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Government Gazette Staatskoerant

REPUBLIC OF SOUTH AFRICA
REPUBLIEK VAN SUID-AFRIKA

Vol. 481

Pretoria, 13 July 2005
Julie

No. 27784



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CONTENTS • INHOUD

No.	Page No.	Gazette No.
GENERAL NOTICE		
Trade and Industry, Department of		
General Notice		
1143 Companies Act (61/1973): Companies Amendment Bill: For public comment.....	3	27784

GENERAL NOTICE

NOTICE 1143 OF 2005

NOTICE IN TERMS OF THE COMPANIES ACT, 1973

(ACT NO. 61 OF 1973)

I, MANDISI MPAHLWA, Minister of Trade and Industry, hereby, in terms of the Companies Act, 1973 (ACT No 61 of 1973), publish the Companies Amendment Bill for public comment. In the main, the Bill deals with the following issues:

- a) The development and enforcement of financial reporting standards.
- b) The promotion and maintenance of the independence of auditors.
- c) The review of the procedures of the Securities Regulation Panel.
- d) The indemnification and imposition of a duty of confidentiality on inspectors.
- e) Issues to be contained in the prospectus.

Comments can be forwarded to Mr Netshitenzhe at e-mail: McDonaldN@thedti.gov.za or fax 012-3942506 on or before 5 August 2005.

MANDISI MPAHLWA, MP
MINISTER OF TRADE AND INDUSTRY

REPUBLIC OF SOUTH AFRICA

COMPANIES AMENDMENT BILL

(MINISTER OF TRADE AND INDUSTRY)

[B* - 2005]

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GENERAL EXPLANATORY NOTE:

[] Words struck out and in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions to existing enactments.

BILL

To amend the Companies Act, 1973, so as to provide for the development and enforcement of financial reporting standards, to promote and maintain the independence of auditors, to update the requirements for registration of a prospectus, to further the objective and expedite the procedures of the Securities Regulation Panel, to indemnify and impose a duty of confidentiality on inspectors, and to provide for incidental matters.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:

1. The "Arrangement of Act" preceding section 1 of the Companies Act, 1973 (hereafter referred to as the principal Act), is hereby amended –
 - a. by replacing "269" in the line below the heading "Chapter X" with "268J";
 - b. by replacing "284" in the line below the heading "Chapter XI" with "283A";

XVA" the heading "Chapter XVB", and below it the reference "440O - 440JJ Financial Reporting Standards".

2. Section 1 of the principal Act is hereby amended –

- a. by inserting after the definition of "holding company" in subsection (1), the following definition:

"inspector" means a person appointed by the Minister in terms of section 254, 257, 258 or 259;

- b. by inserting after the definition of "judicial manager" in subsection (1), the following definition:

"limited purpose company" means a private company that does not (i) take deposits or loans from the public, (ii) offer its shares to the public, or (iii) act as a holding company in respect of a public interest company, and (iv) is not a subsidiary or associate of, or joint venture with a public interest company, that is authorized by unanimous consent of its members to operate as a limited purpose company for purposes of this Act; provided that such consent is given annually in respect of each supervening financial year;

- c. by inserting after the definition of "provisional judicial manager" in subsection (1), the following definition:

"public interest company" means a company that is not a limited purpose company;

- d. by substituting for the definition of "Minister", the following definition:

'Minister', in relation to any matter to be dealt with in the office of a Master in connection with the winding-up or judicial management of companies, means the Minister of Justice and, in relation to any other matter, means the Minister of [~~Industries, Commerce and Tourism~~] Trade and Industry;

3. Section 8 of the principal Act is hereby amended by substituting the following subsection for subsection (1):

(1) [~~No act or omission whatever by the Registrar or any officer or other person in the employment of the State, having duties to perform under this Act, shall subject the State, or the Registrar, or any such officer or person to any liability for any loss or damage sustained by any person in consequence of any such act or omission unless such act or omission was *mala fide* or was due to want of reasonable care or diligence~~].

Neither the State, nor the Registrar, an inspector, or any officer or other person having duties to perform under this Act, shall be held liable for any loss sustained by or damage caused to any person as a result of any *bona fide* act or omission relating to the performance of any duty under this Act, unless gross negligence is proved.

4. Section 144 of the principal Act is hereby amended by replacing paragraph (a)(iii) with the following paragraph:

(iii) a long-term insurer or short-term insurer as defined in the Short-term Insurance Act, 1998 (Act 53 of 1998) [~~an insurer registered or provisionally~~]

~~registered in terms of the Insurance Act, 1943 (Act 27 of 1943)],~~

which is acting as principal, and also to a wholly owned subsidiary of such bank, mutual bank or insurer when it acts as agent in the capacity of authorised portfolio manager for a pension fund registered in terms of the Pension Funds Act, 1956 (Act 24 of 1956), or as manager for a collective investment scheme ~~[unit trust scheme managed by the said wholly owned subsidiary which is]~~ registered ~~[as a management company]~~ in terms of the Collective Investment Schemes Control Act, 2002 (Act 45 of 2002) ~~[Unit Trusts Control Act, 1981 (Act 54 of 1981)]~~;

5. Section 148 of the principal Act is hereby amended –

a. by replacing subsections (1) to (3) with the following subsections:

(1) A prospectus must adhere to the specifications of the 3rd Schedule and contain all the information that an investor might reasonably require to assess –

- (a) the issuer of the shares, its assets and liabilities, financial position, profits and losses, and prospects; and
- (b) the shares and rights attaching to them.

(2) As long as an offer remains open, any person responsible for information in the prospectus must, as that person becomes aware of it –

- (a) correct any error;
 - (b) report on any new matter;
 - (c) report on any change of a matter reported in the prospectus;
- provided that these are ‘relevant’ or ‘material’ according to the definition of the 3rd Schedule.

(3) A correction or report under (2) must be registered as a supplement to the prospectus, simultaneously published to known recipients of the prospectus and included with any future distribution of the prospectus.

a. ~~by replacing subsection (2) with the following subsection:~~

~~(2) The information referred to in subsection (1) shall be set out in print or type and shall not be less conspicuous than that in which the additional matter of the prospectus is printed or typed, and shall comply with the requirements of [be set out in separate paragraphs under the headings provided in] Schedule 3 [and in accordance with the instructions contained in Part IV of that Schedule].~~

b. ~~b.~~ by inserting at the beginning of subsection (4) the phrase “Subject to section 148A” and by converting the first letter of the word “any” to the lower case.

6. The principal Act is hereby amended by inserting the following section below section 148:

148A Permission to withhold information

(1) If the Registrar is satisfied that any information required under section 148 is confidential or if publication would significantly prejudice the issuer's competitive or other interests, the Registrar may, on application, dispense with the requirement that that information be published: provided that the Registrar is satisfied that users will not be unduly prejudiced.

(2) An application for a dispensation under subsection (1) shall be in writing and accompanied by the prescribed fee.

7. Section 215 of the principal Act is hereby amended –
a. by replacing subsection (2) with the following subsection:

(2) There shall in addition be entered in the said register the name and date of appointment of the auditor of the company and, where the auditor is a firm, also of the nominated auditor specified in section 274(2), and, in each case, the date and particulars of any change of such name and date of appointment.

8. Section 228 of the principal Act is hereby amended –
a. by substituting for subsections (1) and (2), the following subsections:

(1) Notwithstanding anything contained in its memorandum or articles, the directors of a company shall not have the power, save by a special resolution

~~of its members [with the approval of a general meeting of the company], to dispose of-~~

- (a) ~~the whole or [substantially the whole] the greater part of the undertaking of the company; or~~
- (b) ~~the whole or the greater part of the assets of the company.~~

(2) ~~[No]~~ A special resolution of the company approving any such disposal shall not be effective ~~[have effect]~~ unless it authorizes or ratifies in terms the specific transaction.

- b. by inserting after the existing subsection (3), the following subsections:

(4) The provisions of subsections (1) to (3) shall also apply in the case of a disposal by a company's subsidiary if on analysis of in relation to the consolidated financial statements of the holding company, the disposal qualifies would qualify under subsections (1) (a) or (b) as a disposal by the holding company.

