section 164 of Act 71 of 2008

Section 164 of the principal Act is hereby amended by—

(a) the substitution in subsection (8), for the opening phrase, of the following:

“(8) A demand delivered in terms of subsections (5) to (7) must also be delivered to the Panel, and must state—”

(b) the substitution in subsection (9), for paragraph (c), of the following:

“(c) the company, by a subsequent special resolution, revokes the adopted resolution that gave rise to the shareholder’s rights under this section.”

(c) the substitution in subsection (15)(c)(v), for clause (aa), of the following:

“(aa) the dissenting shareholders to either withdraw their respective demands[, **in which case the shareholder is reinstated to their full rights as a shareholder,**]or to comply with subsection (13) (a); and”

(d) the insertion, immediately before subsection (16), of the following:

“(15A) At any time until the court has made an order contemplated in subsection (15)(c)(v), a dissenting shareholder may accept the offer made by the company in terms of subsection (11), in which case—

(a) that shareholder must comply with the requirements of subsection 13(a); and

(b) the company must comply with the requirements of subsection 13(b).”

(e) the insertion, immediately after subsection (19), of the following:

“(20) Except to the extent—

(a) expressly provided in this section; or

(b) that the Takeover Regulation Panel rules otherwise in a particular case,

a payment by a company to a shareholder in terms of this section does not obligate any person to make a comparable offer under section 125 to any other person.”

97. Amendment of section 166 of Act 71 of 2008

Section 166 of the principal Act is hereby amended by the substitution, for subsection (1), of the following:

“(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, or
- (b) an accredited entity, as defined in subsection (3) [**for resolution by mediation, conciliation or arbitration.**]; or
- (c) any other person.”

10 **98. Amendment of section 168 of Act 71 of 2008**

Section 168 of the principal Act is hereby amended by the substitution, for subsection (1), of the following:

“(1) Any person may file a complaint in writing—

- (a) with the Panel in respect of a matter contemplated in Part B or C of Chapter 5, or in the Takeover Regulations; or
- (b) with the Commission in respect of any provision of this Act not referred to in paragraph (a), [**alleging that a person has acted in a manner inconsistent with this Act, or that the complainant’s rights under this Act, or under a company’s Memorandum of Incorporation or rules, have been infringed.**]

20 alleging that a person has acted in a manner inconsistent with this Act, or that the complainant’s rights under this Act, or under a company’s Memorandum of Incorporation or rules, have been infringed.”

99. Amendment of section 171 of Act 71 of 2008

Section 171 of the principal Act is hereby amended by—

- 25 (a) the substitution, for subsection (1), of the following:

“(1) Subject to subsection (3), the Commission, or the Executive Director of the Panel, may issue a compliance notice in the prescribed form to any person whom the Commission or Executive Director, as the case may be, on reasonable grounds believes—

5 (a) has contravened this Act; or

(b) assented to, was implicated in, or directly or indirectly benefited from, a contravention of this Act, **[unless the alleged contravention could otherwise be addressed in terms of this Act by an application to a court or to the Companies Tribunal.]**

10 unless the alleged contravention could otherwise be addressed in terms of this Act by an application to a court or to the Companies Tribunal.”

(b) the substitution, for subsection (4), of the following:

“(4) A compliance notice contemplated in subsection (1) must set out—

[(a) must set out—]

15 [(i)(a) _____ the person or association to whom the notice applies;

[(ii)(b) _____ the provision of this Act that has been contravened;

[(iii)(c) _____ details of the nature and extent of the non-compliance;

[(iv)(d) _____ any steps that are required to be taken and the period within which those steps must be taken; and

20 **[(v)(e) _____ any penalty that may be imposed in terms of this Act if those steps are not taken.”**

(c) the substitution, for subsection (7), of the following:

“(7) If a person to whom a compliance notice has been issued fails to comply with the notice, the Commission or the Executive Director, as the case may be, may either—

25

- (a) apply to a court for the imposition of an administrative fine; or
- (b) refer the matter to the National Prosecuting Authority for prosecution as an offence in terms of section 214 (3), **[but may not do both in respect of any particular compliance notice]**

5 but may not do both in respect of any particular compliance notice.”

