

REPUBLIC OF SOUTH AFRICA

CORPORATE LAWS AMENDMENT BILL

*(As introduced in the National Assembly as a section 75 Bill; explanatory summary of Bill
published in Government Gazette No 28765 of 21 April 2006)
(The English text is the official text of the Bill)*

(MINISTER OF TRADE AND INDUSTRY)

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GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

 Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Companies Act, 1973, so as to amend certain definitions and insert new definitions; to make a distinction between public interest companies and limited interest companies; to limit the liability of various office bearers to that arising from gross negligence in relation to the performance of their functions; to make further provision relating to the use of electronic aids in the furnishing of information relating to companies; to broaden the Minister's powers of delegation; to provide for new ways of giving notice; to make further provision regarding financial assistance for the purchase of a company's shares; to eliminate certain formalities regarding the memorandum and articles; to allow the registrar to restore the registration of a company which has been deregistered in certain circumstances; to make further provision regarding matters to be stated in a prospectus; to change the requirements relating to the disposal of the undertaking of a company; to make new provision in respect of the disclosure of information; to make new provision for the appointment of auditors and audit committees; to provide anew in respect of financial statements; to make new provision regarding the Securities Regulation Panel; to make provision in respect of financial reporting standards; to establish and make further provision for a Financial Reporting Standards Council and a Financial Reporting Investigations Panel; to create an offence in respect of non-compliant financial reports; and to amend Schedule 4 by inserting definitions and amending other provisions relating to financial reporting.

To amend the Close Corporations Act, 1984, so as to insert definitions; to make further provision relating to the use of electronic aids in the furnishing of information; to provide for new methods of giving notice; to make further provision with regard to disclosure of information; and to allow the registrar to restore the registration of a corporation which has been deregistered in certain circumstances; and to provide for matters connected therewith.

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

Amendment of section 1 of Act 61 of 1973, as amended by section 1 of Act 76 of 1974, section 1 of Act 64 of 1977, section 26 of Proclamation 234 of 1978, section 1 of Act 84 of 1980, section 1 of Act 83 of 1981, section 1 of Act 29 of 1982, section 1 of Act 31 of 1986, section 106 of Act 82 of 1986, section 94 of Act 94 of 1990, section 1 of Act 82 of 1992, section 1 of Act 35 of 1998, section 2 of Act 37 of 1999 and section 1 of Act 35 of 2001

1. Section 1 of the Companies Act, 1973, is hereby amended—

- (a) by the insertion in subsection (1) before the definition of “Court” of the following definition: 10
 “**‘Council’** means the Financial Reporting Standards Council established by section 440P;”;
- (b) by the insertion in subsection (1) after the definition of “external company” of the following definitions: 15
 “**‘financial report’** means financial statements and any financial information in a circular, a prospectus or a provisional announcement of results upon which users may reasonably rely;
‘financial reporting standards’ means statements of Generally Accepted Accounting Practice adopted by the Accounting Practices Board prior to the establishment of the Council, and thereafter issued in terms of section 440U(2); 20
‘financial statements’ means annual financial statements, provisional annual financial statements and interim or preliminary reports and includes, where applicable, group and consolidated financial statements;”;
- (c) by the insertion in subsection (1) after the definition of “holding company” of the following definition: 25
 “**‘inspector’** means a person appointed by the Minister in terms of section 254, 257 or 258;”;
- (d) by the substitution in subsection (1) for the definition of “Minister” of the following definition: 30
 “**‘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**] responsible for Justice and, in relation to any other matter, means the Minister of [**Industries, Commerce and Tourism**] Trade and Industry;”;
- (e) by the insertion in subsection (1) after the definition of “officer” of the following definition: 35
 “**‘Panel’** means the Financial Reporting Investigations Panel established by section 440W;”;
- (f) by the insertion in subsection (1) after the definition of “share” of the following definition: 40
 “**‘signature’** includes an electronic signature and an advanced electronic signature as defined in section 1 of the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002);”;
- (g) by the insertion in subsection (1) after the definition of “this Act” of the following definition: 45
 “**‘user’** in relation to a financial report, means a shareholder, prospective shareholder, creditor, regulator or any person who relies on information contained in the report;”;
- (h) by the addition of the following subsections: 50
 “(6) (a) A company is a public interest company if—
 (i) its articles provide for an unrestricted transfer of its shares;
 (ii) it is permitted by its articles to offer shares to the public; 55
 (iii) it decides by special resolution to be a public interest company; or
 (iv) it is a subsidiary of a company described in subparagraph (i), (ii) or (iii).
 (b) A company with two or more types or classes of shares is a public interest company if its articles provide for the unrestricted transfer of shares in one or more of these types or classes. 60

- (c) For the purposes of this subsection—
- (i) a transfer of shares is unrestricted if it is not subject to an effective right of pre-emption;
 - (ii) an effective right of pre-emption is a right of pre-emption which operates in favour of all shareholders of the company and upon every proposed sale of shares to a person who is not a shareholder of the company.
- (d) A company is a limited interest company if it is not a public interest company.
- (e) An effective right of pre-emption contained in the articles of a limited interest company shall be deemed also to operate, with the necessary changes, upon—
- (i) the disposal of a beneficial interest in a share of the company; and
 - (ii) an offer by the company of shares created in terms of section 75(1) to any person who is not a shareholder of the company.
- (f) For the purposes of paragraph (e)(i), ‘beneficial interest’ shall be as defined in subsection 140A(1), except that it shall apply in relation to a share rather than to a security.
- (7) A public interest company, which on or prior to its annual general meeting ceases to fall within the definition of a public interest company, may by a special resolution passed at that meeting become a limited interest company if the directors certify that the company will not in the following financial year seek to become a public interest company.”.

Amendment of section 8 of Act 61 of 1973, as amended by section 46 of Act 88 of 1996 25

2. Section 8 of the Companies Act, 1973, is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) Neither the State, nor the Registrar, an inspector, or any officer or appointee of the State 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.”.

Amendment of section 9 of Act 61 of 1973, as amended by section 1 of Act 59 of 1978, section 2 of Act 29 of 1982, section 2 of Act 70 of 1984 and section 2 of Act 35 of 2001 35

3. Section 9 of the Companies Act, 1973, is hereby amended—

- (a) by the substitution in subsection (1) for the words preceding paragraph (a) of the following words:

“Subject to the provisions of subsection (4), and subject to the availability of the original document, any person may, on payment of the prescribed fee (including an additional fee if any document is not uplifted personally at the Companies Registration Office)—”;
- (b) by the deletion in subsection (1A) of the word “or” at the end of paragraph (a);
- (c) by the addition to subsection (1A) of the word “or” at the end of paragraph (b); and
- (d) by the addition to subsection (1A) of the following paragraph:

“(c) obtain a certificate from the Registrar as to the contents or part of the contents of any documentation kept by him or her in terms of this Act in respect of any company.”.

Insertion of section 17A in Act 61 of 1973

4. The following section is hereby inserted in the Companies Act, 1973, after section 17:

“Delegation

17A. The Minister may in writing delegate any of the powers and entrust any of the duties assigned to the Minister by Chapters IX and XIII and sections 79(2), 272, 440U and 440FF to any officer or employee in the public service.”. 5

Amendment of section 28 of Act 61 of 1973

5. Section 28 of the Companies Act, 1973, is hereby amended by the substitution for subsection (3) of the following subsection: 10

“(3) The Registrar shall give notice in the [*Gazette*] prescribed manner of the conversion of a company into another type or form of company.”.

Amendment of section 29C of Act 61 of 1973

6. Section 29C of the Companies Act, 1973, is hereby amended by the substitution for subsection (5) of the following subsection: 15

“(5) The Registrar shall give notice in the [*Gazette*] prescribed manner of the conversion of a close corporation into a company.”.

Amendment of section 38 of Act 61 of 1973, as amended by section 3 of Act 37 of 1999 20

7. Section 38 of the Companies Act, 1973, is hereby amended by the insertion after subsection (2) of the following subsections:

“(2A) Subsection (1) does not prohibit a company from giving financial assistance for the purchase of or subscription for shares of that company or its holding company, if— 25

- (a) the company’s board is satisfied that—
- (i) subsequent to the transaction, the consolidated assets of the company fairly valued will be more than its consolidated liabilities; and
 - (ii) subsequent to providing the assistance, and for the duration of the transaction, the company will be able to pay its debts as they become due in the ordinary course of business; and 30

(b) the terms upon which the assistance is to be given is sanctioned by a special resolution of its members.