(5) A company may not effect any material disposal of business or assets unless —

- (a) the company's auditor has certified that the disposal is not a disposal contemplated under subsections (1) (a) or (b), as read with subsection (4); or
- (b) the disposal has been authorized in terms of subsections (1) and (2).

9. The principal Act is hereby amended by inserting the following section after section 261:

261A Preservation of secrecy

An inspector may only disclose information acquired in the course of performing his or her duties in terms of this Act, if the disclosure:

- (a) is required by the Act or in terms of any other law;
- (b) is required by a court; or
- (c) with the permission of the Minister.

10. Chapter X of the principal Act is hereby amended –
- a. by replacing both occurrences of “269” in the heading and sub-heading with “268J”;
 - b. by inserting the following section below the sub-heading:

268J. Only registered auditors to be appointed

No person may be appointed auditor of a company unless that person is a registered auditor.

In this Chapter “registered auditor”, “firm” and “IRBA” have the same meaning as in the Auditing Profession Act, 2005.

- c. by inserting section 269A(2) (c) ~~the following section after~~ section 269 in the following manner:

a director is an independent non-executive director if the director –

- (i) is not involved in the day to day management of the business and has not in the last three years been employment as an executive manager or executive director of the issuer or its group;
- (ii) is not or does not represent a shareholder with the ability to control or significantly influence management or the board;
- (iii) is not a member of the immediate family of an individual mentioned in (ii);
- (iv) is not a professional advisor to the issuer or its group, except as a director;
- (v) is not a significant supplier to, or customer of the issuer or its group;
- (vi) has no significant contractual relationship with the issuer or its group; and
- (vii) has no business or other relationship that could be seen to materially interfere with the director's capacity to act independently.

269A Audit committees for public interest companies

For every financial year of a company which, on the qualifying date, is a public interest company, the board of directors shall appoint an audit committee consisting of not less than three independent non-executive directors.

(2) For purposes of this Chapter –

- (a) “qualifying date” is the first day of the immediately preceding financial year or, if there is no such preceding financial year, the first day of the company’s first financial year;
- (b) “financial year” shall be construed in accordance with section 285;
- (c) a director is an independent non-executive director if, except as a director and member of the audit committee, the director does not receive any remuneration or other benefit (whether direct or indirect), does not undertake any consultancy, advisory or other work, and is not connected, directly or indirectly, from, for or with the company or any subsidiary or parent of the company or, if the company is a member of a group, any other member of the group.

(3) In relation to the appointment of an audit committee of a public interest company, the reference in subsection (1) to the board of directors is a reference to the board exclusive of any director who, at the time of the appointment, is a member of an existing audit committee of the company.

11. Section 270 of the principal Act is amended by replacing subsections (1) to (3) with the following subsections:

(1) Subject to section 270A, [A] a company shall at every annual general meeting appoint an auditor or auditors to hold office from the conclusion of that meeting until the conclusion of the next annual general meeting of the company.

(2) A retiring auditor shall be deemed to be reappointed at any annual general meeting without any resolution being passed, unless—

- (a) he is not qualified for reappointment; or
- (b) a resolution has been passed under section 278; or
- (c) he has given the company and the Registrar notice in writing of his unwillingness to be reappointed at the next annual general meeting.

(3) The provisions of subsection (2) shall not apply —

- (a) during the tenure of an audit committee; or
- (b) where notice of an intended resolution to appoint some person or persons in place of a retiring auditor has been duly given under section 279 but cannot be proceeded with by reason of the death, incapacity or disqualification of that person or of all those persons.

12. The principal Act is hereby amended by inserting the following section after the amended section 270:

270A Functions and funding of audit committees

(1) An audit committee of a public interest company has the following duties with respect to the financial year for which it is appointed –

- (a) to nominate, for appointment as auditor of the company under section 270, a registered auditor who, in the opinion of the audit committee, is independent of the company;
- (b) to determine the fees to be paid to the auditor and the auditor's terms of engagement;
- (c) to ensure that the appointment of the auditor complies with the provisions of this Act and any other enactment relating to the appointment of auditors;
- (d) to determine, subject to the provisions of this Chapter, the nature and extent of any non-audit services which the auditor may provide for the company;
- (e) to insert into the financial statements to be issued in respect of the financial year a statement as to whether or not the audit committee is satisfied –
 - (i) that the financial statements and any audit of them are in compliance with the provisions of any applicable law; and

(ii) that the auditor is independent of the company;

(f) to receive and deal appropriately with any complaints (whether from within or outside the company) relating either to the accounting practices, including internal audit, of the company or to the content or auditing of its financial statements or to any related matter.

(2) Nothing in this section precludes the appointment by a public interest company of an auditor other than one nominated by the audit committee, and where such an auditor is to be appointed, paragraph (a) of subsection (1) shall not apply, but the appointment shall not be valid unless the audit committee certifies –

(a) that, in its opinion, the proposed auditor is independent of the company; and

(b) that it is satisfied that it can carry out its duties under paragraphs (b) to (e) of subsection (1) with respect to the proposed auditor.

(3) Neither the appointment nor the duties of an audit committee of a public interest company shall reduce the functions and duties of the board of directors of the company except with respect to the appointment, fees and terms of engagement of the auditor.

(4) A public interest company shall meet all expenses reasonably incurred by its audit committee including, if the audit committee considers it

appropriate, the fees of any consultant or specialist engaged by the audit committee to assist it in the performance of any of its duties.

(5) In considering whether, for the purposes of subsection (1)(a), subsection (1)(e)(ii) or subsection (2)(a), a registered auditor is independent of a company, the audit committee shall in relation to the company and any subsidiary or parent of the company or, if the company is a member of a group, any other member of the group –

(a) ascertain that the auditor does not, except as auditor or in rendering services permitted under subsection (1)(d), receive any remuneration or other benefit (whether direct or indirect);

(b) ~~, does not undertake~~ consider the extent of any consultancy, advisory or other work, and is not connected, directly or indirectly, from, for or with the company or any subsidiary or parent of the company or, if the company is a member of a group, any other member of the group undertaken by the auditor; and

(cb) in any case where that registered auditor has previously been appointed as auditor of the company, consider whether the auditor's independence may have been prejudiced as a result of any ~~that~~ previous appointment.

13. Section 271 of the principal Act is hereby amended by inserting the following subsection after subsection (1):

(1A) Except in the case of an appointment by the Registrar, subsection (1) has effect subject to section 270A(2).

Section 273 of the principal Act is hereby amended by substituting the following section for that section:

273 Filling of casual vacancies

(1) Subject to subsection (2) and ~~[the provisions of]~~ section 280, a casual vacancy in the office of auditor of a company–

(a) shall, if such auditor be the only incumbent, be filled by the directors within thirty days, and the provisions of section 271 shall mutatis mutandis apply in regard to the filling of such vacancy and the duty of the company; or

(b) may, if there be more than one incumbent, be filled by the directors, but while any such vacancy continues, the surviving or continuing auditor shall act as auditor of the company.

(2) Subsection (1) does not apply in the case of a vacancy in the office of auditor of a public interest company arising during the tenure of an audit committee; and, in such a case, if the nominated auditor dies, or the auditor or nominated auditor becomes disqualified, resigns or is removed, the directors shall within twenty days propose to the audit committee a registered auditor to become the new auditor.

(3) If, in such a case as is described in subsection (2), the former nominated auditor was a member of a firm and the firm itself is not disqualified or removed, only another member of the firm may be proposed to the audit committee to be the new nominated auditor.

(4) If, within ten days of the making of a proposal to an audit committee under subsection (2), the audit committee does not give notice in writing to the directors rejecting the proposed auditor, the directors shall proceed to the appointment (either by appointing the auditor or, as the case may require, by selecting the new nominated auditor).

(5) In this Chapter "nominated auditor" means the individual mentioned in subsection 274(2).

14. Section 274 of the principal Act is hereby amended by substituting the following section for that section:

~~[274 Firm may be appointed auditor~~

~~(1) A firm of auditors may be appointed to hold the office of auditor of a company.~~

~~(2) A change in the composition of the members of a firm of auditors while holding office as auditor of a company shall not constitute a casual vacancy in the office of auditor but if less than one-half of the members of such firm remain after any one such change, it shall be taken as a resignation of the auditor and a casual vacancy shall have been constituted.]~~

274 Appointment of firm as auditor

(1) This section applies where the registered auditor appointed as auditor of a company is a firm.