100. Amendment of section 172 of Act 71 of 2008

Section 172 of the principal Act is hereby amended by the substitution in subsection (1), for the expression “in terms of [section 171]”, of the expression “in terms of this Act”.

101. Amendment of section 175 of Act 71 of 2008

10 Section 175 of the principal Act is hereby amended by the substitution in subsection (2), for paragraph (f), of the following:

“(f) the degree to which the respondent has co-operated with the Commission or Takeover Regulation Panel, as the case may be, and **[a]the court;**”

Part 8 – Amendments affecting Chapter 8 of the Principal Act**102. Amendment of section 191 of Act 71 of 2008**

Section 191 of the principal Act is hereby amended by the substitution in subsection (1), for
5 paragraph (b), of the following:

“(b) **[Commissioner]**Commission on the management of the Commission’s resources, or
the performance of any of its functions;”

103. Amendment of section 194 of Act 71 of 2008

Section 194 of the principal Act is hereby amended by the substitution in subsection (3), for
10 paragraph (b), of the following:

“(b) sufficient persons with legal training and experience to satisfy the requirements of
[subsection]section 195 (3)(a).”

104. Amendment of section 195 of Act 71 of 2008

Section 195 (7) of the principal Act is hereby amended by the substitution, for the
15 expression “[An] decision”, of the expression “A decision”.

105. Amendment of section 200 of Act 71 of 2008

Section 200 of the principal Act is hereby amended by—

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

“(1) The Panel may appoint—

(a) an Executive Director; and

(b) one or more deputy Executive Directors,**[on terms and conditions
determined by the Panel]**

on terms and conditions determined by the Panel, subject to subsection (4).”

(b) the insertion, immediately after subsection (3), of the following:

“(4) The chairperson of the Panel, designated in terms of Section 198, in consultation with the Minister and with the concurrence of the Minister of Finance, may determine the remuneration, allowances, benefits, and conditions of appointment of—

- (a) The Executive Director;
- (b) each member of the Panel, and
- (c) each member of the Takeover Special Committee.”

106. Amendment of section 202 of Act 71 of 2008

Section 202 of the principal Act is hereby amended by the substitution, for subsection (2), of the following:

“(2) The Takeover Special Committee consists of—

- (a) a chairperson, who must be an attorney or advocate whether practicing or not; and
- (b) at least two other persons, [each of whom must be designated from time to time by the Takeover Regulation Panel from among those of its members appointed by the Minister in terms of section 197 (1)(d).]

each of whom must be designated from time to time by the Takeover Regulation Panel from among those of its members appointed by the Minister in terms of section 197 (1)(d).”

107. Amendment of section 203 of Act 71 of 2008

Section 203 of the principal Act is hereby amended by the substitution, for subsection (1), of the following:

“(1) The Minister must establish a council, to be known as the Financial Reporting Standards Council, consisting of—

- 5
- (a) four persons, each of whom is registered and practicing as an auditor;
- (b) two persons each of whom is responsible for preparing financial statements on behalf of public companies;
- (c) two persons responsible for preparing financial statements for private companies, or personal liability companies;
- 10
- (d) four persons who, in their capacity as holders of securities issued by a company, or as creditors of a company, are reasonably expected to rely on financial statements, as contemplated in the definition of ‘**financial statement**’ in section (1);
- (e) two persons knowledgeable in company law;
- 15
- (f) one person nominated by the executive officer of the Financial Services Board as defined in the Financial Services Board Act, 1990 (Act No. 97 of 1990), or any successor body to it;
- (g) one person nominated by the Governor of the South African Reserve Bank, or any successor body to it; **[and]**
- 20
- (h) a number of persons, nominated one each by any exchange that imposes adherence to financial reporting standards as a listing requirement **[each of whom must be appointed by the Minister, to serve for a term of three years]; and**
- (i) one person nominated by the body governing the regulation of the accounting professions.

each of whom must be appointed by the Minister, to serve for a term of three years.”