(2B) For the purposes of paragraph (2A)(a), the directors must consider any contingent liabilities which may arise to the company, including any contingent liability which may result from giving the assistance.”. 35

Amendment of section 43 of Act 61 of 1973, as amended by section 2 of Act 84 of 1980, section 7 of Act 83 of 1981, section 3 of Act 63 of 1988 and section 3 of Act 35 of 1998

8. Section 43 of the Companies Act, 1973, is hereby amended by the substitution for subsection (3) of the following subsection: 40

“(3) The Registrar shall register such translated name or shortened form of the name or translated name of the company concerned or such defensive name and, where registration is effected pursuant to an application under subsection (1) or (2), the Registrar shall give notice thereof in the [*Gazette*] prescribed manner.”. 45

Amendment of section 44 of Act 61 of 1973, as amended by section 3 of Act 111 of 1976 and section 8 of Act 83 of 1981

9. Section 44 of the Companies Act, 1973, is hereby amended by the substitution for subsection (2) of the following subsection:

“(2) Where the name, translated name or shortened form of the name or translated name of a company is changed, the Registrar shall enter the new name, translated name or shortened form of the name or translated name in the register in place of the former name, translated name or shortened form of the name or translated name, issue a certificate of incorporation altered to meet the circumstances of the case or a certificate that the new name, translated name or shortened form of the name or translated name, has been entered in the register in place of the former name, translated name or shortened form of the name or translated name and give notice of the change of name, translated name or shortened form of the name or translated name in the [*Gazette*] prescribed manner.”.

Substitution of section 61 of Act 61 of 1973

10. The following section is hereby substituted for section 61 of the Companies Act, 1973:

“Consolidation of articles

61. A company may at any time after the registration of its articles, submit to the Registrar a document in the prescribed form, containing a consolidated and full statement of all the articles applying to the company together with a certificate by a notary public to the effect that the articles of the company have been truly stated and, on payment of the prescribed fee, the Registrar [**shall endorse on that document**] must issue, in respect of that document, a certificate to the effect that the articles stated therein constitute the articles of the company as at the date of the certificate.”.

Amendment of section 63 of Act 61 of 1973

11. Section 63 of the Companies Act, 1973, is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

“(1) If a memorandum and articles complying with the requirements of this Act [**together with a copy thereof certified by a notary public as a true copy**] are lodged with the Registrar in the manner prescribed, he or she shall upon payment of the prescribed fee, register such memorandum and articles[, **place his or her seal on the copy, and endorse thereon the date of registration and the certificate provided for in section 64**].”; and

(b) by the deletion of subsection (3).

Amendment of section 64 of Act 61 of 1973

12. Section 64 of the Companies Act, 1973, is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) Upon the registration of the memorandum and articles of a company the Registrar [**shall endorse thereon**] must issue a certificate [under his hand and seal] to the effect that the company is incorporated.”.

Amendment of section 73 of Act 61 of 1973, as amended by section 5 of Act 59 of 1978, section 4 of Act 29 of 1982, section 5 of Act 31 of 1986, section 4 of Act 18 of 1990, section 28 of Act 35 of 2001 and section 4 of Act 39 of 2002

13. Section 73 of the Companies Act, 1973, is hereby amended—

(a) by the substitution for subsections (3) and (5) of the following subsections respectively:

“(3) If the Registrar does not within one month after sending the letter receive any answer thereto or receives an answer to the effect that the company is not carrying on business or is not in operation, he or she may

publish in the [*Gazette*] prescribed manner and send to the company by registered post a notice that at the expiration of two months from the date of that notice the company mentioned therein will, unless good cause is shown to the contrary, be deregistered.

(5) At the expiration of the period mentioned in any notice referred to in subsection (3) or upon receipt from any company of a written statement signed by every director thereof to the effect that the company has ceased to carry on business and has no assets or liabilities, the Registrar may, unless good cause to the contrary has been shown by the company, deregister the company concerned, and shall give notice **[to that effect in the *Gazette*]** of the deregistration and the date thereof in the prescribed manner **[and the date of the publication of such notice in the *Gazette* shall be deemed to be the date of deregistration]**: Provided that the liability (if any) of every director, officer and member of the company shall continue and may be enforced as if the company had not been deregistered.”; and

(b) by the insertion after subsection (6), of the following subsection:

“(6A) Notwithstanding subsection (6), the Registrar may, if a company has been deregistered due to its failure to lodge an annual return in terms of section 173, on application by the company concerned and on payment of the prescribed fee, restore the registration of the company, and thereupon the company shall be deemed to have continued in existence as if it had not been deregistered: Provided that the Registrar may only so restore the registration of the company after it has lodged the outstanding annual return and paid the outstanding prescribed fee in respect thereof.”.

Amendment of section 144 of Act 61 of 1973, as amended by section 8 of Act 111 of 1976, substituted by section 8 of Act 35 of 1998 and amended by section 1 of Act 125 of 1998

14. Section 144 of the Companies Act, 1973, is hereby amended by the substitution for paragraph (a) of the following paragraph:

“(a) if the offer is made to—

- (i) a bank registered or provisionally registered in terms of the Banks Act, 1990 (Act No. 94 of 1990); or
- (ii) a mutual bank registered or provisionally registered in terms of the Mutual Banks Act, 1993 (Act No. 124 of 1993); or
- (iii) **[an insurer registered or provisionally registered in terms of the Insurance Act, 1943 (Act No. 27 of 1943)]** a long-term insurer as defined in the Long-term Insurance Act, 1998 (Act No. 52 of 1998), or a short-term insurer as defined in the Short-term Insurance Act, 1998 (Act No. 53 of 1998),

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 authorized portfolio manager for a pension fund registered in terms of the Pension Funds Act, 1956 (Act No. 24 of 1956), or as manager for a **[unit trust scheme managed by the said wholly owned subsidiary which is]** collective investment scheme registered **[as a management company]** in terms of the **[Unit Trusts Control Act, 1981 (Act No. 54 of 1981)]** Collective Investment Schemes Control Act, 2002 (Act No. 45 of 2002);”.

Substitution of section 148 of Act 61 of 1973, as amended by section 11 of Act 111 of 1976 and section 10 of Act 64 of 1977

15. The following section is hereby substituted for section 148 of the Companies Act, 1973:

“**Matters to be stated in prospectus**

148. (1) A prospectus must adhere to the specifications of Schedule 3 and contain all information that an investor may reasonably require to assess—

- (a) a company in which a right or interest is to be acquired, its assets and liabilities, financial position, profits and losses, cash flow and prospects; and
- (b) the shares and the rights attached to them.
- (2) As long as an offer remains open, any person responsible for information in the prospectus must, when that person becomes aware of it—
- (a) correct any error;
- (b) report on any new matter; and
- (c) report on any change of a matter included in the prospectus, if these are relevant or material in terms of Schedule 3.
- (3) A correction or report in terms of subsection (2) must be registered as a supplement to the prospectus, simultaneously published to known recipients of the prospectus and included in future distributions of the prospectus.
- (4) Subject to section 148A, any person who knowingly is a party to the issue of a prospectus in contravention of this section shall be guilty of an offence.”.

Insertion of section 148A in Act 61 of 1973

16. The following section is hereby inserted in the Companies Act, 1973, after section 148:

“Permission to omit information

- 148A.** (1) The Registrar may, on application, allow information required under section 148 to be omitted from the prospectus, if the Registrar is satisfied that—
- (a) publication of the information would be unnecessarily burdensome for the applicant, seriously detrimental to a company mentioned in section 148(1)(a) or against the public interest; and
- (b) users will not be unduly prejudiced by the omission.
- (2) An application under subsection (1) shall be in writing and accompanied by the prescribed fee.”.

Amendment of section 173 of Act 61 of 1973

17. Section 173 of the Companies Act, 1973, is hereby amended by the addition of the following subsection:

- “(4) The information required to be disclosed in terms of this Act, as contained in the latest annual return of a company, must for the purposes of this Act, in the absence of any subsequent compliance with any relevant disclosure requirement of this Act, be regarded as the latest disclosed information in respect of the company concerned.”.

Amendment of section 215 of Act 61 of 1973, as amended by section 14 of Act 59 of 1978, section 7 of Act 18 of 1990 and section 5 of Act 82 of 1992

18. Section 215 of the Companies Act, 1973, is hereby amended by the substitution for subsection (2) of 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 subsection 274(3) applies, also of the individual contemplated in that subsection, and, in each case, the date and particulars of any change of such name and date of appointment.”.

Amendment of section 228 of Act 61 of 1973, as amended by section 10 of Act 35 of 1998

19. Section 228 of the Companies Act, 1973, is hereby amended—
- (a) by the substitution for subsections (1) and (2) of the following subsections respectively:

“(1) Notwithstanding anything contained in its memorandum or articles, the directors of a company shall not have the power, save **[with the approval of a general meeting of the company]** by a special resolution of its members, 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 **[have effect]** not be effective unless it authorizes or ratifies in terms the specific transaction.”; and

(b) by the addition of the following subsections:

“(4) The greater part of an undertaking or assets for the purposes of subsection (1) shall be calculated according to the fair value of the undertaking or assets determined in the manner described in the relevant financial reporting standards.

(5) If, in relation to the consolidated financial statements of a holding company, a disposal by any of its subsidiaries would constitute a disposal by the holding company under subsection (1)(a) or (b), the disposal requires a special resolution by the members of the holding company, and subsections (1) to (4) shall also apply to such a disposal.