(2) The appointment of a firm as auditor of a public interest company shall not be valid unless the appointment specifies, in addition to the name of the firm, the name of the individual registered auditor (being a member of the firm) who undertakes the audit.

(3) In the case of a company for which a firm is appointed as auditor for a financial year, a change in the composition of the members of the firm shall not of itself constitute a casual vacancy in the office of auditor for that year, but if, by comparison with the membership at the time of the appointment, less than one half of the members of the firm remain after any such change, the occasion of that change shall be taken as a resignation of the auditor and a casual vacancy shall be taken to have arisen accordingly.

15. The principal Act is hereby amended by the insertion of the following section after the substituted section 274:

274A Rotation of auditors

(1) The same individual may not serve as the nominated auditor of a public interest company for more than four consecutive financial years.

(2) Where an individual has served as the nominated auditor of a public interest company for two or more consecutive financial years and then ceases to be the

nominated auditor, the individual may not again become the nominated auditor of that company until after the expiry of at least two further financial years.

16. Section 275 of the principal Act is hereby amended –

a. by replacing paragraph (f) of subsection (1) with the following paragraph:

(f) a person who at any time during the financial year was a director or officer of the company. [; or]

b. by deleting paragraph (g) of subsection (1);

c. by deleting the phrase “if he is registered under the Public Accountants’ and Auditors’ Act, 1991” in subsection (3).

17. The principal Act is hereby amended by inserting the following section after the amended section 275:

275A Certain non-audit services not open to current auditor of public interest company

(1) For any financial year of a public interest company for which an individual is the nominated auditor, the individual may not perform, for that company, any book-keeping, accounting (as distinct from auditing) or internal audit services nor any services prescribed under subsection (2).

(2) The Minister may prescribe further descriptions of services which an auditor may not perform for a public interest company during a financial year for which he is the nominated auditor.

(3) This section –

- (a) does not affect the power of an audit committee under section 270A(1)(d) to limit further the services which an auditor of a public interest company may perform; and
- (b) is without prejudice to any limitation imposed on an auditor in relation to a particular company by virtue of section 21 of the Auditing Profession Act 2004 (auditor having financial interest in company excluded from audit).

18. Section 280 of the principal Act is hereby amended by replacing subsections (2) to (5) with the following subsections:

(2) An auditor intending to resign shall deliver to the company and to the Registrar a written notification in the prescribed form to the effect that he has no reason to believe that in the conduct of the affairs of the company a ~~[material irregularity]~~ reportable irregularity, within the meaning of section 22 of the Auditing Profession Act 2004 has taken place or is taking place which has caused or is likely to cause financial loss to the company or to any of its members or creditors, other than an irregularity (if any) which has been reported to the ~~[Public Accountants' and Auditors' Board in terms of the Public Accountants' and Auditors' Act, 1991 (Act 80 of 1991)]~~ IRBA under that Act, and it shall not be necessary that such an auditor shall have carried out, for the purposes of such notification, a special audit subsequent to the date up to which the last annual financial statements on which he has already reported, were made up.

(3) The directors of the company shall forthwith upon receipt of the said written notification [~~appoint an auditor~~] proceed to the appointment of an auditor in accordance with section 273 to fill the vacancy and shall lodge the said notification together with the return required under section 276 with the Registrar.

(4) The resignation of an auditor shall become effective upon the receipt by the Registrar of the written notification referred to in subsection (2).

(5) If the directors fail to [~~appoint an auditor~~] proceed as mentioned in subsection (3) to the appointment of an auditor to fill the vacancy within three months after the receipt of the written notification referred to in subsection (2), any person who—

- (a) at the expiration of that period of three months was a director of the company or became a director of the company after that period has expired and before the filling of the vacancy; and
- (b) was aware of the vacancy but failed to take all reasonable steps to ensure that it would be filled in accordance with subsection (3),

shall together with the company be jointly and severally liable for all debts incurred by the company during the existence of the vacancy.

19. Chapter XI of the principal Act is hereby amended by inserting the following section under the heading “Accounting Records”:

283A Definitions

For purposes of this Chapter and Schedule 4,

“financial report” means financial statements and any other financial information, including circulars, prospectuses and provisional announcements of results, intended for publication to users;

“financial reporting standards” means standards issued in terms of section 440U(2).

“financial statements” means annual financial statements, provisional annual financial statements and interim or preliminary reports and includes, where applicable, group and consolidated financial statements;

“user” in relation to a financial report, means a shareholder, prospective shareholder, creditor, regulator or any other person who places a reliance on information published by the company.

20. Section 284 of the principal Act is hereby amended by deleting the word “annual” in the second last line of subsection (3).
21. Section 286 of the principal Act is hereby amended –
- a. by substituting the following subsection for subsection (2):

(2) The annual financial statements required to be made out under subsection (1) shall consist of–

- (a) a balance sheet~~[, including any notes thereon or document annexed thereto providing information required by this Act];~~

(b) ~~an income statement[, including any similar financial statement where such form is appropriate and including any notes thereon or document annexed thereto providing information required by this Act];~~

(bA) a cash flow statement;

(bB) a statement of changes in equity;

(bC) a summary of significant accounting policies and other explanatory notes on the items under (a) to (bB);

(c) a directors' report complying with the requirements of this Act; and

(d) an auditor's report as required by section 301.

b. by the deletion of subsection (3).

22. The principal Act is hereby amended by inserting the following sections after section 286:

286A Accounting Standards

(1) Public interest companies –

(i) must comply with financial reporting standards for public interest companies;

(ii) must complete financial statements in compliance with paragraph (i), and the other provisions of this Act and Schedule 4 pertaining to public interest companies;

(iii) may only publish financial reports produced in accordance with the standards referred to in (i).

(2) Limited purpose companies –

(i) must comply with financial reporting standards for public interest companies, provided that the directors may depart from any requirement of these standards if the particulars of the departure and reasons for it are disclosed in financial reports;

(ii) must complete financial statements in compliance with paragraph (i), and the other provisions of this Act and Schedule 4 pertaining to limited purpose companies;

(iii) may only publish financial reports that comply with paragraph (i).

286B Attendance of auditors

(1) Not more than one month before the date of the annual general meeting of a public interest company at which the board of directors of a public interest company will vote to approve the financial statements of the company for any financial year are to be considered, the nominated auditor must attend a meeting of the board of directors audit committee to consider with the board matters which appear to the auditor or the board audit committee to be of importance and relevant to the proposed financial statements and to the affairs of the company generally.

(2) At every annual general meeting of a public interest company at which the financial statements of the company for a financial year are to be considered or agreed, the nominated auditor must attend and respond to the best of his or her ability to any question which is put to the auditor and is relevant to the audit of the financial statements.

(3) If the nominated auditor fails to attend a meeting as required by subsection (1) or subsection (2), the auditor is guilty of an offence unless –

- (a) the nominated auditor is prevented by circumstances beyond his or her control from attending the meeting; and
- (b) the nominated auditor ensures that another individual who is a registered auditor attends the meeting in place of the nominated auditor and carries out the duties of the nominated auditor at the meeting; and
- (c) if the nominated auditor is a member of a firm, the individual attending the meeting in place of the nominated auditor is a member of that firm.

(4) If, in the case of a company other than a public interest company due notice is given of the intention to move a resolution requiring the presence of the auditor at an annual general meeting of the company at which financial statements of the company for any financial year are to be considered, the auditor shall attend that meeting and respond to the best of his or her ability to any question which is put to the auditor

and is relevant to the audit of the financial statements.

(5) If an auditor fails to comply with subsection (4), the auditor is guilty of an offence unless –

- (a) the nominated auditor is prevented by circumstances beyond his or her control from attending the meeting; and
- (b) the auditor ensures that another individual who is a registered auditor attends the meeting in place of the nominated auditor and carries out the duties of the nominated auditor at the meeting.

(6) In this section "nominated auditor" has the meaning given by section 274(3).

23. Section 287 of the principal Act is hereby amended by replacing it with the following section:

287 Offence to issue incomplete or non-compliant financial reports [~~statements and circulars~~]

If any financial report [~~statements or circulars~~] of a company which is [~~are~~] incomplete in any material particular or otherwise does not comply with the requirements of this Act, is [~~are~~] issued, circulated or published, the company and every director or officer thereof who is a party to such issue, circulation or publication, shall be guilty of an offence.