Part 9 – Amendments affecting Chapter 9 of the Principal Act**108. Amendment of section 212 of Act 71 of 2008**

Section 212 of the principal Act is hereby amended by the substitution in subsection (6), for
5 the expression “[five] business days”, of the expression “10 business days”.

109. Amendment of section 214 of Act 71 of 2008

Section 214 of the principal Act is hereby amended by—

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

10 “(c) was knowingly a party to an act or omission by a business calculated to defraud
a creditor or employee of the company, or a holder of the company’s
securities, or with another fraudulent purpose; or—

(i) **conduct prohibited by section 22 (1); or**

15 (ii) **an act or omission by a business calculated to defraud a creditor,
employee or security holder of the company, or with another
fraudulent purpose; or]**”

(b) the substitution in subsection (1), for paragraph (d), of the following:

20 “(d) is a party to the preparation, approval, dissemination or publication of a
prospectus or a written statement contemplated in section 101, that contains an
‘untrue statement’ as defined and described in section 95.—

(i) **financial statements or summaries, to the extent set out in section 29
(6); or**

(ii) **a prospectus or a written statement contemplated in section 101,
that contains an ‘untrue statement’ as defined and described in
section 95.]”**

(c) The substitution in subsection (2), for the expression “subsection (1)(d)”, of the expression “subsection (1)(d) and section 29 (6)”.

(d) The insertion immediately after subsection (3) of the following:

5 “(4) A person who contravenes section 99 (1), (2), (3), (4), (5), (8) or (9) and, if that person is a company, every director and prescribed officer of the company who knowingly was a party to the contravention, is—

(a) guilty of an offence; and

(b) liable to any other person for any losses sustained as a consequence of that contravention.”

10 **110. Amendment of section 218 of Act 71 of 2008**

Section 218 of the principal Act is hereby amended by the substitution, for subsection (1), of the following:

15 “(1) Nothing in this Act renders void an agreement, resolution or provision of an agreement, resolution, Memorandum of Incorporation or rules of a company that is prohibited, ~~[void,]voidable~~ or that may be declared unlawful in terms of this Act, unless a court ~~[declares]~~ has made a declaration to that effect regarding that agreement, resolution or provision [to be void].

Part 10 – Amendments affecting Schedules of the Principal Act**111. Amendment of Schedule 1 of Act 71 of 2008**

(1) Schedule 1 of the principal Act is hereby amended by the substitution in Items 1(1)(b), 1(5), 1(5)(b)(i), 2(3) and 5(4), for each instance of the word “[subitem]” or “[subitems]”, of the word “sub-item” or “sub-items”, respectively.

(2) Item 1 of Schedule 1 of the principal Act is hereby amended by the substitution in sub-item (3), for the opening phrase, of the following:

“(3) A non-profit company must not, directly or indirectly, pay any portion of its income or transfer any of its assets, regardless **[whether]** how the income or asset was derived, to any person who is or was an incorporator of the company, or who is a member or director, or person appointing a director, of the company, except—”

112. Amendment of Schedule 2 of Act 71 of 2008

Item 1 of Schedule 2 of the principal Act is hereby amended by the substitution, for sub-item (2), of the following:

“(2) A notice of conversion must be accompanied by—

(a) a **[certified copy of a special resolution]** written statement of consent approving the conversion of the close corporation signed by members of the corporation holding in aggregate, at least 75% of the members’ interest in the corporation;

(b) **[either a new]**a Memorandum of Incorporation**[or an amendment to the company’s Memorandum of Incorporation]** consistent with the requirements of this Act **[in either case];** and

(c) the prescribed filing fee.”