(6) This section shall not apply to a disposal between a wholly owned subsidiary and its holding company, or between two wholly owned subsidiaries of the same holding company.”.

Insertion of section 261A in Act 61 of 1973

20. The following section is hereby inserted in the Companies Act, 1973, after section 261:

“Preservation of secrecy

261A. An inspector may only disclose information acquired in the course of performing his or her duties in terms of this Act, if the disclosure is—

- (a) required by this Act or in terms of any other law;
 (b) required by a court; or
 (c) in the public interest and the Minister has authorized the disclosure in writing.”.

Amendment of section 269 of Act 61 of 1973

21. Section 269 of the Companies Act, 1973, is hereby amended by the addition of the following subsections:

“(6) No person or firm may be appointed as auditor of a company unless that person or firm is a registered auditor.

(7) In this Chapter “registered auditor”, “firm” and “Regulatory Board” have the same meanings as in the Auditing Profession Act, 2005 (Act No. 26 of 2005).”.

Insertion of sections 269A and 269B in Act 61 of 1973

22. The following sections are hereby inserted in the Companies Act, 1973, after section 269:

“Audit committees for public interest companies

269A. (1) In every financial year in which a company is a public interest company, its board of directors shall appoint an audit committee for the following financial year.

(2) Subsection (1) shall not apply to a company—

- (a) if the audit committee of a holding company will perform the functions required under section 270A(1) on behalf of that company;
 (b) if the company ceases to be a public interest company in the manner contemplated in section 1(7);

- (c) if the company belongs to a category of companies specified by the Minister under section 269B.
- (3) An audit committee must have at least two members and consist only of non-executive directors of the company who must act independently.
- (4) For the purposes of this Chapter—
- (a) “financial year” shall be construed in accordance with section 285;
- (b) a director is a non-executive director of a company if the director—
- (i) is not involved in the day to day management of the business and has not in the past three financial years been a full-time salaried employee of the company or its group;
 - (ii) is not a member of the immediate family of an individual mentioned in subparagraph (i);
- (c) a director acts independently if that director—
- (i) expresses opinions, exercises judgment and makes decisions impartially;
 - (ii) is not related to the company or to any shareholder, supplier, customer or other director of the company in a way that would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that director is compromised by that relationship.

Minister’s powers in respect of audit committees

269B. (1) The Minister may by publication in the *Gazette* specify certain categories of companies that are not required to appoint an audit committee in terms of section 269A(1).

(2) The Minister must be satisfied that little or no benefit would result from the appointment of an audit committee by companies in a category mentioned in subsection (1).”

Amendment of section 270 of Act 61 of 1973, as amended by section 20 of Act 111 of 1976

26. Section 270 of the Companies Act, 1973, is hereby amended by the addition to subsection (2) of the following paragraphs:

- “(d) an audit committee appointed by the company in terms of section 269A(1) objects to the reappointment; or
(e) section 274A(1) applies.”

Insertion of section 270A in Act 61 of 1973

24. The following section is hereby inserted in the Companies Act, 1973, after section 270:

“Functions and funding of audit committees

270A. (1) An audit committee of a public interest company must with respect to the financial year for which it is appointed—

- (a) 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) determine the fees to be paid to the auditor and the auditor’s terms of engagement;
- (c) ensure that the appointment of the auditor complies with this Act and any other legislation relating to the appointment of auditors;
- (d) determine, subject to this Chapter, the nature and extent of any non-audit services which the auditor may provide to the company;
- (e) pre-approve any proposed contract with the auditor for the provision of non-audit services to the company;
- (f) insert in the financial statements to be issued in respect of that financial year a report—
 - (i) describing how the audit committee carried out its functions; and

- (ii) stating whether the audit committee is satisfied that the auditor was independent of the company;
 - (g) receive and deal appropriately with any complaints (whether from within or outside the company) relating either to the accounting practices and internal audit of the company or to the content or auditing of its financial statements, or to any related matter; and
 - (h) perform other functions determined by the board.
- (2) Nothing in this section precludes the appointment by a public interest company at its annual general meeting 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 is satisfied that the proposed auditor is independent of the company.
- (3) The appointment of an audit committee shall not reduce the functions 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 the fees of any consultant or specialist engaged by the audit committee to assist it in the performance of its duties.
- (5) In considering whether, for the purposes of subsection (1)(a), (1)(f)(ii) or (2), 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)(e), receive any remuneration or other benefit;
 - (b) consider the extent of any consultancy, advisory or other work undertaken by the auditor;
 - (c) consider whether the auditor's independence may have been prejudiced as a result of any previous appointment as auditor; and
 - (d) consider compliance with other criteria specified for independence by any professional or industry code."

Amendment of section 273 of Act 61 of 1973

25. Section 273 of the Companies Act, 1973, is hereby amended by the addition of the following subsections, the present section becoming subsection (1):

"(2) If a vacancy arises in the office of auditor of a public interest company during the tenure of an audit committee, subsection (1) does not apply and the directors shall within 21 days propose to the audit committee a registered auditor to be appointed as the new auditor.

(3) If, in a case contemplated in subsection (2), the former designated 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 designated auditor.

(4) If, within 10 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 designated auditor.

(5) In this Chapter "designated auditor" means the individual contemplated in subsection 274(3)."

Substitution of section 274 of Act 61 of 1973

26. The following section is hereby substituted for section 274 of the Companies Act, 1973:

“Appointment of firm as auditor

274. (1) This section applies where the auditor appointed in terms of section 270(1) is a firm. 5

(2) A change in the composition of the members of a firm appointed as auditor of a company for a financial year shall not itself constitute a casual vacancy in the office of auditor for that year, but if, by comparison with the membership of that firm at the time of its latest appointment, less than one half of the members remain after 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. 10

(3) 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.”. 15

Insertion of section 274A in Act 61 of 1973

27. The following section is hereby inserted in the Companies Act, 1973, after section 274: 20

“Rotation of auditors

274A. (1) The same individual may not serve as the auditor or designated auditor of a public interest company for more than five consecutive financial years. 25

(2) Where an individual has served as the auditor or designated auditor of a public interest company for two or more consecutive financial years and then ceases to be the auditor or designated auditor, the individual may not be appointed again as the auditor or designated auditor of that company until after the expiry of at least two further financial years.”. 30

Amendment of section 275 of Act 61 of 1973, as amended by section 27 of Act 64 of 1977, section 18 of Act 59 of 1978, section 28 of Act 80 of 1991 and section 8 of Act 82 of 1992

28. Section 275 of the Companies Act, 1973, is hereby amended—

- (a) by the deletion in subsection (1) of paragraph (g); and 35
(b) by the substitution for subsection (3) of the following subsection:

“(3) The provisions of subsection (1) shall not be construed as prohibiting the appointment as auditor of a private company, no shares of which are held by a public company, of a person who by himself or herself or his or her partner or employee habitually or regularly performs the duties of secretary or bookkeeper of such private company if he or she is registered [under the Public Accountants’ and Auditor’s Act, 1991,] with the Regulatory Board and all the shareholders of such private company agree in writing to his or her appointment and the relevant circumstances are set out in the auditor’s report on the affairs and annual financial statements of such private company.”. 40 45

Insertion of section 275A in Act 61 of 1973

29. The following section is hereby inserted in the Companies Act, 1973, after section 275:

“Certain non-audit services not open to current designated auditor of public interest company 50

275A. (1) An auditor appointed to a public interest company may not for the duration of the appointment perform any bookkeeping or accounting (as distinct from auditing) services and, to the extent that these would be subject to its own auditing, internal audit or tax advisory services for that company.

(2) Subsection (1) does not affect the power of an audit committee under section 270A(1)(d) or (e) to further limit the services which an auditor of that company may render.”.

Amendment of section 276 of Act 61 of 1973, as substituted by section 16 of Act 83 of 1981

30. Section 276 of the Companies Act, 1973, is hereby amended by the substitution for subsections (3) and (4) of the following subsections respectively:

“(3) (a) Any auditor of a company shall give notice on the prescribed form to the company concerned of any change in his or her particulars which are in terms of section 215(2) to be entered in the register referred to in that section, and he or she shall give such notice within fourteen days after the occurrence of any such change.

(b) The requirements of paragraph (a) are met if the auditor gives notice of the relevant changes to the Registrar in the prescribed electronic format and also to the company concerned.

(4) (a) A company shall, after any entry has been made in the register referred to in section 215 in respect of particulars pertaining to the auditor of the company, lodge with the Registrar a return in the prescribed form, and the company shall lodge such return within fourteen days after an auditor has vacated his or her office or after receipt of a notice contemplated in subsection (2) or (3) of this section, as the case may be.

(b) If the auditor of the company has given notice to the Registrar of any changes contemplated in subsection (3) and in the manner contemplated therein, the lodging of a return by the company in respect of such changes is not required.”.

