**Background Note and Explanatory Memorandum on the Companies Amendment Bill**

**Part 1: Background of and Rationale for the Bill**

1. **BACKGROUND**
   1. This Background Note is published to set out certain proposed changes to the Companies Amendment Act, 2008. It provides the motivation for substantial changes, and seeks public comment on the proposed changes. This Amendment Bill was first published for public comment on 21 September 2018 and has been significantly revised as a result of engagement since then. For this reason, and to enable further public comment, it is published a second time, in amended form.
   2. In 2011, the Companies Act, 2008 (Act No. 71 of 2008) ("the Act"), that was a result of the 2004 policy review, came into effect. It repealed the Companies Act, 1973. The Act introduced significant changes by providing inter alia for business rescue, simplification of registration, social and ethics committees for public companies, corporate governance including financial accountability, and provisions relating to shareholder activism. The Act provides for the establishment of institutions, such as the Companies and Intellectual Property Commission ("the Commission"), Companies Tribunal ("the Tribunal"), Specialist Committee in Company Law, Financial Reporting Standards Council and Takeover Regulations Panel.
   3. The Act, and the Companies Regulations, 20111 ("the regulations"), were implemented in May 2011. The Act was subject to review after five years of implementation.
   4. The Specialist Committee on Company Law (“**SCCL**”) was established in 2011 in terms of section 191 of the Act to advise the Minister on any matter relating to companies law or policy. The SCCL has met regularly since its original appointment.

1 GNR. 351 of 26 April 2011

* 1. The Department of Trade, Industry and Competition undertook a review of aspects of the Companies Act in order to identify changes needed to keep up with the current trends and to remedy some anomalies and eliminate certain deficiencies in the Act as discovered with implementation.
  2. The SCCL proposed various amendments to the Act. The SCCL considered these amendments as necessary or desirable in light of various problems exprerienced since the Act came into operation. Other stakeholders also proposed some amendments.
  3. The original Bill was published in the Government Gazette for public comment on 21 September 2018, followed by extensive public engagement between Government and a number of interested persons and organisations. These included the following:
     + The Specialist Committee on Company Law;
     + South African Institute of Chartered Accountants;
     + Banking Association of South Africa;
     + South African Institute of Professional Accountants;
     + South African Property Owners Association;
     + Strate;
     + Johannesburg Stock Exchange;
     + The Institute of Directors in Southern Africa;
     + Independent Regulatory Board for Auditors;
     + Amabhungane;
     + Helen Suzman Foundation;
     + B-BBEE Commission;
     + Companies and Intellectual Property Commission;
     + Companies Tribunal;
     + Takeover Regulation Panel;
     + Association of Black Securities and Investment Professionals; and
     + Who Owns Whom (Pty) Ltd.
  4. In addition to the consultation with a range of organisations, substantial discussions were held with the business and labour constituencies represented at the National Economic Development and Labour Council

(Nedlac). Engagement at Nedlac commenced in July 2019 and concluded in June 2021. This Background Note provides an insight into the position by various constituencies in these discussions.

* 1. To make this Background Note clearer to members of the public, in some cases it uses less precise language than is set out in the Bill. For example, this Background Note refers in particular instances to ‘shares’ where the Bill refers to ‘securities’ (which may include debentures). As in all such cases where there is a difference between this Background Note and the Bill, the language in the Bill itself should be relied on.
  2. Members of the public and interested parties are invited to submit comments on the proposed changes set out in the Bill before these will be considered by Cabinet for approval. In particular, comments are sought on the following:
     1. the extent to which the Bill addresses concerns raised in the previous public consultation process regarding gaps and challenges experienced by practitioners following the review of the implementation of the Companies Act, No 71 of 2008, as amended;
     2. whether and how the changes contemplated will impact on the ease of doing business and the objective of eliminating unnecessary red- tape;
     3. the proposals on greater transparency on pay gaps and the power and responsibilities of shareholders and directors in this regard as well as specific mechanisms to deal with these issues as identified in the discussion below; and
     4. on the new provisions on beneficial ownership in light of the global effort to address anti-money laundering and financing of terrorism as well as on appropriate triggers for disclosure and the content of the disclosure.

# PHILOSOPHICAL PILLARS OF THE PROPOSED AMENDMENTS

* 1. It is necessary at the outset, and before identifying and explaining the proposed amendments, to point out that there are a number of important policy objectives which the proposed amendments are designed to achieve. In order to appreciate these underlying policy objectives it is necessary to identify them and thereafter to group the proposed amendments into the various categories of policy objectives so identified.
  2. The three prime categories of policy objectives sought to be addressed by the proposed amendments are as follows :-
     1. first, the ease of doing business. In this regard it is important that company law should, among other factors, be clear, user friendly, consistent with well-established principles and not be over burdensome on the conduct of business. This is important not only for the attraction of foreign investors but also for the efficient and effective conduct of the domestic economy and for the creation of jobs. As will be seen from the explanations set out in this memorandum, in respect of many of the proposed amendments, they are technical in nature, and based on submissions received during the extensive engagement with interested parties, and are designed to ease the doing of business through providing legal certainty where these do not currently apply, providing greater flexibility to companies in certain circumstances, or removing unnecessary provisions in the Act. These changes are discussed in Section 4 below;
     2. secondly, the achievement of equity as between directors and senior management on the one hand, and shareholders and workers on the other hand as well as addressing public concerns regarding high levels of inequalities in society. Certain of the proposed amendments are designed to achieve better disclosure of senior executive remuneration and the reasonableness of the remuneration. These issues are addressed primarily in the proposed requirements of the Remuneration Report. These are issues which have raised similar concerns in other leading

jurisdictions. The provisions relating to transparency on the pay gap and the reasonableness of remuneration provide an objective benchmark which will assist the public dialogue on this topic. The changes are discussed in Section 5 below;

