

Draft Companies Amendment Bill 2021

Summary of important amendments

Disclaimer:

This document reflects some of the key amendments to the Bill. Please refer to the Draft Companies Amendment Bill for all proposed amendments.

1. Amendment of section 1 - Definitions

- a. Insertion of the definitions of the B-BBEE Act and B-BBEE Commission
- b. Substitution of definition of securities
- c. Insertion of the definition of Treasury Regulations
- d. New definition of “true owner” which states that a “*true owner*” means a natural person, who would in all the circumstances be considered to be the **ultimate and true owner of the relevant securities**, whether by reason of being capable either directly or indirectly (via the intermediation of others in the chain of holders of beneficial interest in the relevant securities) of directing the registered holder with regard to the securities or because of being a person for whose benefit the securities enure or for any other reason, not limited ejusdem generis, which could be the registered holder itself, or if the registered holder is not the true owner or the only true owner, would be the last person in the chain of any holders of beneficial interest in the relevant securities”

2. Amendment of section 16 – Amending Memorandum of Incorporation

The Draft Bill proposes to amend section 16(9)(b) of the Companies Act, 71 of 2008 (Act) by replacing this paragraph dealing with the effective date of the amendment of a company’s MOI. The section in the Act currently states that an amendment to the MOI takes effect (in any case other than 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, if any, set out in the in the Notice of Amendment.

The proposed amendment states that the amendment to the MOI **will take effect 10 business days after the receipt of the Notice of Amendment by the Commission** unless the Commission has endorsed or rejected the Notice with reasons **prior to the expiry** of the 10 days period; or the date, if any, set out in the Notice of Amendment, provided that this date shall not be a date prior to the expiry of the 10 business days that the Commission has for consideration of the Notice of Amendment.

3. Amendment of section 25 – Location of company records

The Draft Bill proposes that section 25 of the Act is amended with the requirement that the Commission must publish the notice filed by a company which sets out the location(s) at which particular records are kept, if not kept 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

The Draft Bill proposes that section 26 of the Act 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 Act currently only allows persons who are not shareholders or members to inspect or copy the securities register.

The Draft Bill proposes that Persons who do not hold a beneficial interest in securities issued by the company or who is not a member of a non-profit company has a right to inspect and copy the information contained in the records in subsection (1)(a), (b), (cA), (e) and (f) upon payment of the required fees.

This would allow persons who are not shareholders or members to access the following by paying the required fees:

- company's MOI
- records in respect of directors
- annual financial statements
- securities registers of the profit company or members register of non-profit company
- register of disclosure of beneficial interest.

The Draft Bill also proposes that the right to inspect and copy information contained in the records referred to in subsection 1(c) (reports to annual meetings) and 1(d) (notices and minutes of annual meetings) shall not apply to a private company, non-profit company or personal liability company, where:

- the annual financial statements are internally prepared in a company with a Public Interest Score of less than 100 or
- annual financial statements are independently prepared in a company with a Public Interest Score of less than 350.

The request for access to the information must be complied with within 10 business days, instead of the current 14 business days.

The Draft Bill also includes a legal defense if the director or prescribed officer can show that he /she undertook all reasonable steps to comply with the requirements of sections 26 and 31.

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 identification of individuals as far as the disclosure of directors' and prescribed officers' remuneration is concerned by stating that each individual director or prescribed officer must be named.

The Draft Bill also clarifies that where the disclosure of directors' remuneration must be audited the company policies or background statements on the remuneration report will not be required to be audited.

6. Section 30(A) – Duty to prepare and present the company’s remuneration policy and remuneration report

The new Section 30(A) in the Draft Bill sets out the requirements that public and state-owned companies must prepare and present the remuneration policy for directors and prescribed officers for approval by ordinary resolution at the annual general meeting. Thereafter the remuneration policy must be approved every three years or when material changes are made.

The Draft Bill also introduces the requirement to prepare a remuneration report, which must include the following six parts:

- a background statement;
- the company’s remuneration policy;
- an implementation report dealing with details of remuneration and benefits received by each director or prescribed officer as required in terms of section 30(4), (5) and (6) of this Act;
- the total remuneration including all salary, benefits (including employer contributions to benefit funds), short-term incentives (bonuses) and long-term incentives such as share options and any other type of long term incentive awards which have been settled in the year under review of the employee of the company with the highest total remuneration, be it the chief executive officer or any other prescribed officer in the company as may be specified in terms of section 30(4) and (6) of this Act;
- the total remuneration, including all salary, benefits (including employer contributions to benefit funds) and incentives (bonuses), as recorded in the company’s payroll record, of the employee as defined by section 213 of the Labour Relations Act, 1995 (Act No. 66 of 1995) of the company, with the lowest total remuneration in the company; and
- the average remuneration of all employees, median remuneration of all employees and the remuneration gap reflecting the ratio between the total remuneration of the top 5% highest paid employees and the total remuneration of the bottom 5% lowest paid employees of the company.