Amendment of section 280 of Act 61 of 1973

31. Section 280 of the Companies Act, 1973, is hereby amended by the substitution for subsections (2), (3) and (5) of the following subsections respectively:

“(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 or she 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, 2005 (Act No. 26 of 2005), 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 No. 80 of 1991)]** Regulatory Board 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 or she has already reported, were made up.

(3) The directors of the company shall forthwith upon receipt of the said written notification appoint 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.

(5) If the directors fail to appoint 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.”.

Amendment of section 284 of Act 61 of 1973, as amended by section 10 of Act 82 of 1992

32. Section 284 of the Companies Act, 1973, is hereby amended by the substitution for subsection (3) of the following subsection:

“(3) The accounting records shall be kept at the registered office of the company or at such other place as the directors think fit and shall at all times be open to inspection by the directors and if such records are kept at a place outside the Republic, there shall be sent to and kept at a place in the Republic, and be at all times open to inspection by the directors, such financial statements and returns with respect to the business dealt with in those records as will disclose with reasonable accuracy the financial position of that business at intervals not exceeding twelve months, subject to section 285, and will enable the company’s **[annual]** financial statements to be prepared in accordance with this Act.”.

Insertion of section 285A in Act 61 of 1973

33. The following section is hereby inserted in the Companies Act, 1973, after section 285:

“General requirements for financial statements

285A. (1) A public interest company—

- (a) must comply with financial reporting standards;
 - (b) must comply with the provisions of this Act and Schedule 4 that are applicable to public interest companies;
 - (c) must prepare financial statements that fairly present the financial position and the results of the operations of the company (and its subsidiaries, if applicable) in accordance with paragraph (a).
- (2) A limited interest company—
- (a) must comply with the accounting framework of financial reporting standards;
 - (b) must comply with the provisions of this Act and Schedule 4 that are applicable to limited interest companies;
 - (c) must prepare financial statements that fairly present the financial position and the results of operations of the company (and its subsidiaries, if applicable) in accordance with paragraphs (a) and (b).
- (3) Financial statements must clearly state that they have been prepared in accordance with—
- (a) this Act prior to its amendment by the Corporate Laws Amendment Act, 2006;
 - (b) financial reporting standards; or
 - (c) the requirements of subsection (2)(c).”.

Amendment of section 286 of Act 61 of 1973, as amended by section 11 of Act 82 of 1992

34. Section 286 of the Companies Act, 1973, is hereby amended—

(a) by the substitution for subsection (2) of the following subsection:

- “(2) The annual financial statements required to be made out under subsection (1) shall consist of—
- (a) a balance sheet, income statement and additional components required in terms of financial reporting standards **[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;]** a summary of significant accounting policies and other explanatory notes on the components referred to in paragraph (a);

[(bA) a cash flow statement;]

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

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

(b) by the deletion of subsection (3).

Substitution of section 287 of Act 61 of 1973

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35. The following section is hereby substituted for section 287 of the Companies Act, 1973:

“Offence to issue incomplete or non-compliant financial statements [and circulars]

287. If any financial statements [**or circulars**] of a company which are incomplete in any material particular or otherwise do not comply with the requirements of this Act, 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.”.

Insertion of section 287A in Act 61 of 1973

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36. The following section is hereby inserted in the Companies Act, 1973, after section 287:

“False or misleading reports

287A. (1) If any financial report of a company is false or misleading in a material respect, any person who is a party to the preparation, approval, publication, issue or supply of that report and who knows or ought reasonably to suspect that it is 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 report which is false or misleading if—

- (a) the report includes or is otherwise based on a scheme, structure or form of words devised, prepared or recommended by that person; and
- (b) the scheme, structure or form of words is of such a nature that that person knew or ought reasonably to have suspected that its inclusion or other use in connection with the preparation of the report would cause the report to be false or misleading.

(3) If any person is found guilty of an offence under section 287 in respect of an inaccuracy in or omission from financial statements, such person shall not also be guilty of an offence under this section in respect of the same inaccuracy or omission.”.

Amendment of section 288 of Act 61 of 1973, as amended by section 13 of Act 76 of 1974 and section 24 of Act 111 of 1976

37. Section 288 of the Companies Act, 1973, is hereby amended—

(a) by the deletion of subsection (2); and

(b) by the substitution in subsection (3) for paragraph (a) of the following paragraph:

“(a) Any director or officer of a company who fails to take all reasonable steps to comply or to secure compliance with the provisions of this section or with any other requirements of this Act as to matters to be stated in group [**annual**] financial statements, shall be guilty of an offence.”.

Repeal of section 289 of Act 61 of 1973

38. Section 289 of the Companies Act, 1973, is hereby repealed.

Substitution of section 290 of Act 61 of 1973

39. The following section is hereby substituted for section 290 of the Companies Act, 1973:

“[Where annual] Group financial statements for limited interest companies [are to be consolidated]

290. (1) [Consolidated annual financial statements shall be made out unless] A limited interest company need not consolidate financial statements, if 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—

(a) one set of consolidated annual financial statements dealing with the company and one group of subsidiaries and one or more sets dealing with other groups of subsidiaries;

(b) separate annual financial statements dealing with each of the subsidiaries;

(c) statements annexed to the company’s own annual financial statements dealing with subsidiaries and their effect on the financial statements of the company; or

(d) any combination of the forms described in paragraph (a), (b) or (c).

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

Repeal of sections 291 and 294 of Act 61 of 1973

40. Sections 291 and 294 of the Companies Act, 1973, are hereby repealed.

Amendment of section 300 of Act 61 of 1973, as amended by section 21 of Act 76 of 1974, section 10 of Act 31 of 1986, section 13 of Act 82 of 1992 and section 28 of Act 35 of 2001

41. Section 300 of the Companies Act, 1973, is hereby amended by the substitution for paragraphs (i) and (l) of the following paragraphs respectively:

“(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 or she considers necessary in order to satisfy himself or herself 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]** the requirements of section 285A;

(l) to comply with any applicable requirements of the **[Public Accountants’ and Auditors’ Act, 1991 (Act No. 80 of 1991)]** Auditing Profession Act, 2005 (Act No. 26 of 2005).”

Insertion of section 300A in Act 61 of 1973

44. The following section is hereby inserted in the Companies Act, 1973, after section 300:

“Attendance of auditors

300A. (1) The designated auditor must meet with the audit committee of a public interest company not more than one month before the board meets to approve the financial statements of the company for any financial year, so as to consider matters which appear to the auditor or the audit committee to be of importance and relevant to the proposed financial statements and to the affairs of the company generally. 5 10

(2) The designated auditor must attend every annual general meeting of a public interest company where the financial statements of the company for a financial year are to be considered or agreed to, so as to respond according to his or her knowledge and ability to any question relevant to the audit of the financial statements. 15

(3) Should the designated auditor fail to attend a meeting as required by subsection (1) or subsection (2), the auditor is guilty of an offence unless—

- (a) the designated auditor is prevented by circumstances beyond his or her control from attending the meeting;
- (b) the designated auditor arranges for another auditor with knowledge of the audit to attend and carry out the duties of the designated auditor at the meeting; and
- (c) if the designated auditor is a member of a firm, the individual attending the meeting in place of the designated auditor is a member of that firm. 20 25

(4) If in the case of a limited 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 where financial statements of the company for any financial year are to be considered, the auditor shall attend that meeting and respond according to his or her knowledge and ability to any question which is put to the auditor and is relevant to the audit of the financial statements. 30

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

- (a) the auditor is prevented by circumstances beyond his or her control from attending the meeting; and
- (b) the auditor arranges for another auditor with knowledge of the audit to attend and carry out the duties of the auditor at the meeting. 35

(6) In this section “designated auditor” has the meaning given to it in section 273(5).”

Amendment of section 303 of Act 61 of 1973 40

43. Section 303 of the Companies Act, 1973, is hereby amended by the substitution for the words preceding paragraph (a) of the following words:

“Every public interest 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 [**fairly presenting**] on 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—”. 45

Amendment of section 304 of Act 61 of 1973 50

44. Section 304 of the Companies Act, 1973, is hereby amended by the substitution for subsections (1) and (2) of the following subsections respectively:

“(1) Every public interest company [**having a share capital**], other than a wholly owned subsidiary, which does not within three months after the end of its financial year issue copies of its annual financial statements in terms of section 302 (1) shall not later than the date on which the said period of three months expires 55

send to every member and holder of debentures of the company a copy of the provisional annual financial statements of the company **[fairly presenting the business and operations of the company]** or, in the case of a holding company, of the company and its subsidiaries during that accounting period, and the results thereof. 5

(2) If a **[private]** limited interest company has not issued its annual financial statements in terms of section 302(1) within six months after the end of its financial year, the Registrar may, on application to him or her in the prescribed manner, by any member of that company, and on good cause shown, require that company by written notice to lodge with him or her provisional annual financial statements as referred to in subsection (1) of this section within a period of six weeks from the date of such notice and thereupon the said company shall, unless it issues its annual financial statements within the said period, lodge provisional annual financial statements with the Registrar within the said period.”. 10

Amendment of section 305 of Act 61 of 1973 15

45. Section 305 of the Companies Act, 1973, is hereby amended—

(a) by the deletion of subsection (1); and

(b) by the substitution for subsection (3) of the following subsection:

“(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.” 20

Amendment of section 419 of Act 61 of 1973

46. Section 419 of the Companies Act, 1973, is hereby amended by the substitution for subsection (2) of the following subsection: 25

“(2) The Registrar shall record the dissolution of the company and shall publish notice thereof in the **[Gazette]** prescribed manner.”.

