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YOUR WEALTH

For Attention:

26th November 2010

Mr A Hermans:
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REQUEST FOR COMMENT ON THE COMPANIES AMENDMENT BILL [B40-2010]

The Portfolio Committee on Trade and Industry intends holding public hearings on the Companies Amendment Bill [B40-2010] on the 30th November and 1st December 2010.

Please receive the SAIPA submission to the Portfolio Committee.

Yours faithfully

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FOUNDING MEMBER OF THE
Ethics Institute
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Overview of Companies Amendment Bill 2010 by the South African Institute of Professional Accountants (SAIPA)

1. Further clarification and simplification achieved

The additional time spent on the Amendment Bill is to be welcomed as the Bill fulfills its purpose of, amongst others:

- Making textual and stylistic corrections;
- Simplifying terminology (in which case the revised definition of group of companies is a good example);
- Improving terminology (for example the expanded definition of member); and
- Giving greater clarification - for example removing ambiguity and possible incorrect interpretations on the intention of the Bill to distinguish effectively between audit and independent review, through, amongst others:
 - The amended definition of audit;
 - The reference to section 30(8) in the general interpretation section 5;
 - The addition of subsection 8 to section 30¹; and
 - The related amendments to sections 84 (Application of Chapter) and 90 (appointment of auditor).

2. Query regarding definition of special resolution

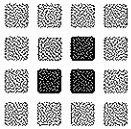
Proposed amendment

The definition of special resolution will be amended to refer to:

(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
- ii. by holders of the company's securities acting other than at a meeting, as contemplated in section 60; or

¹ "(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".



(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.

Comment

Part b of the definition creates the impression that the decision-making of a close corporation, co-operative and other juristic persons will be guided by the definition of special resolution and not their respective acts.

If this was indeed the intention then it is suggested that this be made clear in the other Acts that guide these entities.

If this was not the intention then it is submitted that paragraph b should be redrafted to more clearly state its intention.

3. Section 4 liquidity and solvency test

Proposed amendment

Insert a definition in section 1, for the terms asset; creditor and liability

Comment

The ACCA (South Africa) states that these definitions may remove the common law definition of these terms and replace them with an accounting definition, which should only apply to the preparation of financial statements.

We agree with their submission that these specific definitions should be either removed or included as specific definitions within section 4 (i.e. "For the purposes of this section...").

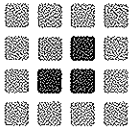
4. Aspect of section 5 (general interpretation of Act) read with section 84 (application of Chapter)

Proposed amendment

The Bill suggests inserting the following subsection (while removing a similar provision from section 84)

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

- (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.



Comment

The wording is difficult to follow and may require further simplification, if possible.

Also, the listing requirement is delegated legislation that receives its legal validity from the Securities Services Act. It is therefore suggested: “(6) Despite the preference given in subsection 4 to the Securities Services Act, or any later Act that succeeds that Act, if there is a conflict between any provision of this Act and a provision of the listing requirements of an exchange:

- (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.

5. Section 24 form and standards for company records

Proposed amendment

The section will be amended to give further clarity on the prescribed or 7 year periods mentioned in the section.

Comment

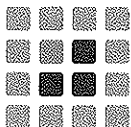
Further clarity is still needed regarding the phrase **“any other public regulation”**.

It is hard to imagine that the legislator intended such a sharp differentiation between a close corporation or other entity with regard to the keeping of records, especially in light of the confusion that it creates for the different entities and the various regulators.

For example, how will the law deal with a company keeping the following records for 7 years when a close corporation, co-operative etc only needs to keep a Basic Conditions of Employment Act record for 3 years, a Compensation for Occupational Injuries and Diseases Act for 4 years, an Employment Equity Act designated employer record for 2 and 3 years, a Financial Advisory and Intermediary Services Act for 5 years, a Financial Intelligence Centre Act record for 5 years, Income Tax Act record for 5 years, Labour Relations Act record for 5 years, National Credit Act record for credit applications and agreements for 3 years etc

6. Further simplification required for section 26 access to company records offence

Proposed amendment



[(6)](8) It is an offence for a company to:

- (a) fail to accommodate any reasonable request for access, or to unreasonably refuse access, to any record that a person has a right to inspect or copy in terms of this section or section 31; or
- (b) to otherwise impede, interfere with, or attempt to frustrate, the reasonable exercise by any person of the rights set out in this section or section 31.

Comment

Make the offence clear within section 31 so that people are aware of it immediately when reading section 31, i.e.

In section 26: “**[(6)] (8)** It is an offence for a company to:

- (a) fail to accommodate any reasonable request for access, or to unreasonably refuse access, to any record that a person has a right to inspect or copy in terms of this section; or
- (b) to otherwise impede, interfere with, or attempt to frustrate, the reasonable exercise by any person of the rights set out in this section.”

In section 31 add: “(4) It is an offence for a company to:

- (a) fail to accommodate any reasonable request for access, or to unreasonably refuse access, to any record that a person has a right to inspect or copy in terms of this section; or
- (b) to otherwise impede, interfere with, or attempt to frustrate, the reasonable exercise by any person of the rights set out in this section.”