24. The principal Act is hereby amended by inserting the following section after section 287:

287A False or misleading statements

(1) If any financial statement of a company is false or misleading in a material respectparticular, any person who is a party to the preparation, approval, publication, issue or supply of that statement and who knows or ought reasonably to suspect, that it is so false or misleading, is guilty of an offence unless subsection (3) applies.

(2) For the purposes of subsection (1), a person shall be regarded as a party to the preparation of a financial statement which is false or misleading in a material particular if –

- (a) the statement includesincorporates or is otherwise based on a scheme devised, prepared or recommended by that person; and
- (b) the scheme is of such a nature that that person knew or ought reasonably to have suspected that its inclusionincorporation or other use in connection with the preparation of the statement would cause the statement to be so false or misleading;

and in this subsection “scheme” includes any structure or form of words.

(3) If a director or other officer of a company is found guilty of an offence under section 287 in respect of an inaccuracy in or omission from any financial statement, the director or other officer shall

not also be guilty of an offence under this section in respect of the same inaccuracy or omission.

25. Section 288 of the principal Act is hereby amended –
 - a. by the deletion of subsection (2); and
 - b. by the deletion of the word “annual” in subsection (3)(a).
26. Section 289 of the principal Act is hereby amended –
 - a. by substituting the following section for subsection (1):

289 Group [~~annual~~] financial statements

~~[(1) (a)]~~ Subject to section 290, group [~~annual~~] financial statements [~~may~~] shall consist of [~~consolidated annual financial statements~~] the items specified in [accordance with] section 286 (2) (a) to (bC) [, (b) and (bA) and being (i) a consolidated balance sheet dealing] and deal with [the state of affairs of] the company and all the subsidiaries [~~to be dealt with in group annual financial statements~~] in accordance with the financial reporting standards referred to in section 286A(1).

~~[(ii) a consolidated income statement dealing with the profit or loss of the company and those subsidiaries; and (iii) a consolidated cash flow statement of the company and those subsidiaries.~~

~~(b) Where consolidated annual financial statements under paragraph (a) are not made out, group annual financial statements may consist of – (i) — more than one set of consolidated annual financial statements, that is to say, one set dealing with the company and one group of subsidiaries and one or more sets dealing with other groups of subsidiaries; or (ii) separate annual financial statements dealing with each of the subsidiaries; or (iii) statements annexed~~

~~to the company's own annual financial statements expanding the information therein contained about the subsidiaries, or of any combination of these forms.]~~

b. by the deletion of subsection (2).

27. Section 290 of the principal Act is hereby amended by substituting the following section for that section:

290 [Where annual] Group financial statements for limited purpose companies[are to be consolidated]

[Consolidated annual financial statements shall be made out unless] (1) A limited purpose company need not consolidate financial statements, if its[the] directors [of the company] are of the opinion that the required information about the state of affairs, business and profit or loss of the company and its subsidiaries would be presented more effectively and meaningfully in the manner [contemplated in section 289 (1) (b)] set out in subsection (2).

(2) If consolidated annual financial statements are not made out, group annual financial statements may consist of-

- (i) more than one set of consolidated annual financial statements, i.e. one set dealing with the company and one group of subsidiaries and one or more sets dealing with other groups of subsidiaries; or
- (ii) separate annual financial statements dealing with each of the subsidiaries; or

(iii) statements annexed to the company's own annual financial statements dealing with subsidiaries and their effect on the financial statements of the company, or

(iv) any combination of the forms described in (i) to (iii) above.

(3) Group financial statements may be wholly or partly incorporated in the company's own financial statements.

28. Section 291 of the principal Act is hereby amended –
- a. by deleting the word “annual” after “group” in the heading;
 - b. by substituting the following subsections for subsections (1) and (2):

(1) Group [~~annual~~] financial statements of a limited purpose company need not deal with a subsidiary if the directors of the company are of the opinion that it is impracticable or would be of no real value to members of the company, in view of the insignificant amounts involved, or would entail expense or delay out of proportion to the value to members of the company and, if the directors are of such opinion about each of the company's subsidiaries, group annual financial statements shall not be required.

(2) If the directors of a limited purpose company are of the opinion that–

(a) if a subsidiary were to be dealt with in group [~~annual~~] financial statements, the result would be

misleading or harmful to the business of the company or any of its subsidiaries; or

(b) the business of the company and that of a subsidiary are so different that they cannot reasonably be treated as a single undertaking or are of such opinion about each of the company's subsidiaries,

group annual financial statements need not deal with that subsidiary, or, as the case may be, no group annual financial statements shall be required~~[, if the Registrar approves]~~.

c. by deleting subsections (3) and (4).

29. Section 294 of the principal Act is hereby amended by inserting the words "limited purpose" after the phrase "directors of a" and deleting the word "holding" before "company" in the first line.
30. Section 298 of the principal Act is hereby amended by substituting the following section for that section:

(1) The~~[annual]~~ financial statements and group annual financial statements, if any, of a company other than the auditor's report, shall be approved by its directors and signed on their behalf by two of the directors or, if there is only one director, by that director~~[, and group annual financial statements shall similarly be approved and signed by the directors of the holding company]~~.

(2) If a copy of any ~~[annual]~~ financial statements, or group annual financial statements which have not been approved and signed as required by subsection

(1), is issued, circulated or published, every director or officer of the company concerned who is a party to such issue, circulation or publication thereof, shall be guilty of an offence.

31. Section 300 of the principal Act is hereby amended by substituting the following paragraph for paragraph (i) of that section:

(i) to examine such of the accounting records of the company and carry out such tests in respect of such records and such other auditing procedures as he considers necessary in order to satisfy himself that the annual financial statements or group annual financial statements ~~[fairly present the financial position of the company or of the company and its subsidiaries and the results of its operations and those of its subsidiaries, in conformity with generally accepted accounting practice applied on a basis consistent with that of the preceding year]~~ comply with the financial reporting standards issued under section 440U(2);

32. Section 303 of the principal Act is hereby amended by substituting the following section for that section:

303 Half-yearly interim reports

Every public company having a share capital, other than a wholly owned subsidiary, shall not later than three months after the expiration of the first period of six months of its financial year send to every member and holder of debentures of the company an

interim report on the results [~~fairly presenting the business and operations~~] of the company, or in the case of a holding company, of the company and its subsidiaries, during the said period of six months[, ~~and the results thereof~~]: Provided that—

- (a) the first interim report to be sent to members and holders of debentures of a company after its incorporation shall—
 - (i) in any case where proviso (a) to section 285 (1) applies and where the period of the first financial year of the company exceeds nine months, be in respect of a period of six months commencing on the date of incorporation of the company; and
 - (ii) in any case where proviso (b) to section 285 (1) applies, be in respect of a period commencing on the date of incorporation of the company and ending six months before the end of its first financial year;
- (b) where a company has changed the end of its financial year under section 285 (2) (b) an additional interim report shall be made out for the period from the beginning of the financial year so changed to the date of the end of the financial year before it was so changed.

33. Section 305 of the principal Act is hereby amended –

- a. by deleting subsection (1);
- b. by substituting the following subsection for subsection (3):

(3) Every interim report and all provisional annual financial statements of a company shall be approved by the directors and signed on their behalf by two of

the directors or, if there is only one director, by that director.

34. Sections 309 and 310 of the principal Act are hereby amended –
- a. by deleting from the heading to these sections, the word “Annual” before “Financial Statements” and the phrase “and Interim Reports”;
 - b. by deleting from the heading to section 309, the word “annual” before “financial statements” and the phrase “and interim reports”.
35. Section 440B of the principal Act is hereby amended –
- a. by substituting for subsection (2), the following section:

(2) Subject to the provisions of subsection (6), the members of the panel shall be appointed by the Minister and shall consist of–

 - (a) the chairperson;
 - (b) the Minister [~~Registrar~~] or his or her nominee;
 - (c) the Commissioner of the Competition Commission [~~chairperson of the Competition Board established by section 3 of the Maintenance and Promotion of Competition Act, 1979 (Act 96 of 1979),~~] or his or her nominee;
 - (d) three persons each nominated by the [~~Johannesburg Stock~~] JSE Securities Exchange South Africa and the [~~Council of South African Banks~~] Banking Council (South Africa); and
 - (e) one person nominated by each of such bodies, associations and institutions, limited to a

maximum of fifteen such bodies, associations and institutions which—

- (i) the Minister in consultation with the panel, has determined as being sufficiently representative of the relevant interests in the regulation of securities; and
- (ii) have been designated by the Minister by notice in the Gazette;

- b. by the deletion of the word “the” in the first line of subsection (8);
- c. by the deletion of subsection (12);
- d. by substituting for subsection (14), the following subsection:

(14) The panel may delegate any of its powers [~~to the executive committee or~~] to any subcommittee [~~of the panel~~] which may be established by the panel.