Amendment of section 440B of Act 61 of 1973, as amended by section 15 of Act 35 of 1998 and section 20 of Act 35 of 1998

47. Section 440B of the Companies Act, 1973, is hereby amended— 30

(a) by the substitution in subsection (2) for paragraphs (b), (c) and (d) of the following paragraphs respectively:

“(b) the **[Registrar]** Minister or his or her nominee;

(c) **[chairperson of the Competition Board established by section 3 of the Maintenance and Promotion of Competition Act, 1979 (Act 96 of 1979),]** the Commissioner of the Competition Commission or his or her nominee; 35

(d) three persons each nominated by the **[Johannesburg Stock Exchange]** JSE Limited and the **[Council of South African Banks]** Banking Association (South Africa); and” 40

(b) by the substitution for subsection (8) of the following subsection:

“(8) If, during **[the]** any period contemplated in subsection (7), a member of the panel nominated pursuant to **[the provisions of]** subsection (2), dies, becomes incapacitated, resigns, or becomes disqualified from being appointed or acting as a director of a company in terms of section 218, or ceases for any other reason to be a member of the panel, the vacancy arising in this manner may be filled for the unexpired period of such member’s term of office by a person nominated by the body, association or institution of which the member who ceases to be on the panel was a nominee.” 45

(c) by the deletion of subsection (12); and

(d) by the substitution for subsection (14) of 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.” 50

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Amendment of section 440C of Act 61 of 1973, as amended by section 2 of Act 69 of 1990

48. Section 440C of the Companies Act, 1973, is hereby amended—

- (a) by the substitution in subsection (4) for paragraph (d) of the following paragraph: 5
- “(d) appeals from decisions of[—
- (i)] the executive director to the [**executive committee referred to in subsection (12) of section 440B;**] panel
- [(ii) **the said executive committee to the panel; and**
- (iii) **a subcommittee of the panel to the panel.**];” and 10
- (b) by the substitution in subsection (6) for the words preceding paragraph (a) of the following words:
- “The panel or [**its executive committee or**] its executive director may—”.

Amendment of section 440D of Act 61 of 1973, as amended by section 16 of Act 35 of 1998 and section 20 of Act 35 of 1998 15

49. Section 440D of the Companies Act, 1973, is hereby amended—

- (a) by the substitution for subsections (1), (3) and (4) of the following subsections respectively:
- “(1) For the purposes of performing its functions in terms of this Chapter, the executive director or the panel [**or any committee thereof**] may— 20
- (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 25 30
- (b) interrogate any such person under oath or affirmation administered by the chairperson or a person appointed by him or her, 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 or her request be allowed, at his or her own expense and under the supervision of the investigating officer, to make copies thereof or to take extracts therefrom at any reasonable time. 35 40
- (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 or she is excused by the chairperson thereof from further attendance or, having attended, refuses to be sworn or to make an affirmation after he or she has been asked by the chairperson (or a person appointed by him or her) to do so or, having been sworn or having made affirmation, fails to answer fully and satisfactorily any question lawfully put to him or her, or fails to produce any book, document or other object in his or her possession or under his or her control which he or she has been summoned to produce, shall be guilty of an offence. 45 50
- (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.”. 55

Insertion of Chapter XVB in Act 61 of 1973

50. The following chapter is hereby inserted in the Companies Act, 1973, after section 440N:

“Chapter XVB**Financial reporting standards**

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Definitions and preliminary

440O. (1) For the 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 No. 36 of 2004);
‘**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, having such powers.

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

Establishment of Council

440P. (1) There is hereby established a body corporate known as the Financial Reporting Standards Council.

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(2) The Council’s objective is to establish financial reporting standards which promote sound and consistent accounting practices.

(3) The Council shall consist of—

- (a) four persons registered and practising as auditors;
- (b) two persons responsible for preparing financial statements on behalf of public interest companies;
- (c) one person responsible for preparing financial statements for limited interest companies;
- (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 which imposes adherence to financial reporting standards as a listing requirement.

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

Appointment and removal of Council members

440Q. (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

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(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 and appoint persons—
 - (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.

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(3) Members appointed in terms of subsection (2)(b) and (c) 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 five or more of the persons 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
- (5) The Minister—
- (a) must remove a member of the Council—
 - (i) who becomes insolvent, is certified as mentally unfit, or is convicted of an offence and sentenced to imprisonment without the option of a fine; 10
 - (ii) who becomes permanently incapacitated;
 - (iii) who has been absent without the chairperson's leave, or in the case of the chairperson, without the deputy chairperson's leave, from three consecutive meetings of the Council; or 15
 - (iv) contemplated 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; 20
 - (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).

Officers and meetings of Council 25

- 440R.** (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) Each member of the Council shall have one vote and a decision of the majority of the members present at a meeting, where at least three quarters of the members are present, constitutes a decision of the Council. 30
- (3) The Council may establish and appoint members to subcommittees to assist in performing the functions of the Council.
- (4) Meetings of the Council shall be open to the public.

Functions of Council 35

- 440S.** (1) The Council shall—
- (a) establish financial reporting standards for public interest companies; and
 - (b) develop standards for limited interest companies.
- (2) Financial reporting standards mentioned in subsection (1)(a) shall be in accordance with the International Financial Reporting Standards of the International Accounting Standards Board or its successor body. 40
- (3) Standards mentioned in subsection (1)(b) shall be developed in consultation with representatives of limited interest companies.

Interested persons in respect of Council 45

440T. 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.

Approval and publication of standards 50

- 440U.** (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; 55

(c) submit financial reporting standards to the Minister.

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

Monitoring

440V. (1) The Minister may, after consultation with the Financial Services Board, specify, by proclamation in the *Gazette*, types or categories of public interest 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 public interest companies contemplated in subsection (1) in order to detect non-compliance with financial reporting standards that may prejudice users; and

(b) where reasonable grounds exist for suspecting such 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 the 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 the nominated officer to be questioned.

(4) The powers conferred by subsection (3) are subject to the law of privilege.

Establishment of Panel

440W. (1) There is hereby established a body corporate known as the Financial Reporting Investigations Panel.

(2) The Panel's objective is to promote the reliability of financial reports by investigating alleged non-compliance with financial reporting standards and recommending appropriate measures for rectification or restitution.

(3) The Panel shall consist of—

(a) an executive officer;

(b) six auditors;

(c) six chartered accountants that are not registered as auditors;

(d) four persons qualified in law;

(e) one person nominated by the executive officer of the Financial Services Board; and

(f) one person, nominated by the exchange in question, for each exchange that imposes adherence to accounting standards as a listing requirement.

Appointment and removal of members of Panel

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

(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 five 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 Limited; and
 - (b) at every subsequent appointment, shall be former members of the Panel. 5
- (5) The Minister—
- (a) must remove a member of the Panel who—
 - (i) becomes insolvent,
 - (ii) is certified as mentally unfit; 10
 - (iii) is convicted of an offence and sentenced to imprisonment without the option of a fine;
 - (iv) fails to disclose a conflict of interests; or
 - (v) is permanently incapacitated; and
 - (b) may remove a member of the Panel if the member— 15
 - (i) regularly declines nomination to an investigation committee;
 - (ii) is not conscientious in the performance of an investigation;
 - (iii) engages 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). 20

Interested persons in respect of Panel

440Y. A person wishing to receive notice of vacancies on the Panel may register with the executive officer of the Panel as an interested person.

Officers and meetings of Panel 25

- 440Z.** (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. 30
- (2) The procedures determined under subsection (1)(b) shall be in accordance with the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000).
- (3) Each member present at a meeting of the Panel shall have one vote and the decision of a majority of the members at any meeting of the Panel where at least two thirds of the members are present, constitutes a decision of the Panel. 35

Investigation of non-compliance

- 440AA.** (1) Any person 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. 40
- (2) Every matter referred to the executive officer shall be noted and the following information recorded:
- (a) the date of receipt; 45
 - (b) the name of 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 the matter was referred to the chairperson of the Panel under subsection (3) and the reasons therefor; and 50
 - (f) if the matter was investigated, the report of the investigation committee;
 - (g) the persons to whom the report mentioned in paragraph (d) was published; 55
 - (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) assess whether the matter warrants investigation and, if so, submit all relevant information to the chairperson of the Panel, with reference to the financial reporting standards in question. 5
- (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. 10
- (5) Members appointed to an investigation committee shall recuse themselves if—
- (a) they have an interest in the company being investigated or in the outcome of the investigation;
- (b) serving on the committee would give rise to any other conflict of interest. 15
- (6) An investigation committee shall consist of—
- (a) one Panel member qualified in law; and
- (b) two or more Panel members qualified in accounting. 20
- (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) if necessary, consult with any specialist advisors;
- (d) assess the materiality of any failure and its prejudice to users; 25
- (e) within 18 business days of its commencement, deliver a written report on the findings of its investigation to the executive officer; and
- (f) if appropriate, make recommendations on how non-compliance may be rectified.
- (8) If the committee has not concluded its investigation within the 18 business days contemplated in subsection (7)(e), the committee shall deliver a provisional report, and the executive officer may then allow additional time or otherwise direct how the investigation should proceed. 30
- (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. 35
- (10) The Minister may, in respect of a particular investigation, by proclamation in the *Gazette*, extend the number of days prescribed in subsections (3), (4) and (7).