The remuneration report must be approved by the board of the company, presented to the shareholders at the annual general meeting and voted on by the shareholders for approval. The voting on the remuneration report shall constitute the voting on the remuneration policy and the implementation report which is to be construed as separate documents with separate voting requirements.

If the remuneration policy is not approved, it must be presented at the next annual general meeting or at a shareholders meeting until it has been approved and no changes may be implemented until the policy has been approved.

The Draft Bill sets out the steps to be undertaken where the implementation report is not approved. Where the implementation report is not approved by ordinary resolution the Draft Bill requires that the non-executive directors that serve on the directors’ committee

for remuneration shall be required to **stand down for re-election**. The Act however does not define non-executive directors and only refers to “directors”.

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).

The Draft Bill includes the requirement for public companies, state-owned companies or private companies with a public interest score that exceeds the limit set out in section 30(2) or the regulations as contemplated in section 30(7) to submit its annual financial statements together with its annual return.

The Draft Bill also includes new requirements that all companies must **file a copy of their company’s securities register** and a **copy of the register of the disclosure of beneficial interest as required** in terms of section 56. It is important to note that all information filed with the CIPC can be accessed by third parties as the Companies Act in section 187 states that the information contained in CIPCs registers must be made available to any person.

The Commission will also now make the annual return available electronically to any person as prescribed.

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 stakeholder, to be held in terms of a stakeholder agreement.

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

The proposed amendments to Section 45 of the Act includes the amendment of the heading from “Loans or other financial assistance to directors” to “Financial assistance” and a new subsection (2A) that states that the provisions of this section shall 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 if the transaction is effected on a recognised stock exchange on which the shares are traded.

12. Section 56 – Beneficial interest in securities

Section 56(2A) is included in the Draft Bill and sets out that a person is also regarded to have a beneficial interest in a security if the person the “true owner” as defined. It is proposed that every company (as opposed to regulated companies as set out in section 117(1)(i)) must establish and maintain a register of the disclosures required and publish in its annual financial statements, if they are required to be audited in terms of section 30(2), a list of persons who in aggregate, alone or together with another person hold beneficial interests amounting to 5% or more of the total number of securities of that class, issued by the company, or any such percentage as may be prescribed by the Minister.

13. Section 61 – Shareholders meetings

Section 61 of the Act is amended by including the requirement for 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.

14. Section 72 – Board committees (Social and Ethics Committee)

The proposed amendments to the social and ethics committee requirements set out that the social and ethics committee must comprise of at least three directors and may include prescribed officers.

In the case of public and state-owned companies’ the majority of the directors must not be involved in the day-to-day management of the business of the company and may not have been involved at any time in the previous three financial years.

Membership of the social and ethics committees for other companies must consist of not less than three directors or prescribed officers provided that at least one of the directors must not be involved in the day-to-day management of the business of the company and may not have been involved in the previous three financial years.

Members of the social and ethics committee of a public or state-owned company must now be elected at each annual general meeting. Other companies that are required to have a social and ethics committee must ensure appointment by the board.

The social and ethics committee reports must be presented to shareholders and must be approved by an ordinary resolution. For public or state-owned companies, the social and ethics committee report must be presented at its annual general meeting, for other companies the social and ethics committee report must be presented annually at a shareholders meeting or approved by a resolution as contemplated in section 60(1). The Draft Bill also sets out steps to be followed if the report is not approved by shareholders.

15. Section 90(1A) – Appointment of auditor

16. The proposed amendment removes the requirement for the auditor of a company referred to in section 84(1)(c)(i) or a company that is required only in terms of its Memorandum of Incorporation to have its annual financial statements audited as contemplated in section 34(2) and 84(1)(c)(i) to be appointed at the annual general

meeting. This has been an administrative issue for private companies that are not required to have an annual general meeting. The proposal is that such auditors must be appointed at a shareholders meeting.

The proposed amendment reduces the period preceding the date of appointment as auditor, during which the person / firm that is being appointed as the auditor must not have been involved in the rendering of certain services, such as bookkeeping, accounting or maintenance of accounting records, from five financial years to two financial years.

17. 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 have 10 or more shareholders with a direct or indirect shareholding in the company and that meet or exceed the financial threshold of annual turnover or asset value to be determined.

18. Section 135 – Post commencement finance

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

The Draft Bill also includes amendments relating to the Companies Tribunal and the Financial Reporting Standards Council.