

REPUBLIC OF SOUTH AFRICA

SAFE DEPOSIT OF SECURITIES AMENDMENT BILL

(As introduced in the National Assembly)

(MINISTER OF FINANCE)

[B 47—98]

REPUBLIEK VAN SUID-AFRIKA

WYSIGINGSWETSONTWERP OP DIE VEILIGE BEWARING VAN EFFEKTE

(Soos ingedien in die Nasionale Vergadering)

(MINISTER VAN FINANSIES)

[W 47—98]

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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 Safe Deposit of Securities Act, 1992, so as to define or redefine certain expressions; to further regulate the disclosure of information by a depository institution and a central securities depository; to exclude uncertificated securities from the provisions that deal with the ownership and delivery of securities and with the registration of securities in the name of a central securities depository; to further regulate the provisions pertaining to the rules of a central securities depository; and to provide for the delegation or assignment of the powers and duties of a central securities depository; 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 85 of 1992, as amended by section 70 of Act 104 of 1993 and section 1 of Act 70 of 1996

1. Section 1 of the Safe Deposit of Securities Act, 1992 (Act No. 85 of 1992) 5
(hereinafter referred to as the principal Act), is hereby amended—

- (a) by the substitution for the definition of “deposit” of the following definition:
“ ‘deposit’ means a deposit of securities for **[safe]** custody and
administration and includes a deposit by means of an entry in a securities
account or a central securities account;”;
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- (b) by the substitution for the definition of “depository institution” of the following definition:
“ ‘depository institution’ means a person or category of persons
authorized by the Registrar to hold and administer securities **[in safe**
deposit] or an interest in securities for the purposes of this Act;”;
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- (c) by the substitution in the Afrikaans text for the definition of “effekte” of the following definition:
“ ‘effekte’ enige genoteerde **[effekte]** aandeel soos omskrew in artikel 1
van die Wet op Beheer van **[Effektebeurse]** Aandelebeurse, 1985 (Wet
No. 1 van 1985), enige genoteerde finansiële instrumente soos omskrew
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- in artikel 1 van die Wet op Beheer van Finansiële Markte, 1989 (Wet No. 55 van 1989), of enige ander **[effekte]** aandele of finansiële instrumente goedgekeur deur die Registrateur by kennisgewing in die *Staatskoerant* en alle bestaande regte of ander voordele ten opsigte van sodanige **[effekte]** aandele of instrumente of wat sodanige **[effekte]** aandele of instrumente toekom, en ook enige sertifikaat wat uitgereik is ten aansien van sodanige **[effekte]** aandele of instrumente of sodanige regte of ander voordele;”;
- (d) by the substitution for the definition of “entry” of the following definition: 10
 “ ‘entry’ includes an electronic recording of any deposit, withdrawal, transfer, attachment, pledge, cession *in securitatem debiti* or other transaction in respect of **[an interest in]** securities;”;
- (e) by the substitution for the definition of “Registrar” of the following definition: 15
 “ ‘Registrar’ means the **[Registrar of Financial Markets as defined in section 1 of the Financial Markets Control Act, 1989 (Act No. 55 of 1989)]** Executive Officer of the Financial Services Board referred to in section 1 of the Financial Services Board Act, 1990 (Act No. 97 of 1990);”;
- (f) by the substitution for the definition of “rules” of the following definition: 20
 “ ‘rules’ means the rules of a central securities depository made in terms of section 12;”; and
- (g) by the addition of the following definition: 25
 “ ‘uncertificated securities’ means uncertificated securities as defined in section 91A of the Companies Act, 1973 (Act No. 61 of 1973).”.

Substitution of heading to Chapter 2 of Act 85 of 1992

2. The following heading is hereby substituted for the heading to Chapter 2 of the principal Act:

“CUSTODY AND ADMINISTRATION OF SECURITIES”.

Amendment of section 2 of Act 85 of 1992, as substituted by section 2 of Act 70 of 1996 30

3. Section 2 of the principal Act is hereby amended—

- (a) by the substitution for subsection (2) of the following subsection: 35
 “(2) (a) Where securities are deposited with a depository institution such institution **[shall]** may, unless the client expressly directs otherwise in writing, **[be entitled to]** deposit them with another depository institution or, if it is a participant, deposit them with a central securities depository.
 (b) The depository institution or participant, as the case may be, shall reflect the number or nominal value of the securities so deposited in a securities account.”; 40
- (b) by the insertion after subsection (2) of the following subsections: 45
 “(2A) A participant shall deposit and administer securities in terms of the rules.
 (2B) If the records of a central securities depository is inconsistent with those of a participant regarding securities deposited with the central securities depository by the participant, the records of the central securities depository shall, until the contrary is proved, be deemed to be correct.”; and
- (c) by the substitution for paragraph (a) of subsection (3) of the following paragraph: 50
 “(a) Every client, depository institution and participant shall be deemed to warrant that such person is entitled to deposit the securities deposited by that person and that any document or instruction relating to such securities and lodged or given by that person is genuine and correct in all respects and that person shall be deemed to have agreed to indemnify the depository institution, participant or the central securities 55

depository against any claim made upon the depository institution, participant or central securities depository and against any loss suffered by the depository institution, participant or central securities depository arising out of such deposit or breach of warranty.”.