7. Use section 75 (director's personal financial interests) throughout for consistency

Proposed amendment

The definition in section 75 will be amended to include:

- (i) an alternate director;
- (ii) a prescribed officer; or
- (iii) a person who is a member of a committee of a board of a company irrespective of whether the person is also a member of the company's board.

Comment



For the sake of simplicity and uniformity, especially as audit committee is a board committee after all; apply the same amendment of director in:

- Section 69 (Ineligibility and disqualification of persons to be director or prescribed officer);
- Section 76 (Standards of directors conduct);
- Section 77 (Liability of directors and prescribed officers); and
- Section 78 (Indemnification and directors' insurance) – but keeping the reference to past director in the section 78 definition

8. Renumbering

Proposed amendment

Insertion of various subsections

Comment

In the interest of uniformity, clarity and simplicity renumber the followings sections so that there are no repealed subsections within or subsections with an A in them:

- a. Section 32 (Use of company name and registration number) – consider changing subsection 7 to subsection 6;
- b. Section 84 (Application of Chapter);
- c. Section 90 (Appointment of auditor); and
- d. Section 136 (Effect of business rescue on employees and contracts).

9. Spell out section 115 definition and renumber the section

Proposed amendment

(4A) In subsection (4) 'act in concert' has the meaning set out in section 117(1)(b).

Comment

Suggest renumbering section so that new subsection becomes subsection 5 etc and spell out the meaning to make compliance easier for all readers:

"(5) In subsection (4) 'act in concert' means any action pursuant to an agreement between or among two or more persons, in terms of which any of them co-operate for the purpose of entering into or proposing an affected transaction or offer;"

10. Spell out section 91 resignation of auditors and vacancies law

Proposed amendment

(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.

Comment

In the interest of clarity and simplicity spell out the provisions in the relevant section 91:

"(6) An auditor may resign from office by giving the company:

- (a) one month written notice; or
- (b) less than one month written notice, with the approval of the board.



(7) If the auditor is removed from office by the board, the company secretary may require the company to include a statement in its annual financial statements relating to that financial year, not exceeding a reasonable length, setting out the auditor's contention as to the circumstances that resulted in the removal.

(8) If the auditor wishes to exercise the power referred to in subsection (7), the auditor must give written notice to that effect to the company by not later than the end of the financial year in which the removal took place and that notice must include the statement referred to in subsection (7).

(9) The statement of the auditor referred to in subsection (7) must be included in the directors' report in the company's annual financial statements."

11. Correction in section 203 (Establishment and composition of Council)

Proposed amendment

(1) The Minister must establish a council, to be known as the Financial Reporting Standards Council, consisting of... (i) one person nominated by the body governing the regulation of the accounting professions...

Comment

Suggest: "(1) The Minister must establish a council, to be known as the Financial Reporting Standards Council, consisting of... (i) one person nominated by the Accounting Practices Board..."

12. Spelling, grammar and typological errors

Spelling errors still appear in the Principal Act and have not been corrected by the Amendment Bill. The following spelling errors should be eliminated from the Principal Act:

12.1. The substitution

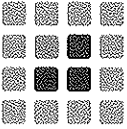
(a) In sections 118(1)(c)(i) and 165(8)(a) for the expression "[interrelated]" of the expression "inter-related";

(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".

- The heading of section 2 of the principal Act should be amended by the deletion of the words "[and inter-related]".
-

13. Page 7, Line 59 of the Bill - Amendment to definition of "Memorandum", etc.



An essential element of the text has been omitted. Sub-paragraph (b) of the definition must be corrected to read as follows:

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

12.2. Page 10, Line 27 of the Bill - Insertion of new subsection (15)

The words "the Act" ought to read "this Act".

This error came about because the provision was first drafted as part of the proposed regulations, and the need to alter the wording for proper reference was not caught when it was moved to the Amendment Bill.

12.3. Page 12, Line 20 of the Bill

The expression ". . . subsection (3)(b)" should read "subsection (3)".

12.4. Page 12, Line 52 - Insertion of a new subsection (5)

There is a grammatical error in that the word 'exists' appear instead of 'exist.'

The intent is to say that a foreign company may apply -

- (a) to transfer its registration to the republic; and
- (b) to exist as a company under the Act.

In other words, they apply for two things.

That is not what it now says, so it needs to be corrected.

It is suggested that the expression "and thereafter exists as a company . . ." be changed to read "and thereafter, to exist as a company . . .".

12.5. Page 13, Line 59 - Reference error

The insertion of a new subsection (10) here was not reflected by a correction to the internal references. The expression "subsections (5) to (9)" must be changed to read "subsections (5) to (10)".

12.6. Page 17, Line 38 - Wording error

The alteration of the word "compiled" to "required" has unintended consequences. This change re-instates the error which was intended to be removed.

The intent of the relevant provisions of the Act is to establish requirements for retaining information about directors. The company is to keep certain records and update them so long as a person remains a director. And, they are to retain those records, as compiled, for a period of seven years after the person ceases to be a director. But they are not required to keep chasing around after former directors to update the file.



