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CORPORATE & COMMERCIAL ALERT

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Companies Amendment Bill, 2021: Circumstances under which private companies will be regarded as regulated companies in the context of affected transactions

It has been over three years since the first publication of the proposed amendments to the Companies Act 71 of 2008 (Act) by the Companies Amendment Bill in September 2018 (Initial Bill). As a result of public presentations and consultation with stakeholders, the Department of Trade, Industry and Competition has now made changes to the Initial Bill, as contained in the Companies Amendment Bill, 2021 (Bill). The Bill was published on 1 October 2021 for public comment. The Bill does not introduce significant changes to the Initial Bill.

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Companies Amendment Bill, 2021: Circumstances under which private companies will be regarded as regulated companies in the context of affected transactions

One of the more welcomed amendments to the Act introduced by the Bill is the reform of the circumstances under which a private company will be regarded as being a regulated company in the context of an affected transaction under section 118(1)(c)(i) of the Act.

It has been over three years since the first publication of the proposed amendments to the Companies Act 71 of 2008 (Act) by the Companies Amendment Bill in September 2018 (Initial Bill). As a result of public presentations and consultation with stakeholders, the Department of Trade, Industry and Competition has now made changes to the Initial Bill, as contained in the Companies Amendment Bill, 2021 (Bill). The Bill was published on 1 October 2021 for public comment. The Bill does not introduce significant changes to the Initial Bill.

However, one of the more welcomed amendments to the Act introduced by the Bill is the reform of the circumstances under which a private company will be regarded as being a regulated company in the context of an affected transaction under section 118(1)(c)(i) of the Act. As section 118(1)(c)(i) of the Act currently stands, a private company will be regarded as being a regulated company if 10% or more of its issued shares have been transferred, other than by transfer between or among related or inter-related persons, within a period of 24 months immediately prior to the date of the proposed transaction. The current section 118(1)(c)(i) definition of a regulated private company has proven to be impractical and at times nonsensical as it may result in small, closely held private companies being regarded as regulated companies solely on a benign transfer of

their shares between unrelated persons in the 24 months preceding the proposed affected transaction. Conversely, other high-turnover private companies with a large number of shareholders may avoid falling into the definition of a regulated company and the resultant application of takeover laws due to there being no transfer of their shares.

The amendment to section 118(1)(c)(i) of the Act that the Bill seeks to introduce is a removal of the current "10% or more share transfer in the preceding 24 months" test and a move back to a position similar to the previous takeover regime in the Companies Act 61 of 1973 and the old Securities Regulation Panel Code (SRP Code). The Bill proposes that a private company will be a regulated company if that private company:

- 1) has 10 or more shareholders with direct or indirect shareholding in the company; and
- 2) the company meets or exceeds the financial threshold of annual turnover or asset value which shall be determined by the Minister of Trade, Industry and Competition in consultation with the Takeover Regulations Panel (Panel).

Furthermore, the amendments seek to expressly grant the Panel the discretion to exempt any particular transaction affecting a private company from takeover laws in terms of section 119(6) of the Act.

Companies Amendment Bill, 2021: Circumstances under which private companies will be regarded as regulated companies in the context of affected transactions...continued

The amendments to section 118(1)(c)(i) of the Act proposed by the Bill may assist in avoiding the arbitrary and unintended consequences of the section in its current form.

These proposed amendments to section 118(1)(c)(i) of the Act differ from the amendments that were proposed by the Initial Bill. The Initial Bill's proposed amendments also sought to bring about more certainty regarding the application of the Takeover Regulations and to do away with the impractical share transfer test. However, it proposed that a private company be "regulated" if its annual financial statements are required to be audited in accordance with section 84(1)(c) of the Act. The Panel submitted that the link to section 84(1)(c) of the Act should be removed on the basis that this section and Regulation 28 of the Companies Regulations, 2011 refer to factors that the Panel considered to be outside of its jurisdiction, such as employment and public interest scores.