Powers of investigation committee 40

- 440BB.** (1) For the 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; 45
- (c) appear at a place designated by the committee to be questioned.
- (2) The powers conferred by subsection (1) are subject to the law of privilege.

Confidentiality

- 440CC.** (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 duties in terms of this Chapter or to comply with any law. 50
- (2) Any person who contravenes the provisions of subsection (1) shall be guilty of an offence. 55

Advisors

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

Publication

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440EE. (1) The executive officer shall within five business days of the receipt of a report of an investigation committee issue a copy thereof to the company investigated.

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

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(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 two business days of that date, or if a response was received, within two business days of the resubmission of the report, the executive officer—

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- (a) shall publish the report to—
 - (i) the Registrar; and
 - (ii) any exchange on which shares of the company are listed;
- (b) may, if it is in the interest of users, publish the report to—
 - (i) any other regulator;
 - (ii) any professional body representing accountants or auditors; or
 - (iii) the news media.

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(5) The Registrar shall make a report available for inspection by the public within two months after its publication.

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Offence and penalty

440FF. (1) A public interest company which issues a financial report that fails to comply with a financial reporting standard, and every director of the company who has signed or was party to the financial report, shall be guilty of an offence.

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(2) A company under investigation may with the agreement of the Minister—

- (a) pay an administrative penalty;
- (b) revise and republish the financial report;
- (c) take any other remedial action; or
- (d) undertake any combination of the measures listed in paragraphs (a) to (c), within a designated time.

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(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 be based on—

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- (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) the probable influence of the failure on the economic decisions of users;
- (e) any previous failures of the same company;
- (f) any other relevant factor.

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(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 must refer the matter to the National Director of Public Prosecutions.

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(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).

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Limitation of liability

440GG. 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. 5

Annual reports

440HH. 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. 10

Administrative Support

440II. (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). 15 20

Remuneration and reimbursements

440JJ. The Minister shall, from funds appropriated by Parliament for that purpose, remunerate members appointed under sections 440Q(1)(b) and 440X(1)(b) and reimburse reasonable expenses incurred in the performance of their duties.”. 25

Amendment of section 441 of Act 61 of 1973, as amended by section 30 of Act 111 of 1976, section 29 of Act 64 of 1977, section 27 of Act 59 of 1978, section 16 of Act 84 of 1980, section 30 of Act 83 of 1981, section 11 of Act 29 of 1985, section 15 of Act 31 of 1986, section 5 of Act 78 of 1989, section 69 of Act 69 of 1990, section 14 of Act 82 of 1992, section 19 of Act 35 of 1998 and section 21 of Act 37 of 1999 30

- 51.** Section 441 of the Companies Act, 1973, is hereby amended—
- (a) by the insertion in subsection (1) after paragraph (b) of the following paragraph: 35
 - “(bA) in section 440FF (1), to a fine not exceeding R1 000 000;”;
 - (b) by the substitution in subsection (1) for paragraph (c) of the following paragraph:
 - “(c) in section [440G (2) or] 440I (2), 440CC(2) or that section as applied by 440DD, to a fine or to imprisonment for a period not exceeding five years or to both [such] a fine and such imprisonment;”;
 - (c) by the substitution in subsection (1) for paragraphs (f) and (g) of the following paragraphs respectively: 40
 - “(f) in section 90, 286, 288, 297, 298, 299, 300A, 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] a fine and such imprisonment; 45
 - (g) in section 242, 268C, 268I [or], 287 or 287A, to a fine or to imprisonment not exceeding a period of three months or to both [such] a fine and such imprisonment;” 50

Amendment of Schedule 4 to Act 61 of 1973, as amended by Proclamation R13 of 1974, Proclamation R19 of 1975, Proclamation R219 of 1976, Proclamation R262 of 1977, section 106 of Act 82 of 1986 and substituted by Government Notice R2921 of 23 October 1992

52. Schedule 4 to the Companies Act, 1973, is hereby amended— 5
- (a) by the substitution for the heading to Schedule 4 of the following heading: 5
“REQUIREMENTS FOR FINANCIAL STATEMENTS”
- (b) by the deletion of paragraph 1;
- (c) by the substitution for paragraph 2 of the following paragraph: 10
“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 the substitution in paragraph 4 for subparagraphs (e), (f), (g), (k) and (l) of the following subparagraphs respectively: 10
- “(e) **‘convertible instruments’** are instruments which may be voluntarily exchanged for shares or debentures during a designated conversion period at a specified exchange ratio; 15
- (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 or recoverable in future periods due [attributable] to [timing] temporary differences. 20
- (k) **‘earnings per share’** means the earnings attributable to each equity share, based on the consolidated net income for the period, after tax, and after deducting outside shareholders’ interest and preference dividends, [but before extraordinary items,] divided by the weighted average number of that class of share in issue; 25
- (l) **‘effective tax rate’** is the taxation charge in the income statement expressed as a percentage of reported income [before extraordinary items];”; 25
- (e) by the deletion in paragraph 4 of subparagraph (m); 30
- (f) by the substitution in paragraph 4 for subparagraphs (o) and (r) of the following subparagraphs respectively: 30
- “(o) **‘financing activities’** are those activities which result in changes in the size and composition of the [capital funding, comprising debt and equity,] contributed equity and borrowings of the reporting entity; 35
- (r) **‘intangible assets’** are [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] identifiable non-monetary assets without physical substance;”; 40
- (g) by the insertion in paragraph 4 after subparagraph (r) of the following subparagraph: 40
- “(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;”; 45
- (h) by the substitution in paragraph 4 for subparagraph (s) of the following subparagraph: 50
- (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 and cash equivalents;”; 50
- (i) by the insertion in paragraph 4 after subparagraph (v) of the following subparagraph: 55
- “(vA) **‘material item’** means any information relating to a company that, either by itself or in conjunction with other information, is of such an extent or nature that it could influence the economic decisions of users of the company’s financial statements.”; 55

- (j) by the substitution in paragraph 4 for subparagraphs (w) and (x) of the following subparagraphs respectively:
- “(w) **‘provision’** means [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] a liability of uncertain timing or amount; 5
- (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.”; 10
- (k) by the deletion in paragraph 4 of subparagraph (aa);
- (l) by the insertion after paragraph 4 of the following paragraph:

“Application

- 4A.** (a) Limited interest companies must comply with the whole of this Schedule. 15
- (b) To the extent that there is no conflicting requirement in financial reporting standards, public interest companies must comply with Part III and with paragraphs 8–10, 14, 17, 23, 25–28, 30–33, 36, 37, 40–42, 45, 56–60 and 73 of this Schedule.”; 20
- (m) by the substitution for the heading and subheading to Part I of the following heading and subheading:

“PART 1

A. GENERAL”

- (n) by the deletion of paragraph 5; 25
- (o) by the substitution for paragraph 29 of the following paragraph:

“[Stock] Inventories

- 29.** (1) There shall be stated the amounts in respect of the following categories of [stock] inventories:
- (a) Raw materials (including component parts); 30
- (b) finished goods;
- (c) merchandise which may itself be shown under appropriate subheadings;
- (d) consumable stores (including maintenance spares);
- (e) work in progress (including standing crops); and 35
- (f) contracts in progress.
- (2) There shall be stated for contracts in progress, whether profits or losses have been taken into account and, if so, on what basis.”;
- (p) by the substitution in paragraph 42 for subparagraphs (c), (q), (s) and (u) of the following subparagraphs respectively: 40
- “(c) the aggregate amount of the dividends [paid and proposed] declared and, if such dividends are provided partly or wholly from capital profits, a statement to that effect;
- (q) the amount of foreign exchange gains and losses taken to the income statement which relate to foreign currency denominated [loans] items; 45
- (s) items of income and expense which, in the accounting period, are [abnormal in amount] material items and result from occurrences the underlying nature of which is typical of the ordinary trading or operating activities of the enterprise;
- (u) where group accounts are not presented, in respect of investments in associates, the dividend received, the investor’s interest in the retained equity income or deficit and the investor’s effective interest in [extraordinary items and] prior period adjustments.”; and 50

- (q) by the substitution for paragraph 46 of the following paragraph:
 “(46) There shall be stated any material items and the amount of these [extraordinary] items [including the nature and amount of taxation and the extent of outside owners’ interest relating to these items].”.