As it appears in the 2008 Act, this clause caused concern: to some people it seemed to require updating the information on former directors after they left the company.

The whole purpose of the amendment was to remove that possible interpretation.

Consequently, the word "required" must be replaced with "compiled".

12.7. Page 18, Lines 49 and 54

At line 49, the existing subsection number ought to appear in bold brackets, denoting a deletion. At the beginning of the line, insert "[(3)]".

At line 54, at the end of paragraph (b), insert "[or]" before "and", to indicate that a substitution is being made.

12.8. Page 23, Line 17 - Reference error in the new subsection (8).

The expression "Subsections (9) to (11)" must be changed to read "subsections (9) and (10)".

It is absolutely imperative that subsection (11) not fall within the ambit of the exemption being created by the new subsection (8).

12.9. Page 26, Line 53 - Reference Error in newly inserted provision

The alteration of the formulation resulted in a cross-reference error. The section of the Act - section 65 (11) - is listing the instances in which a special resolution of a company's shareholders is required. Paragraph (h) is intended to stipulate such a requirement when a South African company seeks to transfer its registration out to a foreign jurisdiction. The relevant section of the Act governing such a transfer out is section 82 (5).

The cross reference is completely wrong, and inapt.

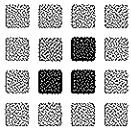
Accordingly, the expression "section (13)" must be changed to read "section 82 (5)".

12.10. Page 33 - Line 6 New provisions required.

The intent here was to preserve the effect of section 146A of the 1973 Companies Act. Some of that provision has been preserved by regulation, but some of it cannot be. The roots of this problem lie in the decision to shift the rules governing prospectuses from being included as a Schedule, to being included as regulations.

In the result, the following needs to be inserted at Line 6, following the insertion of the new subsection (7):

"(8) Sections 104, 105 and 106, each read with the changes required by the context, apply to a rights offer contemplated in section 96 (1)(d), and to any document issued in respect of such a rights offer."



12.11. Page 35, Line 44 of the Bill

A word has been omitted as a result of a reformulation. Insert "may" before 'implement' at the start of the line.

12.12. Page 41, Lines 40 to 44 - Incoherent formulations.

The problem here is that clause (ii) does not read as a proper grammatical extension of paragraph (a).

These lines need to be replaced with the following:

"(a) is—

- (i) a member in good standing of a legal, accounting or business management profession that is subject to regulation by a regulatory authority; or
- (ii) licensed by the Commission in terms of subsection (2) to serve as a practitioner."

12.13. Page 41, Line 57

Some words were omitted as a result of reformulation. Insert "as a business rescue practitioner", after "to practice".

12.14. Page 49, Line 24 - Long standing vocabulary error

Reference to an 'act or omission by a business . . . ' is inconsistent with the wording of the Act, and actually rather vague. What is meant by 'a business'? It is therefore suggested that the words 'a business' should be replaced with 'a company'.

12.15. Page 51, Line 43 - cross-reference.

For certainty, the expression "(1)(d)" should be changed to read "(1)(d)(i) and (ii)", so that it will be clear that the change is being made in both sub-clauses, as was intended.

12.16. Page 52, Line 24

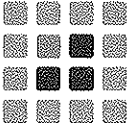
Paragraph (b) at Line 24 of the Amendment Bill should be replaced with the following:

(b) by the substitution for sub-item (3) of the following sub-item:

"(3) The Minister, in consultation with the member of cabinet responsible for national financial matters, must make regulations, to take effect as of the general effective date, providing for the transitional status and conversion of any nominal or par value shares, **[treasury shares,]** and capital accounts of a pre-existing company[, **but any such regulations must—**

(a) **preserve the rights of shares holders associated with such shares, as at the effective date, to the extent doing so is compatible with the purposes of this item; or**

(b) **provide for the company to compensate its shareholders for the loss of any such rights]."**



12.17. Page 52, Line 62 - Re-formulation error

A grammatically unsound sentence appears here as a result of reformulation.

The intent was to allow the Commission to exercise not only the powers vested in the registrar under the 1973 Companies Act, but also the powers vested in the Minister under that Act. This is needed or the Commission will lack the required powers to enforce against offences committed under the 1973 Companies Act, for the simple reason that the enforcement powers were not vested in the Registrar, but in the Minister - and exercised by Office of Companies and Intellectual Property Enforcement within the dti (OCIPE).

The deletion of the word "or", which is critical, is unnecessary. The point is that the clause has to grant two powers:

- (a) to the Commission, to exercise the functions of the Minister or the Registrar under the 1973 Act; and
- (b) to the Panel to exercise the functions of the former SRP under the 1973 Act.

We trust that our submission will receive your favourable consideration. We would welcome an opportunity to come and present our submission. Should you require any further information or wish to discuss this matter in more detail, kindly contact the writer on
082 0643453 or 011-207 7873, or fngwenya@saipa.co.za

Yours faithfully


FAITH NGWENYA
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