* + 1. thirdly, the efforts to counter money laundering and terrorism. South Africa is part of an international effort by leading economies to address this concern. South Africa’s rating in the Mutual Evaluation Assessment of the country’s anti-money laundering and combating the financing of terrorism pointed to weaknesses in determining the true owner of shares in companies. To address this, the Bill sets out proposed amendments relating to disclosure of ultimate beneficial ownership in the shares of a company. Government’s efforts to counter money laundering and terrorism feature not only in the proposed amendments to the Companies Act but also in other areas of legislation and administration. Again, these concerns are being addressed in many foreign jurisdictions. The changes are discussed in Section 6 below.
  1. The fairly extensive amendments to the provision relating to the social and ethics committee are designed to deal with several of the policy areas referred to in paragraph [2.2](#_bookmark1) above. In particular a number of gaps have been remedied such as the requirement regulating annual general meetings for shareholders to appoint the members of the Social and Ethics Committee, and the mechanism and timelines for the appointment of the Social and Ethics Committee. In addition provision will be made for deficiencies described in the Social and Ethics Report to be remedied and for the attendant sanctions for non-compliance with remedying deficiencies.
  2. The remainder of the proposed amendments which do not fall within any of the three prime categories of policy objectives are essentially purely administrative issues, enhancement of regulatory efficiency and tidying up of drafting deficiencies. Examples of these include :-
     1. the definition of the BEE Commission. The insertion of this definition was necessary having regard to the fact that it is referred to in the text of the Act, as amended; and
     2. changes relating to the Companies Tribunal. These are required to promote regulatory or institutional efficiency.

# PROVISIONS – AN OVERVIEW

* 1. Against the background of the three categories of policy objectives referred to in paragraph [2](#_bookmark0) above, and as a result of the public and Nedlac consultations and discussions with the SCCL, a number of changes have been made to the Bill. These changes address amendments to cover the following :-
* to change the definition of securities;
* to provide for the definition of true owner;
* to provide for the preparation, presentation and voting on companies’ remuneration policy and directors’ remuneration implementation report;
* to provide for the filing of the annual financial statements, the filing of the copy of the company’s securities register and the copy of the register of disclosure of beneficial ownership with the Commission;
* to differentiate where the right to gain access to companies’ records may be limited;
* to clarify when a Notice of Amendment of a Memorandum of Incorporation (MoI) takes effect;
* to empower the court to validate the irregular creation, allotment or issue of shares;
* to clarify certain aspects relating to partly paid shares;
* to exclude subsidiary companies from certain of the requirements relating to inter-group financial assistance;
* to provide for instances where a special resolution is required for the acquisition of shares by the company;
* to extend the definition of an employee share scheme to include situations where there are purchases of shares of a company;
* to provide for the circumstances under which a private company will be a regulated company in the context of affected transactions;
* to provide for circumstances where a company is unable to identify the persons who hold a beneficial interest in its securities;
* to deal with the composition of the social and ethics committee and the publication of the application for exemption from the requirement to appoint a social and ethics committee;
* to provide for the presentation and approval of the social and ethics committee report at the annual general meeting or other meetings of shareholders;
* to ensure the differentiation of duties between the chairperson of the Tribunal and its Chief Operation Officer; and
* to provide for matters connected with the above.
  1. The more technical changes relate to the following:
* an amendment to section 16 of the Act which is designed to provide certainty as to the effective date of amendment to the company’s MoI. This is a vital requirement.
* The amendment to section 26 of the Act relates to access to company records to provide clarity and promote transparency. Provision is made for the right of members of the public to inspect and copy a company’s Memorandum of Incorporation and any amendments to it, the records in respect of the company’s directors, annual financial statements, securities register and the register of the disclosure of beneficial interests of the company. Further amendments relate to beneficial holders, the register of the disclosure of beneficial interest of the company and separating reports of annual meetings and annual financial statements as subsections in the Bill.
* The requirement to allow persons to inspect and copy information will not apply to companies below a certain size. The companies excluded are private, non-profit or personal liability companies where an annual financial statement is internally prepared in respect of a company with a Public Interest Score of less than 100 or an annual financial statement which is independently prepared in a company with a Public Interest Score of less than 350. The Bill also introduces a defence in instances where a prescribed officer or director, despite taking reasonable steps, is unable to provide the requested information.
* Certain requirements in section 45 regarding the provision of financial assistance by a holding company to its subsidiary are deleted. This is in recognition of the fact that the protections contained in section 45 are not required for the provision of financial assistance by a holding company to its subsidiary and gives rise to an unnecessary compliance burden.
* Certain important amendments are proposed to section 72 relating to the social and ethics committee: a procedure to exempt certain companies from the requirement to establish a social and ethics committee through an application to the Companies Tribunal; instances where the social and ethics committee is not required. The Bill provides for the minimum qualification requirements for members of the social and ethics committee. It provides for the composition of the social and ethics committees for publicly-listed, state-owned and private companies. The Bill provides for the mechanism for the appointment of the social and ethics committee as well as addressing the filling of vacancies. The Bill clarifies the status of the social and ethics committee report and requirements relating thereto including its presentation to shareholders. The report requires approval by means of an ordinary resolution of shareholders. The Bill provides for the consequences of failing to achieve the approval of shareholders and the process to be followed. One of these consequences includes a requirement that the social and ethics committee must engage with shareholders who voted against the report and who are willing to engage on the vote. Furthermore, the Bill provides that within four months, a public company must publish a statement on its website and the Stock Exchange News Service which shall form part of the committee report. Such statement must include the steps taken to engage with the dissenting shareholders, the outcome of such engagement and the actions that will be taken by the company to address the issues raised by the dissenting shareholders. Such a statement must be presented at the next annual general meeting.
* The amendment in section 90 clarifies when a company which is required to have annual financial statements audited, is also required to appoint an auditor.
* The provisions of section 92 of the Act are amended to reduce the cooling- off period relating to auditors from 5 years to 2 years. The introduction of mandatory audit firm rotation which commences in 2023, makes this an important amendment.
* Section 118 of the Act deals with the jurisdiction of the Takeover Regulation Panel (the “Panel”) in respect of private companies. The existing provisions are irrational and impractical and significantly increase the work load of the Panel. The Panel submitted that the link to section 84(1)(c) should be removed, mainly on the basis that this section and Regulation 28 refer to factors such as employment and public interest score that the Panel considered to be outside its jurisdiction.
* Section 135 of the Act contains a proposal for an amendment in respect of post-commencement finance in business rescue. Certain service providers are precluded by virtue of the statutory moratorium applicable during business rescue from recovering disbursements to third parties. This is manifestly unfair for example to landlords who have to incur costs for utilities such as rates and taxes, electricity, water, sanitation and sewer charges. Failure to provide for these charges can lead to the failure of the business rescue process. By virtue of the proposed amendment, the amounts will be regarded as post-commencement finance and enjoy the relevant preferential ranking.
* Administrative provisions applicable to the Companies Tribunal require the amendments set out in the Bill.
* Provision is made for the judicial rectification of invalid or irregular issue of shares. This provision was contained in the prior Companies Act of 1973 and was inadvertently not carried forward into the Act.

