

Corporate & Commercial

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SOUTH AFRICA

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Companies Act changes imminent: What you can do to prepare

On 26 March 2024, the Companies Amendment Bill (Bill) and the Companies Second Amendment Bill (Second Amendment Bill) were passed by the National Council of Provinces and are now awaiting presidential assent. With this anticipated to happen at any moment, the enactment into law of the Bill and the Second Amendment Bill (collectively, the Bills) is imminent.

The Bills propose sweeping changes throughout several parts of the Companies Act 71 of 2008 (Companies Act) that will impact the corporate governance structures of a vast majority of companies in South Africa. Companies would therefore benefit from becoming acquainted with these changes by preparing for several key duties that will be imposed by the Bills once in force. With uncertainty as to whether there will be a transitional period for the amendments, it is best to prepare as though the amendments will come into force effective immediately on the date to be gazetted by the President.

Additional AGM agenda items

Section 61(7) of the Companies Act places an obligation on public companies to convene an annual general meeting (AGM) and subsection (8) goes on to list what business must be transacted at the AGM, at a minimum. The Bill amends subsection (8) to expand this list to include the presentation of the company's remuneration report, social and ethics committee report and the appointment of the

social and ethics committee. Companies must be mindful to include these new agenda items in the notices of their AGMs once the amendments have been enacted into law.

Duty to prepare and present a company's remuneration policy and report

One of the Bill's primary aims is to promote equity and equality between senior managers and workers. One of the avenues for this is by imposing new transparency requirements on companies in relation to executive pay.

The Bill introduces new requirements that will place a duty on all public and state-owned companies to prepare and present for approval their remuneration policies and remuneration reports. Within the reports, the company must set out, amongst other things, a copy of the company's remuneration policy as contemplated in the new section 30A(2) of the Companies Act, as proposed by the Bill, and an implementation report containing details of:

- the total remuneration received by each director and prescribed officer in the company;
- the total remuneration in respect of the employee with the highest total remuneration;
- the total remuneration in respect of the employee with the lowest total remuneration; and
- the average total 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.

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This remuneration report will have to be presented to and approved by the shareholders at the AGM by an ordinary resolution and, in the event that it is not approved, then it has to be presented at the following AGM or at a special shareholders meeting which is called for such purpose. The remuneration policy will remain in force for three years for approval and must thereafter be approved every three years (subject to an amendment prior to the three-year period in certain circumstances).

In terms of the newly proposed section 30B(4) of the Companies Act, if the remuneration report is not approved by ordinary resolution at the AGM, there are various steps that need to be taken by the remuneration committee or any other committee of the company responsible for remuneration matters.

This is a considerable development in company law and companies will have to take steps to ensure that remuneration policies are adhered to. By requiring disclosure, public and state-owned companies will now have to make a policy-laden determination by balancing the interests of retaining and recruiting the best talent for their top positions, on the one hand, and the views of the shareholders, on the other. As such, public companies can begin preparing their remuneration policies with this in mind and in preparation for the assent of the Bills.

Social and ethics committee report and appointment

Once the changes proposed by the Bill come into force, social and ethics committees (SECs) of public and state-owned companies will be obliged to present an SEC report at their AGMs. An amended section 72 of the

Companies Act will provide for the preparation of the report in the prescribed manner and form. It is unclear what manner and form this report is to take at present, but it is clear from the wording in the Bill that it will have to set out how the SEC performed its functions in terms of the Companies Act and the Companies Regulations, 2011.

As mentioned, the appointment of the SEC will be one of the items which must be done at an AGM of a public company. The Bill contemplates amendments to section 72 of the Companies Act regarding who may sit on the SEC. The amendments provide that the committee must be comprised of no less than three members, provided that:

- in the case of a public or state-owned company, the majority of the members must be directors who are not involved in the day-to-day management of the business of the company and must not have been so involved at any time during the previous three financial years (i.e. non-executive directors); and
- in the case of any other company, not being a public or state-owned company, the members must consist of no less than three directors or prescribed officers, at least one of whom must be a director, who is not involved in the day-to-day management of the business of the company and who must not have been involved in them within the previous three financial years.

The amendments proposed by the Bill seek to increase the profile of SECs and place emphasis on transparency. Companies may have to alter their policies to ensure conformity with these new requirements and can begin to prepare for these changes by reviewing their memoranda of incorporation and SEC charters to align them with these imminent changes.

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SEC exemption

Another important development in the Bill is the category of companies that could qualify for an exemption from the requirement of having an SEC. Currently, in order to be granted an exemption, the Companies Tribunal needs to be satisfied that one of two grounds are met, namely:

- the company is required *in terms of other legislation* to have, and does have, some form of formal mechanism within its structures that substantially performs the function that would otherwise be performed by the SEC; or
- that an SEC is not reasonably necessary in the public interest, given the nature of the activities of the company.

The Bill proposes an amendment to section 72(5) of the Companies Act that will now allow companies that have formal mechanisms within their structures which substantially perform the functions of an SEC, to apply for an exemption from the requirement of having an SEC, irrespective of whether there is a legislative requirement imposed to have the formal mechanisms.

The Bill further clarifies that an SEC will not be required where a company is a subsidiary of another company that already has an SEC or where a company has been exempt from having an SEC by the Companies Tribunal.

Upon enactment of these changes, companies will be empowered to structure their own mechanisms for handling their social and ethics responsibilities. The amendments will also be welcomed by multinationals that have centralised social governance structures.

Organisations that fall into the category of companies that are required to have an SEC, but do not qualify for an exemption under the current Companies Act, can familiarise themselves with the proposed amendments to section 72 of the Companies Act in order to identify whether they will now qualify for an exemption under the soon-to-be amended Companies Act.

Conclusion

An in-depth discussion on other important changes to the Companies Act, which will come into force upon assent of the Bills, can be found [here](#).

Companies are urged to become au fait with these developments and can contact us for assistance with understanding the implications of these developments on their businesses and ensuring compliance once these new laws are in force.

Andre de Lange, Akhona Mgwaba and Matthew Melnick



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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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