The amendments to section 118(1)(c)(i) of the Act proposed by the Bill may assist in avoiding the arbitrary and unintended consequences of the section in its current form. It should be noted, however, that the proposed amendments to the section are not without issues. For example, there is no real clarity on the meaning of "indirect shareholding" in the context of the proposed amendment given that "indirect shareholding" is not a construct used in the Act. A shareholder, as defined

in the Act, is someone who is registered in the share register as the holder of a share. As such, a more appropriate approach to dealing with the "indirect shareholding" position may, for instance, be replacing the "indirect shareholding" construct with the provisions of the revised section 56 of the Act (as proposed by the Bill) dealing with beneficial holders of shares. Furthermore, the Bill does not give guidance as to what the "financial threshold" will be, save that it will be determined by the Minister of Trade, Industry and Competition in consultation with the Panel. The old SRP Code prescribed a "financial threshold" of at least R5 million in subscribed share capital or loan capital. It is hoped that the financial threshold to be prescribed by the minister will be substantial (even higher than previously prescribed in the SRP Code) and a clear calculation basis as to whether a company meets such threshold will be provided as to avoid confusion and small private companies falling into the definition of a regulated company.

Interested persons are invited to submit their written comments to the Bill by 31 October 2021.

Xhanti Mtulu, Andre de Lange and Akhona Mgwaba

OUR TEAM

For more information about our Corporate & Commercial practice and services in South Africa and Kenya, please contact:



Willem Jacobs
Practice Head
Director
Corporate & Commercial
T +27 (0)11 562 1555
M +27 (0)83 326 8971
E willem.jacobs@cdhlegal.com



David Thompson
Deputy Practice Head
Director
Corporate & Commercial
T +27 (0)21 481 6335
M +27 (0)82 882 5655
E david.thompson@cdhlegal.com



Sammy Ndolo
Managing Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E sammy.ndolo@cdhlegal.com

Roelof Bonnet
Director
T +27 (0)11 562 1226
M +27 (0)83 325 2185
E roelof.bonnet@cdhlegal.com

Tessa Brewis
Director
T +27 (0)21 481 6324
M +27 (0)83 717 9360
E tessa.brewis@cdhlegal.com

Etta Chang
Director
T +27 (0)11 562 1432
M +27 (0)72 879 1281
E etta.chang@cdhlegal.com

Vivien Chaplin
Director
T +27 (0)11 562 1556
M +27 (0)82 411 1305
E vivien.chaplin@cdhlegal.com

Clem Daniel
Director
T +27 (0)11 562 1073
M +27 (0)82 418 5924
E clem.daniel@cdhlegal.com

Jenni Darling
Director
T +27 (0)11 562 1878
M +27 (0)82 826 9055
E jenni.darling@cdhlegal.com

André de Lange
Sector head
Director
Agriculture, Aquaculture
& Fishing Sector
T +27 (0)21 405 6165
M +27 (0)82 781 5858
E andre.delange@cdhlegal.com

Werner de Waal
Director
T +27 (0)21 481 6435
M +27 (0)82 466 4443
E werner.dewaal@cdhlegal.com

John Gillmer
Joint Sector head
Director
Private Equity
T +27 (0)21 405 6004
M +27 (0)82 330 4902
E john.gillmer@cdhlegal.com

Johan Green
Director
T +27 (0)21 405 6200
M +27 (0)73 304 6663
E johan.green@cdhlegal.com

Ian Hayes
Director
T +27 (0)11 562 1593
M +27 (0)83 326 4826
E ian.hayes@cdhlegal.com

Peter Hesselting
Director
T +27 (0)21 405 6009
M +27 (0)82 883 3131
E peter.hesselting@cdhlegal.com

Quintin Honey
Director
T +27 (0)11 562 1166
M +27 (0)83 652 0151
E quintin.honey@cdhlegal.com