All the changes described above in paragraph 2.2 of this document have been supported by the Business Unity South Africa (BUSA) and labour representatives at Nedlac.

* 1. In addition to the various changes described above, the Bill also makes provision for changes in two areas that have been the subject of extensive discussions between the business and labour constituencies, together with government representatives. These relate to the reporting of remuneration

within companies and policies connected thereto; and the disclosure of the accurate holdings of the owners of beneficial interests in companies. As these matters affect significant policy issues, they are set out in greater detail in sections 5 and 6 below.

# THE EASE OF DOING BUSINESS

* 1. As set out in paragraph [2](#_bookmark0), and in particular paragraph [2.2.1](#_bookmark2), one of the prime categories of policy objectives sought to be addressed in the proposed amendments is the ease of doing business and conversely the reduction of unnecessary burdens.
  2. It is an important policy objective of all legislation and regulation that it should be cost effective. This essentially entails the costs both of administration and compliance should be effective.

Administrations in many countries worldwide are becoming increasingly attentive to this policy objective of cost efficiency.

* 1. As mentioned earlier in this Explanatory Memorandum clear, well drafted, user friendly legislation is an imperative. Not only does it facilitate efficiency in conducting business but, of equal importance, it reduces the cost of doing business.
  2. Another important objective in this policy domain is the necessity to eliminate excessive administrative burdens. This is particularly necessary in the context of small and medium business. Not only are excessive administrative and regulatory burdens costly to small business but, in addition, in many cases it constitutes a barrier to entry. This factor has many consequences in that, for example, it impacts negatively on employment creation, economic growth and the competitive environment.
  3. In Part 2 of this Explanatory Memorandum there appears a clause by clause description of the various proposed amendments. Without detracting from any of those descriptions it is appropriate to select certain of the proposed amendments by way of illustration how the objective of improving the ease of doing business is advanced. These appear hereunder. They must be regarded simply as a sample of numerous technical amendments all of which are designed to promote the ease of doing business.
  4. The proposal to amend section 16 of the Act gives certainty as to the effective date of an amendment to a company’s Memorandum of Incorporation (MoI). This enables the company and its stakeholders to know with precision the effective date of amendments to the Companies MoI. It eliminates significant uncertainty that currently exists.
  5. The proposed amendment to section 45 of the Act recognises that the prohibition of the provision of financial assistance by a company to its subsidiary did not have commercial rationality and is an unnecessary and costly burden. The elimination of this prohibition will greatly facilitate the ease of doing business in an important area of a company’s business operations.
  6. The proposed amendment to section 26 of the Act eliminates burdens of compliance for private companies, non-profits companies and personal liability companies. They will be relieved of the obligation to provide certain financial information where the public interest score is sufficiently low as not to justify burdening such small companies.
  7. The jurisdiction of the Takeover Regulation Panel in respect of private companies has given rise to an unnecessary overreach of regulatory compliance with an insufficiently rational basis. This has had unnecessary burdensome and costly implications. The proposed amendment to section 118 will sensibly limit the jurisdiction of the Takeover Regulation Panel in respect of private companies to those companies where there is a ‘public interest’ as defined in the Act.
  8. As regards the Social and Ethics Committee, the Bill proposes that the Company Tribunal will have the power in a clarified procedure to grant exemptions to companies on application and on good cause, thereby reducing the compliance burden where it is appropriate to do so.
  9. A proposed amendment to section 90 of the Act recognises the impact of the new provisions in the Auditor legislation requiring Mandatory Audit firm rotation. This effectively limits the selection of audit firms in an economy that has a shortage of suitably resourced audit firms. It is therefore important to reduce the cooling off period of auditor involvement. This Bill will widen the