36. Section 440C of the principal Act is hereby amended –

- a. by substituting for paragraph (d) of subsection (4), the following paragraph:

(d) appeals from decisions of [~~—(i)—~~]the executive director to the panel; [~~executive committee referred to in subsection (12) of section 440B; (ii) the said executive committee to the panel; and (iii) a subcommittee of the panel to the panel.~~]

- b. by deleting the words “its executive committee or” in the first line of subsection (6).

37. Section 440D of the principal Act is hereby amended –

- a. by substituting for subsection (1), the following subsection:

(1) For the purposes of performing its functions in terms of this Chapter, the executive director or the panel [~~or any committee thereof~~] may—

(a) summon any person who is believed to be able to furnish any information on the subject of an investigation or to have in his or her possession or under his or her control any book, document or other object which has any bearing upon that subject, to lodge such book, document or other object with the executive director within the period specified in the summons, or to appear before the executive director or the panel [~~or a committee thereof~~] at a time and place specified in the summons, to be interrogated or to produce such book, document or other object; and

(b) interrogate any such person under oath or affirmation administered by the chairperson or a person appointed by him, and examine or retain for examination any such book, document or other object: Provided that any person from whom any book, document or other object has been taken and retained under this subsection shall, so long as such book, document or object is in the possession of the executive director or the panel [~~or a committee thereof~~], at his request be allowed, at his own expense and under the supervision of the investigating officer, to make copies thereof or to take extracts therefrom at any reasonable time.

b. by substituting for subsections (3) and (4), the following subsections:

(3) Any person who has been summoned to attend before, or to produce any book, document or other object to the executive director or the panel [~~or a committee thereof~~] and who, without sufficient cause (the onus of proof of which shall rest upon him), fails to attend at the time and place specified in the summons or to remain in attendance until he is excused by the chairperson thereof from further attendance or, having attended, refuses to be sworn or to make an affirmation after he has been asked by the chairperson (or a person appointed by him) to do so or, having been sworn or having made affirmation, fails to answer fully and satisfactorily any question lawfully put to him, or fails to produce any book, document or other object in his possession or under his control which he has been summoned to produce, shall be guilty of an offence.

(4) Any person who, after having been sworn or having made affirmation, gives false evidence before the executive director or the panel [~~or a committee thereof~~] on any matter, knowing such evidence to be false or not believing it to be true, shall be guilty of an offence.

38. The principal Act is hereby amended by inserting the following Chapter XVB after section 440N:

Chapter XVB:

Financial Reporting Standards

4400 Definitions and preliminary

(1) For purposes of this Chapter,

'advertise' includes notification to interested persons;

'exchange' means an exchange licensed in terms of section 10 of the Securities Services Act, 2004 (Act 36 of 2004);

'financial reporting standard' means statements of Generally Accepted Accounting Practice issued by the Accounting Practices Board prior to the establishment of the Financial Reporting Standards Council, and thereafter issued in terms of section 440U(2);

'nominated officer' means the person referred to in section 440V(2); and

'regulator' means a statutory body with powers to regulate or supervise companies or the trading of shares in companies and includes any self-regulatory organisation as defined in section 1 of the Securities Services Act, 2004 (Act ... of 2004), having such powers.

(2) Any duty to be performed under this Chapter by a chairperson may in his or her absence be performed by a deputy chairperson.

440P Establishment of Council

(1) There is hereby established a body corporate to be known as the Financial Reporting Standards Council ("the Council").

(2) The Council's objective is to protect users of financial reports by developing financial reporting standards.

(3) The Council shall consist of:

- (a) three auditors of financial statements;
- (b) two persons responsible for preparing financial statements on behalf of public interest companies;
- (c) a person responsible for preparing financial statements for limited purpose companies; and
- (d) four users of financial statements;
- (e) two persons knowledgeable in company law nominated by the Minister;
- (f) one person nominated by the executive officer of the Financial Services Board; and
- (g) one person each nominated by every exchange that imposes adherence to accounting standards as a listing requirement.

(4) The Council shall be autonomous and its members shall serve to promote the objective of the Council.

440Q Appointment and removal of Council members

(1) The Minister shall appoint as members of the Council –

- (a) the persons nominated from time to time under section 440P(3)(e) to (g); and

(b) persons selected in terms of subsection (2).

(2) The Minister shall –

(a) advertise any vacancies under section 440P(3)(a) to (d) and allow at least one month for nominations;

(b) select candidates –

(i) with the qualifications, knowledge and experience necessary to further the objective of the Council;

(ii) who are not full-time employees of the government or of a statutory body;

(c) appoint the chairperson and deputy chairperson of the Council.

(3) Members appointed in terms of subsection (2) shall be appointed every three years and may not serve for more than six consecutive years.

(4) For the sake of continuity, the Minister shall ensure that six or more of the candidates appointed –

(a) at the time the Council is established, shall be former members of the Accounting Practices Board; and

(b) at every subsequent appointment, shall be former members of the Council.

(5) The Minister –

(a) must remove a member of the Council –

- (i) who becomes insolvent, is certified mentally unfit, or is convicted of an offence and sentenced to imprisonment without the option of a fine;
- (ii) who is permanently incapacitated;
- (iii) who has been absent without the chairperson's leave, or in case of the chairperson, without the deputy chairperson's leave, from three consecutive meetings of the Council;
- (iv) described in section 440P(3)(a) to (d), who ceases to be a user, preparer or auditor of financial statements;

(b) may remove a member of the Council for –

- (i) non-performance of duties;
- (ii) serious misconduct; or
- (iii) conduct that undermines the integrity or objective of the Council.

(6) A vacancy arising at any time other than the close of a three year cycle shall be filled in the manner described in subsection (2).

440R Officers and meetings of Council

(1) The Council must –

- (a) determine the procedures to be followed at its meetings;

(b) meet at least three times a year on dates set by the chairperson.

(2) Every member shall have one vote and the decision of nine members at any meeting of the Council at which at least ten members are present constitutes a decision of the Council.

(3) The Council may establish and appoint members to sub-committees to assist in performing the functions of the Council.

(4) Meetings of the Council shall be open to the public.

440S Functions of Council

(1) The Council shall develop financial reporting standards for:

(a) public interest companies; and

(b) limited purpose companies.

(2) Financial reporting standards issued in terms of subsection (1) shall be in accordance with the International Reporting Standards of the International Accounting Standards Board or its successor body.

440T Interested persons in respect of Council

A person wishing to receive notice of vacancies on the Council, advance notice of meetings of the Council or drafts of any prospective amendment to

financial reporting standards, may register with the Council as an interested person.

440U Approval and publication of standards

(1) The Council must –

- (a) give notice to interested persons of any prospective amendment of financial reporting standards, with at least one month to return comment;
- (b) consider any comments made before voting on an amendment;
- (c) submit financial reporting standards to the Minister.

(2) The Minister shall issue financial reporting standards on advice of the Council by publication in the *Gazette*.

440V Monitoring

(1) The Minister may from time to time, after consultation with the Financial Services Board, specify, by proclamation in the *Gazette*, types or categories of companies to be monitored in terms of this section.

(2) The Minister shall nominate a suitably qualified officer who shall –

- (a) monitor the financial reports and accounting practices of the companies specified under

subsection (1) in order to detect non-compliance with financial reporting standards that may prejudice users; and

(b) where reasonable grounds exist for suspecting non-compliance:

(i) document the incident; and

(ii) refer it to the executive officer of the Financial Reporting Investigations Panel referred to in section 440W.