Transitional provisions

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53. (1) Notwithstanding section 285A of the Companies Act, 1973—

- (a) a company that on the commencement date falls within the definition of a limited interest company may delay compliance with section 285A(2) until its first financial year following that date;
 (b) a company that on the commencement date falls within the definition of a public interest company may delay compliance with section 285A(1) until its first financial year following that date.

(2) A company that elects to delay compliance with section 285(1) or (2) shall continue to comply until the beginning of the financial year contemplated in subsection (1)(a) or (b), with sections 286, 288 to 291 and Schedule 4 to the Companies Act, 1973, as they provided before this Act took effect.

(3) For purposes of the limits imposed by section 274A of the Companies Act, 1973, the term of service of an auditor or designated auditor shall be measured from the date of the auditor’s first appointment or reappointment after the date on which this Act took effect.

Amendment of section 1 of Act 69 of 1984, as amended by section 1 of Act 38 of 1986, section 1 of Act 26 of 1997 and section 1 of Act 22 of 2001

54. Section 1 of the Close Corporations Act, 1984, is hereby amended by the insertion after the definition of “regulation” of the following definition:

“‘signature’ includes an electronic signature and an advanced electronic signature as defined in section 1 of the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002);”.

Amendment of section 5 of Act 69 of 1984, as amended by section 2 of Act 22 of 2001

55. Section 5 of the Close Corporations Act, 1984, is hereby amended—

- (a) by the substitution in subsection (1) for the words preceding paragraph (a) of the following words:

“[Any] Subject to the availability of the original document, any person may, on payment of the prescribed fee (including an additional fee if any document is not collected personally at the Registration Office)—”;

- (b) by the deletion in subsection (1A) of the word “or” at the end of paragraph (a);

- (c) by the addition in subsection (1A) of the word “or” at the end of paragraph (b); and

- (d) by the insertion in subsection (1A) after paragraph (b) of the following paragraph:

“(c) obtain a certificate from the Registrar as to the contents or part of the contents of any documentation kept by him or her in terms of this Act in respect of any corporation.”.

Substitution of section 13 of Act 69 of 1984

56. Section 13 of the Close Corporations Act, 1984, is hereby substituted by the following section:

“13. If a founding statement referred to in section 12 complying with the requirements of this Act is lodged with the Registrar in the manner prescribed, and if the business to be carried on by the corporation is lawful, the Registrar shall upon payment of the prescribed fee register such statement in his or her registers and shall give notice of the registration in the [Gazette] prescribed manner.”.

Amendment of section 15 of Act 69 of 1984, as amended by section 5 of Act 38 of 1986, section 2 of Act 81 of 1992 and section 7 of Act 22 of 2001

57. Section 15 of the Close Corporations Act, 1984, is hereby amended—

- (a) by the substitution in subsection (2) for the words preceding paragraph (a) of the following words: 5
 “If any change is made or occurs in respect of any matter particulars of which are so stated in accordance with paragraph (a), (c) or (g) of section 12, an amended founding statement shall in accordance with the requirements of subsection (1) be lodged with the Registrar for registration, and any such change shall only take effect when such statement has been so registered in the relevant registers, or upon a later date mentioned in such statement: Provided that a statement in the prescribed form which may also be in such electronic format as the Registrar may allow and which upon registration thereof shall form part of the founding statement or amended founding statement, shall, instead 10
 of an amended founding statement, be lodged with the Registrar for registration if any such change is made or occurs in respect of—”; and 15
- (b) by the substitution for subsection (2A) of the following subsection:
 “(2A) If a founding statement is altered or something is added thereto by an order of court **[referred to in section 49, the provisions of]** 20
 subsection (1), in relation to the lodging of an amended founding statement therein referred to, shall [mutatis mutandis] apply with the necessary changes in respect of such founding statement.”. 25

Amendment of section 15A of Act 69 of 1984, as inserted by section 8 of Act 39 of 2002 25

58. Section 15A of the Close Corporations Act, 1984, is hereby amended by the addition of the following subsection:

- “(4) The information required to be disclosed in terms of this Act as disclosed in the latest annual return of a corporation, must for the purposes of this Act, in the absence of any subsequent compliance with any relevant disclosure requirement of this Act, be regarded as the latest disclosed information in respect of the corporation concerned.” 30

Amendment of section 26 of Act 69 of 1984, as amended by section 6 of Act 38 of 1986, section 14 of Act 22 of 2001 and section 9 of Act 39 of 2002

59. Section 26 of the Close Corporations Act, 1984, is hereby amended— 35

- (a) by the substitution for subsection (3) of the following subsection:
 “(3) Where a corporation has been deregistered, the Registrar shall give notice **[to that effect in the Gazette, and the date of the publication of such notice shall be deemed to be the date of deregistration]** of such deregistration and the date thereof in the 40
prescribed manner.”;
- (b) by the addition to subsection (6) of the following proviso:
 “: Provided that if a corporation has been deregistered due to its failure to lodge an annual return in compliance with section 15A, the Registrar may only so restore the registration of the corporation after it has lodged the outstanding annual return and paid the outstanding prescribed fee in respect thereof.”; and 45
- (c) by the substitution for subsection (7) of the following subsection:
 “(7) The Registrar shall give notice of the restoration of the registration of a corporation and the date thereof in the [Gazette] 50
prescribed manner and as from **[the] such date [of such notice]** the corporation shall continue to exist and be deemed to have continued in existence as from the date of deregistration as if it were not deregistered.”.

Amendment of section 27 of Act 69 of 1984, as amended by section 7 of Act 38 of 1986, section 2 of Act 64 of 1988, section 6 of Act 81 of 1992 and section 10 of Act 22 of 2001

60. Section 27 of the Close Corporations Act, 1984, is hereby amended by the substitution in section 4 for paragraph (d) of the following paragraph:

“(d) give notice in the [*Gazette*] prescribed manner of the conversion.”.

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Short title and commencement

61. This Act is called the Corporate Laws Amendment Act, 2006, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE CORPORATE LAWS AMENDMENT BILL, 2006

BACKGROUND

1. The Bill introduces a number of amendments to the Companies Act, 1973 (Act No. 61 of 1973), and Close Corporations Act, 1984 (Act No. 69 of 1984), which are required prior to the completion of the corporate law reform process which is currently underway.

2. The Bill seeks to amend the Companies Act, 1973, so as to achieve the following objectives:

- (a) Give legal backing to accounting standards;
- (b) promote auditor independence;
- (c) facilitate shareholder diversification;
- (d) update the requirements for the registration of a prospectus;
- (e) further the objective and expedite the procedures of the Securities Regulation Panel;
- (f) provide for a delegation of some of the Minister's powers;
- (g) effect a uniform standard of liability on officers performing duties under the Act;
- (h) indemnify and impose a duty of confidentiality on inspectors;
- (i) abolish the requirement that a copy of the memorandum and articles of a company to be formed, certified by a notary public as a true copy, be lodged with the Registrar upon incorporation of a new company; and
- (j) abolish the requirement that a subscriber to a memorandum and articles of a company to be formed, or a duly authorized attorney or his or her clerk must personally deliver and uplift that memorandum and articles at the Companies Registration Office.

3. The Bill further seeks to amend both the Companies Act, 1973, and the Close Corporations Act, 1984, so as to achieve the following objectives:

- (a) Provide for electronic signatures on documents;
- (b) provide for electronic disclosure of information in respect of companies and close corporations;
- (c) provide for alternative and cost-effective ways of publishing notices of incorporation of new companies and close corporations, name changes, registration of defensive names, notices relating to deregistration and the dissolution of companies and close corporations;
- (d) provide for the electronic certification of registration of certain documents;
- (e) provide for the Registrar to restore the registration of a company or close corporation which has been deregistered due to failure to lodge an annual return; and
- (f) provide for the auditors of companies and accounting officers of close corporations to disclose certain changes in their particulars directly to the Registrar.

OBJECTS OF BILL

Companies Act, 1973

4. Legal backing to accounting standards

4.1 Because investors make financial decisions based on information published by companies, this information must 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 recent decades investors have lost significant amounts of money due to dubious accounting methods and a rank overstatement of profitability.

4.2 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").

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

4.4 The standard will have 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, thus making our capital markets more accessible to foreign investment.

4.5 The Department of Trade and Industry (“the dti”) will be 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.

4.6 If an investigation finds evidence of non-compliance, the Minister 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 by the proposed section 440FF.

4.7 The Act creates an accounting and disclosure framework through Annexure 4 and various other provisions of the Act. Most of the provisions that are incomplete and outdated will be deleted in favour of the comprehensive new standard to be imposed by the Council. The deletion of these sections avoids the risk of discrepancies developing over time between the provisions of the Act and the standard imposed by the Council.

4.8 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 interest companies”, which will be allowed to comply with a less onerous standard than the one imposed on other companies (viz. “public interest companies”). To qualify as a limited interest company, a company’s articles will have to restrict the transferability of its shares and preclude any offer of its shares to the public.