pool of audit firms that a company will have access to and thus make it easier for companies to appoint suitably- resourced firms.

* 1. There exists an unintended omission in the Act from a provision that was in the predecessor Act permitting an application to Court to ratify an invalid allotment of shares in certain circumstances where, for example, there is insufficient authorised capital to service such allotment. This deficiency in the Act continues to create unnecessary impediments to doing business and means that there is doubt as to the legal remedies and routes available to correct and validate on good cause such invalid allotment. The proposed section 38A will remedy this deficiency.
  2. The proposed amendment to section 40 of the Act will achieve important clarity to the ability of companies in certain circumstances to issue partly paid shares. This section also assists in the financing of BEE transactions. The major effect of the amendments is to substitute a stakeholder arrangement instead of a trust. The main benefit of doing this is that it eliminates any concerns which have been expressed on the basis of the existing provisions that the Trust Property Control Act will apply. This concern will be eliminated.
  3. There is an important amendment to section 135 of the Act which puts on the same basis as post-commencement finance payments by landlords of certain disbursements such as rates and taxes and electricity of tenants which are in business rescue and thus, against whom no legal proceedings may be instituted. This will make the business rescue process more effective and a realistic alternative to liquidation, thus keeping businesses open when otherwise they may be subject to closure.
  4. Certain financial reporting requirements will not be applicable to small and medium enterprise which have a public interest score below certain levels. It is unnecessary to have enterprises which really don’t operate significantly in the public domain to have burdensome and costly financial reporting requirements.
  5. Finally, a significant amendment is proposed to the provisions of section 48(8)(b) which deals with buy-backs by companies of their own shares in excess of 5% of the issued share capital of a company or class of shares of the company. The approval of any such buy-backs by means of a special resolution is currently required. Such a requirement would be entirely unnecessary where the buy-back occurs on a recognised stock exchange or is pro-rata to all shareholders. In such circumstances the protection envisaged by the requirement of a special resolution is unnecessary, time consuming and costly. This has been removed.

# REMUNERATION REPORT

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

The factors giving rise to these concerns are to an extent responsible for the significant levels of inequity in society. Conventional wisdom internationally is that these levels of inequity in society are unsustainable in a post-Covid world. The concerns internationally about inequity in society is even more relevant, and has even greater resonance, in South Africa which is one of the most unequal societies in the world. In order to address these concerns, the Bill makes provision for significant augmentation in the levels of disclosure of executive remuneration. This follows international trends.

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

–

1. it provides shareholders with an effective means of responding to dissatisfaction of excessive remuneration; and
2. it has the so-called shrinking effect which induces the boards of companies and senior executives to refrain from awarding and receiving excessive remuneration for fear of the adverse reputational consequence.
   1. During the course of discussions at Nedlac on the Bill, the matter of wage ratios and the status of remuneration reports was raised and a number of proposals were made. The discussions focused on what an appropriate package of measures would entail that provided for disclosure of information coupled with greater rights for shareholders at annual general meetings in respect of remuneration reports, without placing an undue burden on small business. Based on the outcome of the discussions with representatives of business and labour, amendments were drafted for inclusion in the Bill.
   2. 5.3.
   3. The Bill, in section 30, provides that where remuneration and benefits are received by company directors or prescribed officers, such directors or prescribed officers must be named in the annual financial statements. This is, however, limited to companies that are required in terms of the Act to have their annual financial statements audited. Research presented by Business Unity South Africa (BUSA) showed that it is common practice in a number of jurisdictions to require disclosure of remuneration for specified senior executive positions. This was reported to be the practice in the European Union, the United Kingdom and Australia. While disclosure of executive remuneration was mostly limited to executive directors, it has been expanded in the United Kingdom to include the CEOs and Deputy CEOs. In Australia, disclosure is in respect of executive directors and specified executives.
   4. The Bill also provides shareholders with better tools to respond to how remuneration issues are dealt with in companies. The Bill proposes the insertion of a new section, section 30A, obliging public companies and state- owned companies to prepare and present a directors’ remuneration report for approval by the board of the company and to disclose information on the pay gap between directors and workers in their annual financial statements and annual reports. This section prescribes the format and content of the report, its presentation to shareholders at an annual general meeting and the consequences following the failure of the report to obtain the required shareholder approval.
   5. A remuneration policy report should be presented at an AGM for approval by ordinary resolution. Once approved, such policy would only have to be presented every three years or whenever material changes are made thereafter. Should a remuneration policy not be approved, it must be presented at the next AGM, until approval is obtained. Changes to the policy may only be implemented once shareholders approve it.
   6. In an implementation report, a company would have to publish details of the remuneration and benefits received by each director or prescribed officer. Much of these details are already required in companies’ annual financial statements.
   7. Public companies and state-owned companies will now also be required to publish details of their highest paid employee, their lowest paid employee, their average remuneration, their median remuneration and the gap between the top 5% highest paid and the bottom 5% lowest paid employees.
   8. The remuneration implementation is required to be approved by ordinary resolution by shareholders at an AGM. Where this does not happen, the remuneration committee must explain at the next AGM how the concerns of shareholders have been addressed and the non-executive directors that serve on the remuneration committee shall be required to stand for re- election.
   9. The Bill attempts to strengthen the remuneration report provisions to provide more information to shareholders and stakeholders on the motivation for the remuneration of directors and prescribed officers, for transparency, accountability and good governance purposes.
   10. The amendments proposed in the Bill are also required to tackle the injustice of excessive pay. The pay gap has been a historical challenge in South Africa and a contributor to the country’s inequality. Following this amendment, the Act will allow for stronger shareholder governance on excessive director pay