(3) For purposes of subsection (2), the nominated officer may in writing direct any person believed to have knowledge or information relating to a company mentioned in subsection (1), to –

(a) deliver or produce information;

(b) submit written answers to questions;

(c) appear at a place designated by him or her to be questioned.

(4) The powers conferred under subsection (3) are subject to the law of privilege as applied in judicial proceedings.

440W Establishment of panel

(1) There is hereby established a body corporate to be known as the Financial Reporting Investigations Panel ("the Panel").

(2) The Panel's objective is to protect users of financial reports by investigating alleged non-compliance with financial reporting standards.

(3) The Panel shall consist of:

- (a) an executive officer;
- (b) six auditors;
- (c) six persons qualified in accounting, but not registered as auditors;
- (d) four persons qualified in law;
- (e) a person nominated by the executive officer of the Financial Services Board; and
- (f) one person each nominated by every exchange that imposes adherence to accounting standards as a listing requirement.

440X Appointment and removal of Panel members

(1) The Minister shall appoint as members of the Panel –

- (a) the persons nominated under section 440W(3)(e) and (f); and
- (b) persons selected in terms of subsection (2).

(2) The Minister shall –

(a) advertise vacancies under section 440W(3)(a) to (d) and allow at least one month for nominations;

(b) select candidates who:

(i) have the qualifications, knowledge and experience necessary to further the objective of the Panel;

(ii) are not full-time employees of government or of a statutory body;

(c) appoint from members nominated under section 440W (c) and (e), a chairperson and deputy chairperson.

(3) Members appointed under subsection (2) shall be appointed every three years and may not serve for more than six consecutive years.

(4) For the sake of continuity, the Minister shall ensure that seven or more of the candidates appointed –

(a) at the time the Panel is established, shall be members of the GAAP Monitoring Panel of the JSE Securities Exchange South Africa; and

(b) at every subsequent appointment, shall be former members of the Panel.

(5) The Minister –

(a) must remove a member of the Panel who:

- (i) becomes insolvent, is certified mentally unfit, or is convicted of an offence and sentenced to imprisonment without the option of a fine;
- (ii) fails to disclose a conflict of interests; or
- (iii) is permanently incapacitated.

(b) may remove a member of the Panel:

- (i) if the member regularly declines nomination to an investigation committee;
- (ii) if the member is not conscientious in the performance of an investigation;
- (iii) for engaging in an activity that may undermine the integrity or objective of the Panel.

(6) A vacancy arising at any time other than the close of a three year cycle shall be filled in the manner described in subsection (2).

440Y Interested persons in respect of Panel

A person wishing to receive notice of vacancies on the Panel may register with the executive officer of the Panel as an interested person.

440Z Officers and meetings of Panel

(1) The Panel shall -

- (a) determine the procedures to be followed at its meetings;

(b) determine the procedures to be followed by an investigation committee;

(c) meet at least twice a year on dates set by the chairperson.

(2) The procedures determined under subsection (1)(b) shall be in accordance with the Promotion of Administrative Justice Act, 2000.

(3) Every member shall have one vote and the decision of eleven members at any meeting of the Panel at which at least fourteen members are present constitutes a decision of the Panel.

440AA Investigation of non-compliance

(1) The Minister, the Registrar, the Financial Services Board, and any other regulator or user who has reason to believe that a financial report of a public interest company failed to comply with a financial reporting standard, may refer the matter to the executive officer of the Panel for investigation.

(2) Every matter referred to the executive officer shall be noted and the following information recorded:

(a) the date of receipt;

(b) the company suspected of non-compliance;

(c) the nature of the alleged non-compliance;

(d) the financial report containing evidence of the alleged non-compliance;

- (e) whether or not the matter was referred to the chairperson of the Panel under subsection (3) and the reasons; and
 - (f) if the matter was investigated, the report of the investigation committee;
 - (g) the persons to whom the report mentioned in (g) was published;
 - (h) the date of publication; and,
 - (i) if an administrative penalty was agreed to under section 440FF (2), the amount of the penalty agreed upon and how it was calculated.
- (3) The executive officer shall within five business days of a matter being referred under subsection (1)
=
- (a) assess whether the matter warrants investigation; and, if so
 - (b) submit to the chairperson of the Panel a statement of the reasons, with reference to the financial reporting standards concerned.
- (4) The chairperson shall within seven business days of receipt of a recommendation under subsection (3)
=
- (a) appoint an investigation committee; and
 - (b) notify the company being investigated.

(5) Members appointed to an investigation committee shall recuse themselves if –

- (a) they have an interest in the company being investigated or the outcome of the investigation;
- (b) serving on the committee would give rise to any other conflict of interests.

(6) An investigation committee shall consist of –

- (a) the chairperson or deputy chairperson of the Panel;
- (b) a person qualified in law; and
- (c) at least two persons qualified in accounting.

(7) The investigation committee shall –

- (a) follow the procedures determined from time to time by the Panel;
- (b) investigate whether there was a failure to comply with financial reporting standards;
- (c) assess the materiality of any failure and its prospective prejudice to users;
- (d) consult with any specialist advisors;
- (e) within 18 business days of its commencement, deliver a written report on the findings of its investigation to the executive officer.

(8) If the committee fails to conclude its investigation within the 18 business days provided, the committee shall deliver a provisional report, and the executive officer may then allow additional time or otherwise direct how the investigation should proceed.

(9) If the members of the committee did not reach consensus on the fact or extent of the alleged non-compliance, the written report mentioned in subsection (7)(e) must record the different opinions.

(10) The Minister may by proclamation in the *Gazette*, extend the number of days prescribed under subsections (3) and (4).

440BB Powers of investigation committee

(1) For purposes of section 440AA(7), an investigation committee may in writing direct any person believed to have knowledge or information relating to a company under investigation, to –

- (a) deliver or produce information;
- (b) submit written responses to questions posed by the committee;
- (c) appear at a place designated by the committee to be questioned.

(2) The powers conferred under subsection (1) are subject to the law of privilege as applied to judicial proceedings.

440CC Confidentiality

(1) A member of an investigation committee shall keep confidential the names of the other members of the committee and any information disclosed to him or her during the course of an investigation and not publish it to any other person or use it for any purpose other than to discharge their duties under this Chapter or to comply with any law.

(2) Any person who contravenes the provisions of subsection (1) shall be guilty of an offence.

440DD Advisors

Section 440CC and subsection (5) of section 440AA shall, with the necessary changes, apply also to specialist advisors consulted under section 440AA(7)(d).

440EE Publication

(1) The executive officer shall within five business days of the receipt of a report of an investigation committee, publish it issue a copy thereof to the company investigated.

(2) Any response by the company must be submitted to the executive officer in writing within 7 business days of receipt of the report, and referred back to the investigation committee.

(3) After due consideration of the response, the investigation committee may amend the report and must within 14 business days of receipt of the

company's response, resubmit the report to the executive officer.

(4) If no response was received by the date specified in subsection (2), within 2 business days of that date, or if a response was received, within 2 business days of the resubmission of the report, the executive officer –

(a) shall publish the report to –

(i) the Registrar; and

(ii) any exchange on which shares of the company are listed;

(b) may, if considered in the interest of users, publish the report to –

(i) any other regulator;

(ii) the South African Institute of Chartered Accountants or other professional bodies; and

(ii) the media.

(5) Two months after its publication, a report shall become available for inspection by the public at the office of the Registrar.

440FF Offence and penalty

(1) A public interest company that issues a financial report that fails to comply with a financial reporting standard, and every director of the company that has signed or was party to the financial report, shall be guilty of an offence.

(2) A company under investigation may agree with the Minister to –

- (a) pay an administrative penalty;
- (b) revise and republish the financial report;
or
- (c) take any other remedial action,

within a certain time.

(3) The amount and action contemplated in subsection (2) shall be decided by the nominated officer in consultation with the executive officer and the chairperson of the Panel, and based on the following criteria –

- (a) the nature, extent and materiality of the failure;
- (b) whether the failure was deliberate or reckless;
- (c) any prospective loss or damage to users as a result of the failure;
- (d) its probable influence on the economic decisions of users;
- (e) any previous failures of the same company;
- (f) any other factor they consider relevant.

