

1 OCTOBER 2018



CORPORATE & COMMERCIAL ALERT

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NEWLY-PUBLISHED COMPANIES AMENDMENT BILL: CLOSING THE GAPS AND CLEARING THE AIR

The Minister of Trade and Industry published a draft amendment Bill to the Companies Act, No 71 of 2008 (Companies Act) for public comment on 21 September 2018. The Companies Act has not been substantively amended since coming into effect in 2011; but the Department of Trade and Industry has now published a broad list of proposed amendments, to align the Companies Act with global trends, and to do away with problematic areas and lacunae encountered during seven years of implementation.

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Some of the proposed changes noticeably serve to strengthen checks and balances and ensure investor confidence, whilst others are aimed at softening regulatory requirements which may have proven arduous over the years. While the changes are open for public comment, it is important to consider and prepare for the potential effect on business. Some of the most notable amendments from a corporate and commercial law perspective are listed below.

Each issue easily warrants a detailed discussion and debate in its own right (and no doubt this will develop through the commentary phase on the Bill), however, for present purposes only a few high-level points are made:

Memorandum of Incorporation (section 16):

The CIPC will only have 10 business days to process amendments to the memorandum of incorporation of a company, after which any amendments will be deemed to take effect if the CIPC has not endorsed or rejected same after the filing. This amendment will provide much-needed certainty as to the status and effectiveness of amendments, and will do away with the concern of lengthy delays.

Irregular share issues (new section 38A):

The courts will be given the power to validate irregular share creations, issues and/or allotments. This was a significant omission in the Companies Act when it came into force given that a similar and useful provision was contained in s97 of the previous Companies Act (1973).

Share buy-backs (section 48):

Share buy-backs are to be more stringently regulated as a special resolution of the shareholders of a company will now be required for any share buy-back unless per a *pro rata* buy-back offer or on a recognised stock exchange. However this appears to be a case where the drafting does not accurately reflect the intended change – the intention rather appears to be that share buy-backs from directors and prescribed officers, which currently require a special resolution, are to be exempt from the special resolution requirement if the same are pursuant to *pro rata* offers or on an exchange.

Intra-group financial assistance (section 45):

Probably the most significant and useful proposed change is that a special resolution of the shareholders of a company will no longer be required when companies give financial assistance to, or for the benefit of, a subsidiary.

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The definition of an employee share scheme will include a scheme that involves the purchase of shares, and not just an issue of shares.



This is certainly a helpful and important change, and demonstrates the reduction of regulatory burden. However, a special resolution will still be required in instances where subsidiaries provide financial assistance to each other or to a holding company.

Remuneration report (new section 30A):

The directors of a public company will be required to prepare a directors' remuneration report for submission to the shareholders at the annual general meeting of the company. Albeit that no significant detail as to the content of the remuneration report is to be contained in s30A (apart from requiring (i) a background statement, (ii) an overview of the remuneration policy of the company, and (iii) an implementation report), the required report will presumably mirror the relevant recommended practices contained in King IV (2016) as to content.

Definition of "regulated company" (section 118):

The circumstances in which a private company will be deemed to be a "regulated company" for purposes of the takeover regulations are to

be significantly overhauled. It is now proposed that any private company that is subject to the "extended accountability and transparency" requirements in chapter 3 of the Companies Act shall be a regulated company. This includes any private company that is required to have its financial statements audited, which in turn depends on its "public interest score" as calculated in terms of regulations 26 and 28, or whether it holds assets in a fiduciary capacity.

Employee share schemes (section 95):

The definition of an employee share scheme will include a scheme that involves the purchase of shares, and not just an issue of shares. This expands then the ambit of the exemptions contained in s41, 44 and 45 of the Companies Act regarding special resolution requirements for share issues and financial assistance to directors and prescribed officers, as well as financial assistance in connection with the acquisition of the securities of a company or its related companies. This proposed amendment may be seen as a welcome clarification, as there was some uncertainty regarding this definition.

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This change perhaps allows a person who is still familiar with the relevant industry and affairs of a company to serve as the auditor, whilst still recognising the importance for such person to be independent of the company for a period.

Auditors (section 90):

The period following which a person who was closely involved in the affairs of a company (being directors, prescribed officers, employees, consultants etc.) may be appointed as an auditor of a company after ceasing to be so involved, is proposed to be reduced from five years to two years. This change perhaps allows a

person who is still familiar with the relevant industry and affairs of a company to serve as the auditor, whilst still recognising the importance for such person to be independent of the company for a period.

Click [here](#) for a copy of the draft Bill.

Christine Bodenstein and Yaniv Kleitman



2017 1ST BY M&A DEAL FLOW FOR THE 9TH YEAR IN A ROW.

<p>2017 2nd by M&A Deal Value. 1st by General Corporate Finance Deal Flow for the 6th time in 7 years. 1st by General Corporate Finance Deal Value. 2nd by M&A Deal Flow and Deal Value (Africa, excluding South Africa). 2nd by BEE Deal Flow and Deal Value.</p>	<p>2016 1st by M&A Deal Flow. 1st by General Corporate Finance Deal Flow. 2nd by M&A Deal Value. 3rd by General Corporate Finance Deal Value.</p> <p>2015 1st by M&A Deal Flow. 1st by General Corporate Finance Deal Flow.</p>	<p>2014 1st by M&A Deal Flow. 1st by M&A Deal Value. 1st by General Corporate Finance Deal Flow.</p> <p>2013 1st by M&A Deal Flow. 1st by M&A Deal Value. 1st by Unlisted Deals - Deal Flow.</p>	<p>2012 1st by M&A Deal Flow. 1st by General Corporate Finance Deal Flow. 1st by General Corporate Finance Deal Value. 1st by Unlisted Deals - Deal Flow.</p>
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