and for companies, shareholders and stakeholders to be aware of and, if necessary, address unsustainable pay discrepancies.

* 1. Based on research results presented to Government by BUSA that showed that in most countries, a distinction is made between the requirement for shareholders voting on the remuneration policy and voting on the implementation report, a similar requirement has been included in the Bill. The Bill also follows the example of many other countries where the remuneration policy is only tabled for shareholder approval every three years or when a material change is made.
  2. To ensure greater transparency, the Bill requires improved disclosure of remuneration and wage differentials in companies. The issue of disclosure has become a critical theme in global corporate governance debates, and it is evident that the trend is towards greater disclosure.
  3. The proposals for greater transparency and for publication of the pay gap are also in line with a number of private and other initiatives across the world. It is noted that the King IV Report on Corporate Governance for South Africa states that “the remuneration of executive management should be fair and responsible in the context of overall employee remuneration. It should be disclosed how this has been addressed. This acknowledges the need to address the gap between the remuneration of executives and those at the lower end of the pay scale”. Disclosing executive remuneration and the pay gap can help companies and shareholders assess whether directors’ remuneration is “fair and responsible”.
  4. More countries have, in recent years, introduced new or revised regulatory requirements to strengthen reporting and disclosure requirements. According to research presented by BUSA at Nedlac, Ireland and the United Kingdom, for example, introduced such requirements in response to the revised European Union’s Shareholder Rights Directive which was aimed at encouraging a higher standardised level of disclosure and greater accountability over directors’ pay. According to this research, it does not only target listed companies. In the United Kingdom, large private companies are

now also required to make certain governance related disclosures in an annual report.

* 1. Recent years have seen significant shareholder dissatisfaction over pay and multiple instances where large numbers of shareholders have voted against remuneration reports. In the last year, the remuneration policies of several large listed companies have not received 75% shareholder support. Under current practices, except for boards committing to discuss the matter with disgruntled shareholders, shareholders do not have sufficient mechanisms to address their grievances.
  2. Introducing a requirement for approval by ordinary resolution on a remuneration implementation report will entail a binding vote with consequences, should shareholders be dissatisfied. This is in line with practices seen in Australia where directors have to resign after successive votes against the remuneration report and in the United Kingdom where successive votes that fail mean the composition of the remuneration committee changes.
  3. The approach in the Bill does not go as far as the legal provisions in Australia, where the Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Act of 2011 requires that only 25% of shareholders are required to vote against the remuneration report. The Bill proposes an ordinary resolution, meaning 50% of shareholders need to vote against the remuneration report for the provisions of the Act to be triggered. In addition, unlike Australia, the Bill does not create a requirement for the entire board having to stand for re-election. This was also done to take into account concerns raised by the business representatives at Nedlac. It should be noted however that the proposed amendment is stronger than Australia as it does not require dissenting votes for two consecutive years. Unlike Australia, the process set out in the Bill is also less complicated.
  4. Regarding the requirement in the Bill to disclose pay ratios, this is in line with practices seen in other jurisdictions. For instance, in August 2015, the United States’ Securities and Exchange Commission adopted a rule, in terms of its

Dodd-Frank Wall Street Reform and Consumer Protection Act, which requires a public company, from January 2017, to disclose the ratio of the compensation of its chief executive officer (CEO) to its employees. The Securities and Exchange Commission’s objective was to provide shareholders with information they can use to evaluate a CEO’s compensation.