113. Amendment of Schedule 3 of Act 71 of 2008

Schedule 3, Part A, Item 4 of the principal Act is hereby amended by—

(a) the substitution in the amendment of section 19(1)(b) of Act 69 of 1984, for the expression “section 11 [(4)]”, of the expression “section 11 (3)”;

5 (b) the substitution in the amendment of section 20 of Act 69 or 1984, for the expression “Sections 14 [(4)]”, of the expression “Sections 14 (2) and (3)”.

114. Amendment of Schedule 4 of Act 71 of 2008

Schedule 4 of the principal Act is hereby amended by the insertion, at the end of the Schedule, of the following:

10 “Part A of Chapter 4 of the Consumer Protection Act, 2008 (Act No. 19 of 2008)”

115. Amendment of Schedule 5 of Act 71 of 2008

(1) Schedule 5 of the principal Act is hereby amended by the substitution—

(a) in Items 4(4) and 7(1), for each instance of the word “[preexisting]”, of the word “pre-existing”;

15 (b) in Items 1(2)(b), 3(3), 4 (4)(b), 6(2), 7(2) and (4), 8(1) and (2), 9(1), (2) and (3), 12(4), (5), (7), (7)(c) and (d) and (8) and 13 (1)(c)(i), for each instance of the word “[subitem]” or “[subitems]”, of the word “sub-item” or “sub-items”, respectively.

(2) Item 2 of Schedule 5 of the principal Act is hereby amended by—

20 (a) the insertion, immediately after the Item number, of the expression “(1)”;

(b) the insertion, immediately after the existing clause, of the following:

“(2) Despite section 11, a pre-existing company—

5 (a) whose name, immediately before the effective date, satisfied the requirements of section 49 of the previous Act is not required to change its name to comply with section 11(3)(c) solely on the ground that any part of its name was in an official language other than English; and

(b) may continue to use a translated name that, immediately before the effective date, was registered and otherwise met the requirements of section 50 (2) of the previous Act.

10 “(3) Despite the repeal of the previous Act, section 49 (5) to (7) of the previous Act continues to apply to a pre-existing company that was, immediately before the effective date, engaged in any circumstances contemplated in those provisions.

15 “(4) Despite the repeal of the previous Act, a pre-existing company retains all of the powers set out in that Act in respect of its shares that were issued and outstanding immediately before the effective date, to the extent necessary to give full effect to—

(a) section 35 (6); and

(b) Item 6 (2) of this Schedule.

20 “(5) If, as a consequence of the coming into effect of the Act and the repeal of the previous Act, a conflict, dispute or doubt arises within two years after the effective date concerning the particular manner or form in which, or time by which, a pre-existing company is required to—

25 (a) prepare its annual financial statements, convene an annual general meeting, provide to its shareholders copies of its annual financial statements, any notice or any other document; or

(b) file any particular document with the Commission; or

(c) take any other particular action required in terms of this Act or the company’s Memorandum of Incorporation.

the company may apply to the Tribunal for directions, and a member of the Tribunal may make an administrative order that is appropriate and reasonable in the circumstances.”

(3) Item 4 of Schedule 5 of the principal Act is hereby amended by—

5 (a) the substitution in each of sub-items (1)(a), (1)(b), (1)(c), (1)(d) and (1)(e), for the expression “section 11(3)[(b)]”, of the expression “section 11 (3)”;
10

(b) the substitution in sub-item (1)(b), for the expression “section 53 [(c)]”, of the expression “section 53 (b)”;
15

(c) the insertion, immediately after sub-item (3), of the following:

10 “(3A) If, before the general effective date, the shareholders of a pre-existing company had adopted any agreement between or among themselves, under whatever style or title, comparable in purpose and effect to an agreement contemplated in section 15 (7), any such agreement continues to have the same force and effect—

15 (a) as of the general effective date, for a period of two years, despite section 15 (7), or until changed by the shareholders who are parties to the agreement; and

20 (b) after the two year period contemplated in paragraph (a), to the extent that the agreement is consistent with this Act and the company’s Memorandum of Incorporation.”