Amendment of section 3 of Act 85 of 1992, as substituted by section 3 of Act 70 of 1996 5

4. Section 3 of the principal Act is hereby amended by the substitution for subsections (2) and (3) of the following subsections, respectively:

“(2) A depository institution shall notify the client having a securities account with it in writing or as otherwise agreed to by the client of any entry made in such account. 10

(3) A depository institution shall on request disclose information with regard to the holdings of a client in a securities **[repository]** account, unless the client concerned directs otherwise in writing in a case where the client may do so in terms of any law.” 15

Amendment of section 4 of Act 85 of 1992, as substituted by section 4 of Act 70 of 1996

5. Section 4 of the principal Act is hereby amended—

(a) by the insertion after subsection (3) of the following subsection:

“(3A) Subsections (1), (2) and (3) do not apply to uncertificated securities.”; and 20

(b) by the substitution for subsection (4) of the following subsection:

“(4) A written acknowledgement signed by or on behalf of a depository institution in respect of an owner of securities or of a client, or by or on behalf of a central securities depository in respect of a participant or client, as the case may be, and specifying the interest of that owner, client or participant, as the case may be, shall be *prima facie* evidence of the title or interest of that person in such **[interest]** securities.”. 25

Substitution of section 5 of Act 85 of 1992 30

6. The following section is hereby substituted for section 5 of the principal Act:

“Transfer of securities

5. Transfer of securities or of an interest in securities held by a depository institution **[in a securities repository]** shall be effected **[by agreement completed]** in terms of the rules of a central securities depository by entry in the securities accounts of the transferor and the transferee with the depository institution or institutions concerned.”. 35

Substitution of section 6 of Act 85 of 1992, as substituted by section 5 of Act 70 of 1996

7. The following section is hereby substituted for section 6 of the principal Act: 40

“Pledge, or cession *in securitatem debiti*, of securities

6. (1) A pledge, or cession *in securitatem debiti*, in respect of securities or of an interest in securities held by a depository institution **[in a securities repository]** shall be effected **[by agreement completed]** in terms of the rules of a central securities depository by entry in the securities account of— 45

(a) the pledgor in favour of the pledgee specifying the name of the pledgee, the securities or interest therein ceded and the date; or

(b) the cedent in favour of the cessionary specifying the name of the cessionary, the securities or interest therein ceded and the date, as the case may be.

(2) Such **[an]** securities or interest therein shall not be transferred except with the written consent of the pledgee or cessionary.

(3) The pledgee or cessionary of such **[an]** securities or interest therein shall be entitled to all the rights of a pledgee or cessionary *in securitatem debiti* of movable property.

(4) Notwithstanding section 3(3), a depository institution shall at the request of an issuer disclose to the issuer the information contemplated in subsection (1)(a) and (b) and the issuer shall, in turn, furnish such information to any person who requests it.”.

Substitution of section 8 of Act 85 of 1992, as substituted by section 7 of Act 70 of 1996

8. The following section is hereby substituted for section 8 of the principal Act:

“Delivery of securities

8. (1) Subject to the provisions of sections 4 and 6, the owner of an interest in securities held by a depository institution in a securities repository or a participant holding an interest in a central securities repository, as the case may be, shall at all times be entitled to delivery, within a reasonable time, by the depository institution or central securities depository concerned, of the same number of securities, or securities of the same nominal value, and of the same kind as the securities held on such person’s behalf, **[in such securities repository or central securities repository]** as long as such person has a sufficient unencumbered credit balance of securities with the depository institution or central securities depository concerned.

(2) Subsection (1) does not apply to uncertificated securities.”.

Amendment of section 9 of Act 85 of 1992, as amended by section 71 of Act 104 of 1993 and section 8 of Act 70 of 1996

9. Section 9 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) **[A]** No person may conduct the business of a central securities depository [shall be] unless that person is registered as such in terms of this Act.”.

Amendment of section 10 of Act 85 of 1992, as amended by section 9 of Act 70 of 1996

10. Section 10 of the principal Act is hereby amended—

(a) by the substitution for subsections (2) and (3) of the following subsections, respectively:

“(2) In the event of rights being exercised against a central securities depository in respect of securities deposited with a central securities depository, such rights shall be exercised through a participant, and that participant shall exercise those rights in its own name on behalf of the relevant clients.

(3) All securities held by a central securities depository shall, unless they are bearer or uncertificated securities, be registered in the name of that central securities depository or its wholly owned subsidiary, as defined in section 1(1) of the Companies Act, 1973 (Act No. 61 of 1973), and approved by the Registrar.”; and

(b) by the substitution for subsection (6) of the following subsection:

“(6) A central securities depository shall on request disclose information with regard to the holdings of a participant or client in a central securities **[repository]** account, unless the participant or client concerned directs otherwise in writing in a case where the participant or client may do so in terms of any law.”.