* 1. A wide range of sources point to the unusually wide inequalities in remuneration in the formal sector in South Africa compared with the rest of the world. Analysis of Statistics South Africa data in the annual Labour Market Dynamics survey shows that inequality in pay contributes as much to overall income inequality as joblessness. According to PwC’s regular survey of executive remuneration, the median pre-tax package for a CEO of a listed company was R5,2 million in 2020, and after-tax it was R2,8 million. That was 100 times the national minimum wage. The PwC found that the median pre- tax package for CEOs was 35 times the median pay for unskilled workers in big business. This finding used information from the PwC wages survey, however, which indicated substantially higher wages for ordinary workers than official surveys.2 According to Statistics South Africa’s Labour Market Dynamics survey for 2019, the median pay for all formal workers was virtually the same as the national minimum wage, which would mean it was around 1% of the median pre-tax pay for CEOs of listed companies. For workers in companies with over 50 employees, pre-tax remuneration for CEOs was 95 times the median wage.3
  2. This kind of inequality underpins much of the well-known workplace conflict in South Africa. The proposed publication of indicators of pay differentials will empower shareholders and other stakeholders to see trends and, where warranted, propose changes. There are complex considerations on the appropriate pay-regime that should apply in a particular company; and due note should be taken of the need to attract and retain the best skills for domestic firms. The Bill does not seek to propose what the ratios between executive and worker pay should be; instead it proposes transparency and empowers shareholder voting to be more effective than is currently the case.

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

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

There is no question, however, that there is widespread public concern about existing pay practices and the current regulatory regime. As a recent Business Day editorial put it bluntly, “It is common knowledge that the wage gap in SA is a yawning one... This is mainly a product of SA’s apartheid history which elevated the salaries of white executives to stratospheric levels as well as a response to a skills shortage at executive level. The market for executives is a global one and to attract skills SA has to remain competitive. And once a norm within the market has been established for executive pay it tends to reproduce itself by creating expectations.”4

* 1. The amendments in the Bill have carried the support of BUSA and organised labour at Nedlac, with two exceptions, details of which are outlined below.
  2. First, as regards the vote on the remuneration implementation report, while BUSA supports the formulation in the Bill, Labour proposes that the vote should have the status of a special resolution (with 75% of shareholders having to approve the report), instead of by means of ordinary resolution (requiring 50% of shareholder approval, which Business supports).
  3. Second, as regards the basis for the calculation of the ratio between the highest and lowest paid, BUSA and organised labour supported the principle of disclosure of wage differentials, including the appropriate ratio to be used, namely the remuneration of the top 5% highest paid and the top 5% lowest paid employees. There is as yet no consensus between the business and labour constituencies on the definition of ‘remuneration’.
     1. the option favoured by Business is for “on-target remuneration” of executives to be used to take away peaks and valleys caused by the payment of certain bonuses and allow for better yearly comparison;
     2. the option favoured by Labour is for the use of executives’ actual annual remuneration. It believes that the actual remuneration

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

received by executives should be used to show the real pay gap between the highest and lowest paid employee every year.

* 1. As noted, both the business and labour representatives at Nedlac support the proposals in the Bill on the publication of wage ratio information and the presentation to shareholders at an AGM, with the exception of the specific areas mentioned above. However, a concern has been expressed to Government that a potential consequence of the disclosure requirement may be greater resort to outsourcing of the lowest paid employees, simply to improve company ratios. To address this, it has been suggested that disclosure of the salaries of sub-contracted employees who perform most or all of their work for or in the firm concerned, should also be required. The Bill has not addressed this concern. Public comment on the concern raised as well as any proposals to address and remedy the concern, would be welcome.
  2. Consideration needs to be given as to whether ratios should reflect pre-tax or post-tax remuneration and public comment on this issue is also invited.
  3. Comments from the public will be welcome on the overall approach to remuneration in the Bill, the various provisions proposed as well as on the issues set out in 5.22, 5.23, 5.24 and 5.25 above.

# BENEFICIAL OWNERSHIP

* 1. Transparency in respect of beneficial ownership reporting is becoming a matter of concern internationally. In both the United States and the European Union, efforts have been made to address the matter of the identity of the holders of the beneficial interests in a company.
  2. The purposes of the Companies Act include “encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation” (section 7(b)(iii)). The access and transparency provisions in the Act help to provide oversight, including by customers, suppliers, workers, the media and the public. It allows these parties to shield themselves from risk, help identify

misstatement, fraud and corruption, and assist in compliance and law enforcement. From this perspective, the Act lacks adequate provisions to allow for the establishment of the identity of true owners of companies. The Bill corrects this by providing for a definition of “true owner” and introducing several measures that companies will have to implement to establish and report their true ownership.

