

Draft Companies Amendment Bill

The Department of Trade and Industry published the long awaited Draft Companies Amendment Bill for public comment on 21 September, with a comment deadline of 20 November 2018.

The Companies Act, 2008 (“Act”) has been effective from 1 May 2011 and there have been numerous calls for the Department of Trade and Industry to amend certain sections.

Summary of proposed amendments

1. Amendment of section 1 - Definitions

- a. Insertion of the definition of the B-BBEE Act and B-BBEE Commission
- b. Substitution of definition of securities
- c. Insertion of the definition of Treasury Regulations

2. Amendment of section 16 – Amending Memorandum of Incorporation

Section 16 is amended by replacing the paragraph dealing with the effective date of the amendment of a company’s MOI. The section currently states that the amendment to the MOI takes effect in any case except as per section 16(9)(a) on the later of the date on, and time at, which the Notice of Amendment is filed, or the date set out in the in the Notice of Amendment.

The proposed amendment states that the amendment to the MOI will take effect 10 business day after the receipt of the Notice of Amendment, if the Commission after the 10 business days has not endorsed the Notice or failed to deliver a reaction to the Notice of Amendment to the company with reasons.

3. Amendment of section 25 – Location of company records

Section 25 is amended with the requirement that the Commission must publish the location at which particular records are kept, if not at the company’s registered office. Currently the Act only requires for the notice to be filed with the Commission and not the publication thereof.

4. Amendment of section 26 – Access to company records

Section 26 is amended by changing the access that a person who does not hold or does not have a beneficial interest in any securities issued by a profit company, or who is not a member of a non-profit company have in terms of company records. The current Act only allows other persons to inspect or copy the securities register. The draft Bill proposes access to:

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

The request for access must also be complied with within 5 business days, instead of the current 14 business days.

5. Section 30(4) – Annual financial statements

The proposed amendments to section 30(4) sets out to clarify the confusion that exists with regards to the disclosure of directors remuneration and states that each individual director or prescribed officer must be named.

6. Section 30(4A) – Duty to prepare a directors' remuneration report

Section 30(4A) sets out the requirements that public companies must prepare a directors' remuneration report and sets out what must be included in this report. This proposed amendment align the Companies Act with the King IV Report requirements and require that the directors remuneration report must include a background statement, an overview of the main provisions of the company's policy on remuneration and an implementation report containing details of remuneration and benefits awarded to individual directors. This report must be approved by the board and signed on behalf of the board by a director. This report must also be presented to shareholders at the AGM. The draft Bill does not require a non-binding shareholders vote on the remuneration policy and implementation report.

7. Section 33 – Annual return

The draft Bill removes the section that states that a company must file a copy of its annual financial statements if it is required to have such statements audited in terms of section 30(2) or the regulations contemplated in section 30(7) and replaces this with the requirement to file a copy of its latest annual financial statements. This therefore requires all companies to submit annual financial statements, irrespective on whether the company's financial statements are required to be audited.

The draft Bill includes the requirement that all companies must file a copy of their company's securities register.

8. Section 38A – Validation of irregular creation, allotment or issuing of shares

Section 38A is a new section which allows for the validation by the court of the irregular creation, allotment or issuing of shares.

9. Section 40 – Consideration for shares

Section 40(5)(b) currently require that shares that cannot be realised by the company until a later date must be kept in a trust. The proposed amendment removes the requirement for the shares to be kept in trust but rather that shares can be transferred to a third party as a stakeholder.

10. Section 45 – Loans or other financial assistance to directors

The proposed amendments to this section includes the amendment of the heading from “Loans or other financial assistance to directors” to “Financial assistance to directors and group of companies” and a new subsection (2AA) that states that section 45(2) does not apply to the giving of financial assistance by a company to its own subsidiaries, which eases the burden of companies providing financial assistance to their own subsidiaries and having to apply all the requirements of this section.

11. Section 48 - Company or subsidiary acquiring company’s shares

The requirement for shares when repurchased from a director, a prescribed officer or a related person to the directors or prescribed officer, to be approved by special resolution has been amended and a special resolution is not required if a pro rata offer is made to all the shareholders or a particular class of shareholders or the transaction is effected in the ordinary course on a recognised stock exchange on which the shares traded.

12. Section 61 – Shareholders meetings

Section 61 is amended by requiring the presentation of a social and ethics committee report and a remuneration report to shareholders at the AGM in addition to the presentation of the directors’ report, audited financial statements and the audit committee report.

13. Section 72 – Board committees

The proposed amendment requires all public (no longer only listed public companies) and state-owned companies to appoint a social and ethics committee. The amendments also require that the social and ethics committee report must be externally assured and be presented at the shareholder meeting. Much of the requirements currently included in the Companies Regulations have now been added to the draft Bill. The Regulations currently only require the social and ethics committee to report, through one of its members, to the shareholders at the company’s annual general meeting on the matters within its mandate.

14. Section 90 – Appointment of auditor

The proposed amendment removes the requirement for auditors to be appointed at the annual general meeting, which has been an issue for private companies which are not required to have an annual general meeting. The auditors can now be appointed at a shareholders meeting.

15. Section 118 - Application of this Part, Part C and Takeover Regulations

The draft Bill proposes that the takeover provisions will only apply to private companies that falls within the provisions of section 84(1)(c) which states:

- “(c) a private company, a personal liability company or a non-profit company-
- (i) if the company is required by this Act or the regulations to have its annual financial statements audited every year: Provided that the provisions of Parts B and D of this Chapter will not apply to any such company; or
 - (ii) otherwise, only to the extent that the company's Memorandum of Incorporation so requires, as contemplated in section 34(2).”

16. Section 135 – Post commencement finance

Section 135 is amended with the inclusion of amounts owed by the company to any owner of the property, including a landlord for the property where the company that is placed in business rescue is operating from to post commencement financing.

There are also various amendments relating to the Companies Tribunal and the Financial Reporting Standards Council which interested parties can refer to.