(4) If a company and the nominated officer do not reach agreement under subsection (2), or if the

company fails to pay or take remedial action as agreed, the nominated officer may hand the matter over for prosecution.

(5) A court shall not convict a company or director of an offence under subsection (1) if it is satisfied that the company has performed substantially in terms of an agreement under subsection (2).

440GG Limitation of liability

Neither the Council, the Panel nor their respective members and employees shall be held liable for any loss sustained or damages caused to any person as a result of any *bona fide* act or omission relating to the performance of their duties under this Chapter, unless gross negligence is proved.

440HH Annual reports

The chairperson of the Council and the executive officer of the Panel shall submit to the Minister an annual report on their respective activities in the preceding calendar year.

440II Administrative Support

(1) The Minister, in support of the Council and the Panel, shall

(a) provide offices;

(b) employ staff;

(c) open and operate banking accounts;

- (d) insure against risk;
- (e) perform other administrative acts;
- (f) perform legal acts and institute or defend any legal action; and
- (g) meet all reasonable expenditure.

(2) The Minister may delegate to each of the executive officers of the Council and the Panel, any power necessary for the performance of the acts in subsection (1).

440JJ Remuneration and reimbursements

(1) The Minister shall remunerate members appointed under sections 440Q (1)(b) and 440X(1)(b) and reimburse reasonable expenses incurred in the performance of their duties.

39. Section 441 of the principal Act is hereby amended –
- a. by inserting the following subsection after subsection 1(b):

(bA) in section 440FF (1), to a fine not exceeding R 500 000;

- b. by substitution for paragraph (c) of subsection (1), the following paragraph:

(c) in section [440G (2) or] 440I (2), 440CC(2) or 440DD, to a fine or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment;

- c. by substitution for paragraphs (f) and (g) of subsection (1), the following paragraphs:

(f) in section 90, 286, 286A, 288, 297, 298, 299, 302, 308, 312 (5), 363, 363A, 365, 414, 418 (5) or 421, to a fine or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment;

(g) in section 242, 268C, 268I, 287 or 287A, to a fine or to imprisonment not exceeding a period of three months or to both such fine and imprisonment;

40. Schedule 4 of the principal Act is hereby amended –
- by deleting in the heading to the Schedule the word “annual” and the phrase “, interim reports and provisional annual financial statements”;
 - by deleting paragraph (1), paragraph (12) with its heading and paragraph (44),;
 - by substituting the following paragraph for paragraph (2):

This Schedule has effect in addition to the requirements of the Act in respect of [annual] financial statements [~~, provisional annual financial statements and interim reports~~].

- d. by replacing the definitions at (e), (f) and (g) of paragraph (4) with the following definitions:

(e) “convertible instruments” are instruments which may be voluntarily exchanged for shares or debentures during a designated conversion period at a specified exchange ratio;

- (f) "current taxation" is the amount of income tax payable or recoverable in respect of taxable income or tax loss, for the period;
 - (g) "deferred taxation" is the tax payable in future periods due [attributable] to timing differences.
- e. by deleting the phrase "but before extraordinary items," and the phrase "before extraordinary items" in (k) and (l), respectively, of paragraph (4);
- f. by deleting the definition of "extraordinary items" at (m) of paragraph (4);
- g. by substituting the following definitions for the definitions at o and r of paragraph (4):
 - (o) "financing activities" are those activities which result in changes in the size and composition of the contributed equity and borrowings ~~[capital funding, comprising debt and equity,]~~ of the reporting entity;
 - (r) "intangible assets" are identifiable non-monetary asset without physical substance ~~[non-monetary assets without physical substance and include but are not restricted to goodwill, patents, trademarks, brand names, copyrights, franchises, licences, know-how and publication titles]~~
- h. by inserting the following definitions after (r) and (v), respectively, of paragraph (4):
 - (rA) "inventories" are assets held for sale in the ordinary course of business, in the process of production for sale, or in the form of materials or supplies to be consumed in the production process or in the rendering of services;

(vA) "material item" means any information relating to a company which, either by itself or in conjunction with other information, could influence the economic decisions of users of the company's financial statements. The extent or the nature of the item could render it a material item;

- i. by substituting the following definitions for paragraphs (s), (w) and (x), respectively of paragraph (4):

(s) "investing activities" are those activities relating to the acquisition and disposal of ~~[fixed assets and investments, including advances]~~ long-term assets and other investments not falling within the definition of cash;

(w) "provision" means a liability of uncertain timing or amount ~~[any amount written off or retained by way of providing for depreciation or diminution in value of assets or retained by way of providing for any known liability, the amount of which cannot be determined with substantial accuracy]~~

(x) "retained equity income or deficit of an associated company" is the investor's effective interest in the retained income or loss (net of dividends received) of the investee for the accounting period before ~~[extraordinary items and]~~ prior year adjustments;

- j. by deleting the definition of "stock" at (aa) of paragraph (4);
k. by inserting above the heading "Part 1" the following heading and paragraph, by replacing the references to "paras 5-51" and "paras 5-6" with "paras 6-51" and "para 6", respectively,

by deleting the sub-heading "Departure from accounting concepts", and by deleting the existing paragraph 5:

Application

(5) (a) The whole of this Schedule applies to Limited Purpose Companies.

(b) Part III and paragraphs 8, 9, 10, 14, 17, 23, 25 - 28, 30 - 33, 36, 37, 40 - 42, 45, 56 - 60 and 73 of Parts I, II and IV, apply to Public Interest Companies to the extent that there is no conflicting requirement in the statements of Generally Accepted Accounting Practice published from time to time by the Financial Reporting Standards Council.

- l. by substituting for the heading "Stock" above paragraph (29), the heading "Inventories" and by substituting for the word "stock" in paragraph (29)(1) the word "inventories";
- m. by substituting in paragraph (42), for the phrase "paid and proposed" in (c), the word "declared", for the word "loans" in (q) the word "items, and for the phrase "abnormal in amount" in (s) the phrase "material items"
- n. by deleting from the last line of paragraph (42) (u), the phrase "extraordinary items and";
- o. by replacing paragraph 46 with the following paragraph:

(46) There shall be stated any material items, the amount of these [extraordinary] items [~~including the nature and amount of taxation~~] and the extent of outside owners' interest relating to these items.

- p. by inserting after paragraph (51) the following heading and paragraphs:

Part I : E. Statement of Changes in Equity

(51A) Except in the case of the first financial statement , the corresponding amounts for the preceding period for all items shown in the statement of changes in equity shall be stated.

(51B) An entity shall present a statement of changes in equity showing:

- _____ (a) profit or loss for the period;
- _____ (b) each item of income and expense for the period that, as required by accounting standards to be recognized directly in equity, and the total of these items;
- _____ (c) total income and expense for the period (calculated as the sum of (a) and (b)), showing separately the total amounts attributable to equity holders of the parent and to minority interest; and
- _____ (d) for each component of equity, the effects of changes in accounting policies and corrections of errors.

(51C) The statement of changes in equity must also disclose:

- _____ (a) the amounts of transactions with equity holders acting in their capacity as equity holders, showing separately distributions to equity holders;
- _____ (b) the balance of retained earnings (i.e. accumulated profit or loss) at the beginning of

the period and at the balance sheet date, and the changes during the period; and

(c) a reconciliation between the carrying amount of each class of contributed equity and each reserve at the beginning and the end of the period, separately disclosing each change.

MEMORANDUM OF THE OBJECTIVES OF THE COMPANIES
AMENDMENT BILL, 2005

1. The Bill introduces a number of urgent amendments required prior to the anticipated completion of the corporate law reform process which is currently underway.
2. These amendments fall into 65 categories:
 - a. amendments required to give legal backing to accounting standards;
 - b. amendments required to promote and maintain auditor independence;
 - c. amendments required to update the requirements for the registration of a prospectus;
 - d. amendments required to further the objectives and expedite the procedures of the Securities Regulation Panel; ~~and~~
 - e. amendments required to indemnify and impose a duty of confidentiality on inspectors; and
 - f. an amendment required to effect a uniform standard of liability on officers performing duties under the Act.
3. Amendments required to give legal backing to accounting standards

1. General

Because investors make financial decisions based on information published by companies, it is necessary that this information be accurate and reliable.