* 1. A “true owner” is defined by the proposed amendments as a natural person who has the power to direct the registered holder of a share with regard to the share or who ultimately benefits from the shareholding. In terms of the proposed definition in the amendments, only a natural person can be a true owner. The identification of the true owner is part of the broader objective of identifying the holders of beneficial interests in the company. The Bill proposes several amendments to section 56 of the Act in an endeavour to identify the true owner more effectively.
  2. In terms of the current Act, unless a company knows the identity of all the persons who hold a beneficial interest in its shares the company may request registered holders of shares to disclose the identity of holders for whose benefit the shares are held. The proposed amendments to Section 56 will –
     1. place an obligation on companies to require from the registered share holder details of the identity of persons who hold beneficial interests.
     2. strengthen provisions requiring that companies establish and maintain a register of owners of beneficial interests in its shares.
     3. require companies to publish in its audited financial statements, details of all persons who alone or in the aggregate hold beneficial interests amounting to 5% or more of the total number of shares of that class.
     4. strengthens the provisions for registered shareholders to disclose to companies who holds beneficial interests in its shares.
  3. In terms of the current Act, a company may request holders of shares to disclose the identity of the ultimate beneficial-interest holders, that is the juristic persons or nominees for whose benefit the shares are held. The Bill seeks to ensure transparency not only around this first tier of beneficial holders (or all nominee arrangements in the security register) but also to require that companies reveal the ultimate beneficial owners. This is the overall objective of these sections of the Bill.
  4. The definition of “true owner” in the Bill is in line with the amended Financial Intelligence Centre Act (FICA).
  5. It also aligns with that of the Financial Action Task Force (FATF), the inter- governmental body that develops and promotes policies to protect the global financial system against money laundering, terrorist financing and the financing of proliferation of weapons of mass destruction. The FATF states “beneficial owner refers to the natural person(s) who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise ultimate effective control over a legal person or arrangement.”
  6. There are a multiplicity of reasons supporting legislative measures to determine the ultimate owners of beneficial interests in a company. Fraud and tax evasion can thrive when company ownership is opaque. Company ownership arrangements can be misused for illicit purposes and other crimes including money laundering (proceeds of corruption) and terrorism finance.
  7. To overcome this, authorities and the public need to know not only who the registered shareholders of a company are, but also whether they hold those shares on behalf of others, and, in the case of owners that are companies or trusts, who ultimately own the beneficial interest in those shares.
  8. European Union countries, among others, have made significant strides in requiring beneficial ownership data to be disclosed by companies, and making it public. Under the Fourth Anti-Money Laundering Directive of June

2017, all EU member states set up central registers of beneficial ownership. Under the Fifth Anti-Money Laundering Directive of April 2018, these were to be made public by early 2020.

* 1. The Group of Twenty’s (G20) Global Framework for Tracing Beneficial Ownership requires members and affiliated countries such as South Africa to encourage beneficial owner disclosure in all their legislation governing business and investment institutions. Hence the SA Government has adopted the G20 High-Level Principles on Beneficial Ownership Transparency in October 2015 to prevent misuse of juristic persons and legal arrangements of ownership. This resulted in South Africa’s action plan to align relevant legislation and to set up an Interdepartmental Task Team, in which the Department of Trade, Industry and Competition (**the dtic**) and the CIPC participate. Establishing and disclosing the true ownership of companies will increase transparency including in public procurement and allow government and the public to monitor government procurement spending.
  2. Several other amendments contained in the Bill sets out the details of the system to establish the ultimate holders of the beneficial interests in a company.
  3. The current Act does not compel companies to request from holders of their shares to disclose the identity of the holders of the beneficial interests. It states that a company that suspects that shares are held for the beneficial interest of others “may” require the registered or suspected beneficial owners to declare the true state of affairs. The Bill intends to change this by closing the loophole of “don’t ask, don’t tell” and changing the “may” to “must”, requiring companies to procure this information.
  4. Following a request from the business representatives at Nedlac for the Bill to prescribe the frequency of such requests by companies, a provision has been inserted that companies must require this information from registered shareholders once every quarter, in instances where a company does not know the identity of all the persons who own beneficial interests in the company.
  5. It is recognised that ultimate beneficial ownership by an individual may be held either by a single nominee or through multiple nominees holding smaller levels of shares. The distinction was made in the Bill between on the one hand, the company requesting information from shareholders and the shareholder disclosing such information to the company; and on the other hand, the company reporting or publishing the beneficial ownership information. The Bill requires that all beneficial ownership be requested by and disclosed to the company concerned, but that the company in turn be required to report/publish shareholding information only in instances where persons in the aggregate, alone or together with other persons, own 5% or more of the beneficial interests of the shares in a class.
  6. Several of the early implementers of public beneficial ownership registers, including the United Kingdom and Ukraine, adopted a 25% threshold. This has been criticised as being too high. There appears to be increasing recognition internationally that the 25% threshold level leaves many relevant beneficial owners outside of the disclosures-net.
  7. According to ownership transparency advocacy groups, a lower threshold for publication of information is in line with current international trends. A number of countries have applied lower thresholds recently including Argentina (1 share or above), Senegal (2%), Nigeria (5%), Paraguay (10%), Kenya (10%) and the Cayman Islands (10%).
  8. At Nedlac, there is consensus between business, labour and government on the requirement on a company to *disclose/publish* information only in instances where the threshold of 5% or more is exceeded.
  9. However, there are different approaches proposed as to when the requirement on companies to *request* true ownership should apply. Two options were identified for the scope of application of the provisions.
     1. the first option is that companies should only have to request information relating to true ownership from those shareholders with

5% or more shareholding of a company. The motivation given for this threshold is to avoid an undue burden on shareholders and firms, by only requiring meaningful levels of shareholdings to be subject to the provision of requiring the identity of the ultimate owners of the beneficial interests in those shares;

* + 1. a second option is to make such provision applicable to all shareholding. The motivation given is to avoid shareholders fragmenting their economic interest through multiple smaller shareholdings held through nominee companies.
  1. Comments from the public will be welcome on the overall approach to beneficial ownership in the Bill but also specifically on the threshold for requiring information as to the identity of the holders of beneficial interests in the shares.
  2. It should be pointed out that two other matters of importance in Company Law Reform are currently being addressed by Government and the SCCL. These are worker representation on company boards and the extension of directors’ duties in favour of a multiplicity of stakeholders. These issues are not addressed in the Bill and will be dealt with in a further Bill to be introduced later this year after appropriate consultation.