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

4.10 Schedule 4 to 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 interest companies only. This has the effect of maintaining a secondary, less onerous standard for limited interest companies.

4.11 The amended paragraph 5 of Schedule 4 brings about this distinction. The other amendments to Schedule 4 will eliminate various anachronisms and bring about a tighter correlation with GAAP.

5. Auditor independence

5.1 These amendments are incidental to the provisions of the Auditing Profession Act, 2005 (Act No. 26 of 2005) (“the APA”), which aims to address recent failures by auditors to perform an independent assessment of the accounting records and policies of their clients. The APA 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 President has already signed the APA. Regulations are still being prepared and the APA will come into force on proclamation by the President.

5.2 By virtue of the new section 268J to the Companies Act, 1973, only auditors registered under the APA may in future be appointed as auditors of companies. This means that all audits of company accounts will from now on be subject to the controls and safeguards of that Act.

5.3 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 a company’s Board of Directors.

The new section 269A of the Companies Act, 1973, requires that auditors be nominated by an audit committee, which will also be responsible for setting the auditor’s remuneration. In terms of the new section 274A, a rotation of auditors will be required.

No individual auditor may be appointed to a company for more than five consecutive years.

5.5 The new section 275A will preclude an auditor from performing certain non-audit services for the company.

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

5.7 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.

5.8 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.

6. Shareholder diversification

6.1 Section 38 prohibits a company from providing financial assistance for the purchase of its own shares. This rule is aimed at the preservation of the company’s capital, in the interest of creditors and present shareholders.

6.2 In recent years, following the example of the United States, a solvency test has gained favour over the preservation of capital as an alternative protection to creditors and shareholders. This enables a financially strong company to offer assistance for the purchase of its shares.

6.3 South African law adopted the solvency test for purposes of share buy-back schemes introduced to the Act by earlier amendments to section 85. There are also various other exceptions to the rule on financial assistance.

6.4 The proposed amendment to section 38 introduces a further exception to facilitate shareholder diversification or BBBEE. A company will be able to offer assistance under the new provision if it complies with the solvency test and if its present shareholders approve the terms of the transaction.

7. Additional information for a prospectus

7.1 The revised Schedule 3 (not included with the Bill) specifies more fully the form and content of a prospectus. Both the scope and detail of the information required have been extended. This raises the statutory requirement to the level currently imposed by the JSE listing requirements.

7.2 Because of the ambit of information required, the JSE listing requirements allow an issuer to apply for an exemption from certain of its provisions. This will be granted where publication of specific information will be unduly prejudicial to the issuer. A similar discretion will be conferred on the Registrar by the proposed section 148A.

7.3 The amended Schedule 3 requires a disclosure in the prospectus of any exemptions granted under section 148A.

7.4 The amendment to section 144(2) is consequential.

8. The Securities Regulation Panel (“SRP”)

8.1 The Companies Act, 1973, contains a number of provisions 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.

8.2 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.)

8.3 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.

8.4 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.

8.5 The first amendment to section 228(1) will require that the disposal of the greater part of assets of the business of a company should from now on require a special resolution. There has also been a certain liberal interpretation of the term “substantially the whole” in relation to the disposal of a business undertaking, in order to avoid the application of section 228(1).

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

8.7 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 R5 million and which have more than ten beneficial shareholders. (A wholly owned subsidiary only has one beneficial shareholder.)

8.8 The objective to protect minority shareholders in the holding company is thus defeated in such circumstances. The new section seeks to remedy the current anomaly.

8.9 Sections 440B, C and D 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 appeals process 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 R1 million.)

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

9. Delegation of certain of the Minister’s powers

9.1 Section 7(3) of the Companies Act, 1973, enables the Registrar to delegate in writing any of the powers and entrust any of the duties assigned to the Registrar under the Act, to any officer in the public service.

9.2 Whereas the powers and duties of the Minister have been much extended by various amendments to the Act, a similar discretion to delegate has not been conferred upon the Minister. The proposed new section 17A identifies certain powers that are suitable for delegation and confers upon the Minister the power to delegate these in writing.

10. Uniform standard of liability on officers performing duties under the Act

10.1 Section 8 of the Companies Act, 1973, circumscribes liability for duties performed under the Act to mala fides and negligence, whereas section 440J requires gross negligence.

10.2 Section 49 of the APA follows section 86 of the Public Finance Management Act, 1999 (Act No. 1 of 1999), and numerous other Acts which circumscribe liability at gross negligence.

10.3 In view of the precedents created for gross negligence and the discrepancy that has arisen within the Companies Act, 1973, the proposed amendment to section 8 creates a uniform standard of liability based on mala fides and gross negligence.

11. Indemnity and duty of confidentiality on inspectors

Inspectors are appointed by the Minister to conduct statutory investigations. The amended section 8 of the Companies Act, 1973, extends indemnity to include inspectors (previously excluded). The proposed new section 261A imposes a duty of confidentiality in respect of the information an inspector is exposed to during the course of an investigation.

12. Companies Act, 1973, and Close Corporations Act, 1984 (“the Acts”)

12.1 Technical amendments to certain sections of the Acts need to be effected to enable the Companies and Intellectual Property Registration Office of the dti (“CIPRO”) to advance to full electronic communication and transactions.

12.2 These provisions relate mainly to signatures, electronic disclosure of information, the issuance of electronically generated certificates, the abolition of the requirement that a notary public must certify a copy of a company's memorandum and articles of association and electronic disclosure of certain changes of information in respect of auditors of companies and accounting officers of close corporations by such auditors and accounting officers.

12.3 Both Acts still require that notice be given in the *Government Gazette* of the names, translated and shortened forms of the names of all new companies and close corporations, of any subsequent changes in these names and of conversions of companies and close corporations. These Acts further require notices of deregistration of companies and close corporations to be published in the said *Gazette*.

12.4 This compulsory publication in respect of names and conversions is of very little, if any, value to the average person and it is mainly attorneys and accountants who subscribe to the *Government Gazette* and do the necessary checks on behalf of their clients. The abovementioned information is also obtainable on the CIPRO interactive website free of charge.

12.5 In relation to the process of deregistration, both Acts, in addition to the said publication, require that proper written notice be given by way of registered post to all relevant companies and close corporations of the deregistration process. This latter requirement has proper value and the parties concerned can then enter into correspondence with the Registrar in relation to the proposed deregistration.

12.6 The compulsory publication in the *Government Gazette* (which has to be done at least monthly), on the other hand, brings with it an enormous expense (currently ± R4,1 million per annum) without adding value.

12.7 It is furthermore expected that with the introduction of annual returns for private companies and close corporations a cleansing of the register of inactive private companies and close corporations will take place as was the case with public companies.

12.8 This will result in an escalation of costs for publication of deregistration notices in the *Government Gazette* to more than R20 million. In view of the proper correspondence process prior to deregistration and the availability of the notices on the CIPRO website this will result in unnecessary expenditure. The Bill proposes to abolish this requirement. In all cases proper correspondence and publication on the CIPRO website should suffice.

12.9 The sanction for failure to submit annual returns is deregistration. If a company has been deregistered the only way of restoring its registration is, currently, for the interested party to obtain a High Court order for the restoration. This financial burden is inappropriate for a company which has been deregistered solely due to not lodging the annual return, and it is proposed that the Registrar be given the power to restore the registration concerned provided that the outstanding annual return is lodged and the appropriate fee is paid. In respect of close corporations the Registrar may restore a registration, but it is proposed that he or she may also only do so if the outstanding annual return has been lodged and the outstanding fees paid.

13. OTHER DEPARTMENTS/BODIES CONSULTED

National Treasury
Financial Services Board (FSB)
Johannesburg Securities Exchange Limited (JSE)
CIPRO

14. ORGANISATIONAL AND PERSONNEL IMPLICATIONS

The Bill proposes the establishment of a Financial Reporting Standards Council and Financial Reporting Investigations Panel. The dti will provide the administrative support to these institutions. CIPRO's information technology systems are equipped to handle the proposed electronic lodgement processes.

15. FINANCIAL IMPLICATIONS FOR STATE

The remuneration of members and operating expenses of the above institutions will be borne by the dti from its existing budget, as well as fees that may be payable. The proposed amendments will have no direct financial implications, but will have huge cost reduction benefits for CIPRO in the medium to long term. The electronic lodgement

processes will furthermore lead to significant cost savings for companies and close corporations in complying with the Acts.

16. COMMUNICATION IMPLICATIONS

The electronic means of conducting business with the relevant registries will all be additional to the existing paper-based environment. Appropriate communication measures will be implemented by the dti's marketing division in consultation with the relevant stakeholders.

17. PARLIAMENTARY PROCEDURE

17.1 The State Law Advisers and the Department of Trade and Industry are of the opinion that the Bill must be dealt with in accordance with the procedure set out in section 75 of the Constitution, since it does not contain any provision to which the procedure set out in section 74 or 76 of the Constitution applies.

17.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

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