As long as a variety of accounting methods are possible, companies are able to select the mode of accounting that presents their financial position in the most favourable light. In the past decades investors have lost considerable amounts of money due to dubious accounting and a rank overstatement of profitability.

2. Standard to be imposed

The amendments to Chapter XI of the Act will impose a uniform accounting standard to ensure that any financial information published by a company is calculated in accordance with generally accepted accounting practice ("GAAP").

This standard will be developed and maintained by a Financial Reporting Standards Council ("the Council"), to be established under the new Chapter XVB.

The standard will need to be comparable with the international standards adopted from time to time by the International Accounting Standards Board. This will ensure a tight correlation between the accounting practices of South Africa and the international investment community – making our capital markets more accessible to foreign investment.

3. Compliance and sanction

An officer within the Department of Trade and Industry will become responsible for monitoring compliance with prescribed accounting standards. Together with other regulators - such as the Financial Services Board - and investors, the Department may refer any apparent non-compliance with standards for investigation by a team of experts, to be drawn from a newly established Financial Reporting Investigations Panel.

If an investigation finds evidence of non-compliance, the Registrar may require the company to republish the information, take other remedial action or pay a penalty. If the company fails to co-operate, the matter may be handed over for prosecution in terms of a new offence created under the proposed section 440FF.

4. Disclosure provisions of the Act

Where the Act has previously tried to create an accounting and disclosure framework through various of its provisions, these are both incomplete and outdated. Most of these provisions will be deleted in favour of the comprehensive new standard to be imposed by the Council. This also avoids the risk of discrepancies developing over time between the legislative requirements and the standard imposed by the Council.

5. More lenient standard for limited purpose companies

Since the standard to be imposed is primarily for the benefit of investors, and since it is an onerous standard, it is necessary to make provision for closely held companies that do not offer their shares to the public. The amendments thus propose a category of company referred to as “limited purpose companies” - which will be allowed to deviate from the financial reporting standards imposed on other companies (viz. “public interest companies”), provided that all shareholders consent, and provided also that the deviation is noted and reasons given.

As a further concession, certain other options will be retained for limited purpose companies, while being repealed for public interest companies. For example, the choice whether or not to consolidate group financial statements (dealt with under sections 289 – 291 of the Act).

6. Revision of the 4th Schedule

Schedule 4 of the Act has historically served as a detailed specification for disclosure in financial statements. A careful review of this schedule has identified those areas that are dealt with in current statements of GAAP and those provisions that are supplementary to GAAP. The supplementary provisions have been retained for all companies, whereas the other requirements have been retained for limited purpose companies only. This has

the effect of maintaining a secondary, less onerous financial reporting standard for limited purpose companies.

The amended paragraph 5 of the 4th Schedule brings about this distinction.

The other amendments to the 4th Schedule will dispense with various anachronisms and bring about a tighter correlation with GAAP.

4. Amendments to promote and maintain auditor independence

1. General

These amendments are incidental to the provisions of the proposed Auditing Profession Bill ("the APB"), which aims to address recent failures by auditors to perform an independent assessment of the accounting records and policies of their clients. The APB will bring about a more stringent regulation of the auditing profession and make provision for an Independent Regulatory Board for Auditors and for a Standard-Setting Board for Auditor Ethics and Auditing. The APB will be submitted to Parliament concurrently with this Bill.

2. Only regulated auditors may audit for purposes of the Companies Act

By virtue of the new section 268J to the Companies Act, only auditors registered under the Auditing Profession Act may in future be appointed as auditors of companies. This means that all audits of company accounts will henceforth be subject to the controls and safeguards of that Act.

3. Measures to promote auditor independence

Many cases of auditor malpractice seem to have stemmed from auditors having too close an association with their

clients. Several measures are introduced to ensure that auditors will remain independent and not prone to “capture” by the company’s Board of Directors.

- The new section 269A requires that auditors be nominated by an audit committee, which will also be responsible for setting the auditor’s remuneration.
- By the new section 274A, a rotation of auditors will be required. Henceforth no individual auditor may be appointed to a company for more than 4 consecutive years.
- The new section 275A will preclude an auditor from performing certain non-audit services for the company.

The distinction created between “public interest companies” and “limited purpose companies” for purposes of compliance with accounting standards, will also apply in relation to audit committees and the rotation of auditors. These requirements will thus apply only to public interest companies, with the current less onerous standard prevailing for limited purpose companies.

A company’s opportunity to remove an auditor, or for an auditor to simply resign and walk away, when an irregularity has been detected, is curtailed by the amendments to sections 277, 278 and 280.

4. Offence to be party to false or misleading information

The new section 287A makes it an offence for any auditor or other person to be party to false or misleading information in the financial statements of a company.

5. Amendments to require additional information for a prospectus

The revised 3rd Schedule specifies more fully the form and content of the prospectus. The amendment to section 144(2) is consequential.

Both the scope and detail of information required for a prospectus have been extended. This will close the current gap between the JSE listing requirements and the information to be provided in a prospectus. Because the ambit of information required in terms of the JSE listing requirements is so extensive, they make provision for an exemption from certain of the requirements – where publication of specific information may cause undue prejudice to the issuer. In view of the more onerous prospectus requirements introduced under the revised 3rd Schedule, it is considered necessary for the Act to provide the Registrar with a similar discretion.

The amended Schedule 3 requires disclosure in the prospectus of any dispensations obtained under section 148A.

6. Amendments to further the objectives and expedite the procedures of the Securities Regulation Panel (“SRP”)

1. General

The Companies Act contains a number of provision designed to protect minority shareholders of a company in the event of a takeover bid.

Foremost amongst these are section 440K which requires the compulsory acquisition of the shareholding of minorities in affected transactions, and the other provisions of Chapter XVA which establishes the Securities Regulation Panel (“the SRP”) to regulate affected transactions.

2. Amendment of Section 228

Section 228 currently allows directors to dispose of the assets or greater part of the business of a company by an

ordinary resolution of the shareholders. (A change of name, by contrast, would require a special resolution.)

Section 228 is being used more and more often for purposes of effecting a takeover – as an alternative to section 440K which has more stringent requirements.

For the year ended February 2003, the SRP authorized 27 transactions in terms of section 228 and 33 transactions in terms of section 440K. For the year ended February 2004, 17 transactions were authorized in terms of section 228 and 16 in terms of section 440K.

The first amendment to 228(1) will require that the disposal of the greater part of assets of the business of a company should henceforth require a special resolution.

In addition, there have been certain liberal interpretations of the term “substantially the whole” in relation to the disposal of a business undertaking, in order to avoid the application of subsection 228(1).

The purpose of the second amendment to 228(1) is to henceforth apply the more objective test already used in respect of assets, namely “the greater part”, also to the disposal of a business undertaking.

3. Insertion of a new subsection (4) to section 228

Certain legal opinions hold that a disposal by a wholly owned subsidiary does not fall within the jurisdiction of the SRP – no matter how material it is in relation to the consolidated balance sheet of the holding company. This is because the Securities Regulation Code applies only to public companies and private companies of which shareholder capital exceeds R 5 million and which have more than ten beneficial shareholders. (A wholly owned subsidiary only has one beneficial shareholder.)

The objective to protect minority shareholders in the holding company is thus defeated in such circumstances.

Subsection 4 is inserted to remedy the current anomaly.

~~4. Insertion of a new subsection (5) to section 228~~

~~There have been certain liberal interpretations of the terms “substantially the whole” and “the greater part” of business and assets, respectively, for purposes of avoiding authorization as required under subsection (1).~~

~~The insertion of subsection (5) will ensure that the applicability of subsection (1) will be established independently by the company’s auditors.~~

~~5.4. Amendment of sections 440B, C and D~~

The transactions referred to the SRP need to be attended to speedily. Long delays may have a negative impact on the prospects of the companies involved.

These sections provide for the establishment of an executive committee of the SRP to hear appeals against the decisions of the Executive Director before the appeal is heard by the full Panel. This delays the bringing of appeals to finality and increases the costs for all parties. (One such hearing was only finalized after a year, and the SRP alone incurred legal costs of approximately R 1 million.)

The amendments will dispense with intermediate appeal to the executive committee in order to shorten the appeal process and reduce costs to all parties.

Printed by and obtainable from the Government Printer, Bosman Street, Private Bag X85, Pretoria, 0001

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