# PART 2: CLAUSE BY CLAUSE DESCRIPTION OF THE BILL

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

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

# Clause 1

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

# Clause 2

Clause 2 of the Bill proposes an amendment to section 16 of the Act by requiring that a Notice of Amendment will take effect 10 business days after receipt of the Notice of Amendment to the Memorandum of Incorporation, if the Commission, after the expiry of the 10 business days, has not endorsed the Notice of Amendment or has failed to deliver a rejection of the Notice of Amendment to the company with reasons.

# Clause 3

Clause 3 of the Bill proposes an amendment to section 25 of the Act by requiring the Commission to publish the notice filed by the company in a prescribed manner.

# Clause 4

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

# Clause 5

Clause 5 of the Bill proposes an amendment to section 30 of the Act and provides that where remuneration and benefits are received by a director or prescribed officer of the company, that director or prescribed officer must be named. It further provides for the remuneration policy and background statement of the report not to be made subject to an audit.

# Clause 6

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

# Clause 7

Clause 7 of the Bill proposes an amendment to section 31 of the Act by extending the existing statutory offence to a director or prescribed officer of the company, for refusing access to financial statements and sets out the defence available to such directors or prescribed officers’ of the company.

# Clause 8

Clause 8 of the Bill proposes amendments to section 33 of the Act and requires companies with a public interest score that exceeds the limit set out in the Act, to file with their annual returns, a copy of the company’s latest financial statements. It further proposes the filing by every company of a copy of the security register and a copy of the register of disclosure of beneficial interests with the Commission to ensure transparency and for the Commission to make the annual return available electronically to any person in a prescribed manner.

# Clause 9

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

# Clause 10

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

# Clause 11

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

# Clause 12

Clause 12 of the Bill proposes an amendment to section 48 of the Act that a special resolution will not be required when a company is implementing a share-buyback by

means of an offer made *pro-rata* to all shareholders including where directors, prescribed officers or person/s related to a director or prescribed officer of the company holds shares which are the subject of the offer and will also not be required in respect of transactions effected on a recognised stock exchange.

# Clause 13

Clause 13 of the Bill proposes amendments to section 56 of the Act by providing for the establishment and maintaining of a register of disclosure by the company of beneficial interests. Further it imposes an obligation on the company, where the identity of persons who hold a beneficial interest, including the true owner, is unknown, to request from the registered security holder each quarter to provide details of beneficial interest holders.

# Clause 14

Clause 14 of the Bill proposes amendments to section 61 of the Act by providing for the appointment of the social and ethics committee at the AGM and requiring the social and ethics committee report and remuneration report to be presented at the AGM.

# Clause 15

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

# Clause 16

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

# Clause 17

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

# Clause 18

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

# Clause 19

Clause 19 of the Bill proposes an amendment to section 135 of the Act by inserting subsection (1A), providing that any amounts due by a company under business rescue to the landlord in terms of a contract where the landlord has paid to any third party during the business rescue proceedings in respect of public utility services, company’s share of rates and taxes, electricity and water, sanitation and sewer charges, will be regarded as post-commencement financing with the appropriate ranking of preferences arising therefrom.

# Clause 20

Clause 20 of the Bill proposes amendments to section 145 of the Act by determining the voting interest of the landlord to be equal to the amount referred to in section 135(1A).

# Clause 21

Clause 21 of the Bill proposes amendments to section 160 of the Act by providing that the Companies Tribunal must stipulate the date in the administration order for the company to comply with, before the applicant can approach the Commission to change the name.

# Clauses 22 and 23

Clause 22 of the Bill amends section 166 of the Act by providing that if the Tribunal has issued a certificate stating that a mediation process has failed, an affected person may

refer the matter to arbitration. Clause 23 of the Bill proposes consequential amendments to section 167 of the Act by deleting certain obsolete provisions in section 167(1).

# Clause 24

Clause 24 of the Bill proposes amendments to section 194 of the Act by inserting subsection (1A) conferring certain powers on the chairperson of the Tribunal, for the appointment of the Chief Operations Officer and conferring certain responsibilities thereto.

# Clause 25

Clause 25 of the Bill proposes amendments to section 195 of the Act by giving the Tribunal the power to conciliate arbitrate or adjudicate administrative matters affecting the company in terms of the Act as may be referred to it by the B-BBEE Commission.

# Clause 26

Clause 26 of the Bill proposes amendments to section 204 of the Act by giving the Financial Reporting Standards Council the power to issue financial reporting pronouncements.

# Clauses 27

Clause 27 of the Bill proposes an amendment to the arrangement of sections in the principal Act by virtue of the insertion of new provisions into the principal Act.

# Clause 28

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