Brian Jennings
Director
T +27 (0)11 562 1866
M +27 (0)82 787 9497
E brian.jennings@cdhlegal.com

Rachel Kelly
Director
T +27 (0)11 562 1165
M +27 (0)82 788 0367
E rachel.kelly@cdhlegal.com

Yaniv Kleitman
Director
T +27 (0)11 562 1219
M +27 (0)72 279 1260
E yaniv.kleitman@cdhlegal.com

Justine Krige
Director
T +27 (0)21 481 6379
M +27 (0)82 479 8552
E justine.krige@cdhlegal.com

Johan Latsky
Executive Consultant
T +27 (0)11 562 1149
M +27 (0)82 554 1003
E johan.latsky@cdhlegal.com

Nkcubeko Mbambisa
Director
T +27 (0)21 481 6352
M +27 (0)82 058 4268
E nkcubeko.mbambisa@cdhlegal.com

Nonhla Mchunu
Director
T +27 (0)11 562 1228
M +27 (0)82 314 4297
E nonhla.mchunu@cdhlegal.com

Ayanda Mhlongo
Director
T +27 (0)21 481 6436
M +27 (0)82 787 9543
E ayanda.mhlongo@cdhlegal.com

William Midgley
Director
T +27 (0)11 562 1390
M +27 (0)82 904 1772
E william.midgley@cdhlegal.com

Tessmerica Moodley
Director
T +27 (0)21 481 6397
M +27 (0)73 401 2488
E tessmerica.moodley@cdhlegal.com

Anita Moolman
Director
T +27 (0)11 562 1376
M +27 (0)72 252 1079
E anita.moolman@cdhlegal.com

OUR TEAM

For more information about our Corporate & Commercial practice and services in South Africa and Kenya, please contact:

Francis Newham

Executive Consultant
T +27 (0)21 481 6326
M +27 (0)82 458 7728
E francis.newham@cdhlegal.com

Gasant Orrie

Cape Managing Partner
Director
T +27 (0)21 405 6044
M +27 (0)83 282 4550
E gasant.orrie@cdhlegal.com

Verushca Pillay

Director
T +27 (0)11 562 1800
M +27 (0)82 579 5678
E verushca.pillay@cdhlegal.com

David Pinnock

Joint Sector head
Director
Private Equity
T +27 (0)11 562 1400
M +27 (0)83 675 2110
E david.pinnock@cdhlegal.com

Allan Reid

Joint Sector Head
Director
Mining & Minerals
T +27 (0)11 562 1222
M +27 (0)82 854 9687
E allan.reid@cdhlegal.com

Megan Rodgers

Sector Head
Director
Oil & Gas
T +27 (0)21 481 6429
M +27 (0)79 877 8870
E megan.rodgers@cdhlegal.com

Ludwig Smith

Director
T +27 (0)11 562 1500
M +27 (0)79 877 2891
E ludwig.smith@cdhlegal.com

Tamarin Tosen

Director
T +27 (0)11 562 1310
M +27 (0)72 026 3806
E tamarin.tosen@cdhlegal.com

Roxanna Valayathum

Director
T +27 (0)11 562 1122
M +27 (0)72 464 0515
E roxanna.valayathum@cdhlegal.com

Roux van der Merwe

Director
T +27 (0)11 562 1199
M +27 (0)82 559 6406
E roux.vandermerwe@cdhlegal.com

Andrew van Niekerk

Head of Projects & Infrastructure
Director
T +27 (0)21 481 6491
M +27 (0)76 371 3462
E andrew.vanniekerk@cdhlegal.com

Charl Williams

Director
T +27 (0)21 405 6037
M +27 (0)82 829 4175
E charl.williams@cdhlegal.com

Emma Hewitt

Practice Development Director
T +27 (0)11 562 1635
E emma.hewitt@cdhlegal.com

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI

Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. PO Box 22602-00505, Nairobi, Kenya.
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114 E cdhkenya@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

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