(d) the substitution, for sub-item (4), of the following:

“(4) During the period of two years immediately following the general effective date—

(a) if there is a conflict between—

25 (i) a provision of this Act, and a provision of a [preexisting]pre-existing company’s Memorandum of

Incorporation, the latter provision prevails, except to the extent that this Schedule provides otherwise;

(ii) a binding provision contemplated in sub-item (3), and this Act, the binding provision prevails; or

5 (iii) a provision of an agreement contemplated in sub-item (3A), and this Act or the company's Memorandum of Incorporation, the provision of the agreement prevails, except to the extent that the agreement, or the Memorandum of Incorporation, provides otherwise; and

10 (b) despite Chapter 7, until a pre-existing company has filed an amendment contemplated in ~~subitem~~ sub-item (2)(a), neither the Commission nor the Panel may issue a compliance notice to that company with respect to conduct that is—

(i) ~~inconsistent with this Act; but~~

15 (ii) consistent with **[that company's Memorandum of Incorporation]** a provision that prevails over this Act in terms of paragraph (a)."

(4) Item 6 of Schedule 5 of the principal Act is hereby amended by—

(a) ~~the deletion, from the Item heading, of the expression "[treasury shares,]" ;~~

20 (b) ~~the deletion, from the opening phrase of sub-item (3), of the expression "[treasury shares,]";~~

(c) the substitution in sub-item (3)(a), for the expression "**[shares holder]**", of the word "shareholders"; and

(d) by the insertion, immediately after sub-item (4), of the following:

“(5) Section 164 does not apply with respect to the conversion by a company of par value or nominal value shares of a pre-existing company in terms of this Item, and in accordance with the regulations.

- 5 (5) Item 7 of Schedule 5 of the principal Act is hereby amended by the substitution, for sub-item (2), of the following:

10 “(2) A person contemplated in **[subitem]** sub-item (1) who, in terms of this Act, is ineligible to be, or disqualified from being, a director, alternate director, prescribed officer, company secretary or auditor is regarded **[to have]** as having resigned from [that] every such office in any company as from the effective date.

- (6) Item 8 of Schedule 5 of the principal Act is hereby amended by the substitution in sub-item (3), for paragraph (b), of the following:

15 “(b) a defensive name, or renewal of the registration of a defensive name, in terms of section 43 of the previous Act that was in effect immediately before the effective date must be regarded as if it had been **[reserved]** registered in terms of section 12 (9) of this Act, as from the actual date on which that registration or renewal was granted. **[effective date, but any such reservation of a name expires on the earlier of –**

20 (i) **the date the name is used by a company incorporated by the person for who the name has been reserved; or**

(ii) **the second anniversary of the general effective date.]**

- (7) Item 11 of Schedule 5 of the principal Act is hereby amended by the substitution, for sub-item (3), of the following:

25 “(3) A document that, before the effective date, had been served or filed in accordance with the previous Act must be regarded as having been satisfactorily served or filed for any comparable purpose of this Act.”

- (8) Item 12 of Schedule 5 of the principal Act is hereby amended by—

“(a) the substitution in sub-item (4), for the expression “[subitem] (2)”, of the expression “sub-items (1) and (2)”; and

(b) the substitution in sub-item (5), for the expression “[subitems(2) and] (3)”, of the expression “sub-items (1) to (3)”.

5 (9) Item 13 of Schedule 5 of the principal Act is hereby amended by the substitution in sub-item (1)(c), for sub-paragraph (i), of the following:

10 “(i) the Commission may exercise any power of the Minister or the Registrar, or the Panel may exercise any power of the Securities Regulation Panel, in terms of the previous Act to investigate and prosecute any breach of that Act that occurred during the period of three years immediately before the effective date, subject to sub-item (2); and”.

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