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Amendment of section 11 of Act 85 of 1992, as substituted by section 10 of Act 70 of 1996

11. Section 11 of the principal Act is hereby amended by the substitution for subsections (3) and (4) of the following subsections, respectively:

“(3) The provisions of sections 5 and 6 shall apply *mutatis mutandis* to the transfer, pledge and cession *in securitatem debiti* by one participant to another of an interest in securities held **[in deposit]** by a central securities depository.

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(4) A central securities depository shall notify a participant having a central securities account with it in writing or as otherwise agreed to by the participant of any entry made in such account.”.

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Amendment of section 12 of Act 85 of 1992, as substituted by section 11 of Act 70 of 1996

12. Section 12 of the principal Act is hereby amended—

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

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“The rules of **[any]** a central securities depository shall be framed so as to ensure, to the satisfaction of the Registrar—”;

(b) by the substitution for paragraph (d) of subsection (1) of the following paragraph:

“(d) that the central securities accounts kept for each participant are conducted with due regard to their interests and the interests of their clients;”;

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(c) by the substitution for paragraph (h) of subsection (1) of the following paragraph:

“(h) that, unless the rights are exercised directly against the issuer, proper measures are taken to pay to the participants or clients all dividends and other payments made by the issuers of securities and to convey to them all notices regarding rights and other benefits accruing to the securities and to give effect to the lawful instructions of the participants or clients with regard to voting rights and other matters and to ensure that the rights of participants or clients are not in any way diminished by the fact that securities held by them or on their behalf are held collectively in a central securities repository as provided for by this Act.”;

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(d) by the substitution for paragraphs (j) and (k) of subsection (1) of the following paragraphs, respectively:

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“(j) that proper measures are taken by a participant to ensure that the rights of clients are not in any way diminished by the fact that securities held on their behalf are held collectively in a securities repository or central securities repository as provided for by this Act and to ensure that, where a participant agrees—

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(i) to **[pay clients all]** receive moneys in respect of securities [received by a participant from the] on behalf of clients from a central securities depository, [or] issuer or [a] company, such moneys are paid to the clients concerned [and];

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(ii) to convey to clients all information regarding rights and other benefits accruing to the securities held on behalf of such clients, such information is, in fact, conveyed; and

(iii) to give effect to the lawful instructions of clients with regard to voting rights and other matters, the necessary action is taken; **[and]**

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[(iv) to ensure that the rights of clients are not in any way

diminished by the fact that securities held on their behalf are held collectively in a securities repository or central securities repository as provided for by this Act]

- (k) that, on written request from a client or an owner **[or client]** of securities or of an interest in securities held in a securities repository or central securities repository, a participant be required to deliver the same number of securities, or securities of the same nominal value and of the same kind, as the securities held on behalf of that client or owner **[or client]** in **[a]** the securities repository or central securities repository, as long as the client or owner **[or client]** has a sufficient unencumbered credit balance of securities with the relevant participant;; 5 10
- (e) by the substitution for paragraph (p) of subsection (1) of the following paragraph: 15
- “(p) that the right of clients and participants to withdraw instruments in respect of securities be subject to a time limit from the date and time of the deposit;”; and
- (f) by the insertion after subsection (1B) of the following subsection: 20
- “(1C) (a) A central securities depository may, with the consent of the Registrar, delegate or assign any power or duty conferred upon or assigned to it by or under this Act or by the rules to any person. (b) A central securities depository is not divested of any power or duty delegated or assigned under paragraph (a). (c) A central securities depository may, and the Registrar may by written notice to a central securities depository, cancel a delegation or assignment made under paragraph (a).”.

Amendment of section 13 of Act 85 of 1992, as amended by section 12 of Act 70 of 1996

13. Section 13 of the principal Act is hereby amended by the substitution for the words preceding paragraph (a) of the following words: 30
- “The attachment of securities or of an interest in securities deposited with a depository institution and held in a securities repository or central securities repository shall only be complete when—”.

Amendment of section 19 of Act 85 of 1992

14. Section 19 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection: 35
- “(1) This Act shall be called the **[Safe Deposit] Custody and Administration of Securities Act, 1992**, and the provisions thereof shall come into operation on a date fixed by the State President by proclamation in the *Gazette*.”.

Substitution of long title of Act 85 of 1992, as substituted by section 15 of Act 70 of 1996 40

15. The following long title is hereby substituted for the long title of the principal Act: 45
- “To provide for the registration of a central securities depository for the **[safe]** custody and administration of securities in terms of a predetermined set of rules; to permit a depository institution to become a participant of a central securities depository; to permit clients to deposit securities through a participant with a central securities depository; **[and]** to provide for the ownership, transfer, pledge and delivery of securities held **[in safe custody]** by a depository institution; and to provide for matters connected therewith.”.

Short title

16. This Act is called the Safe Deposit of Securities Amendment Act, 1998, and takes effect on a date fixed by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE SAFE DEPOSIT OF SECURITIES AMENDMENT BILL, 1998

1. GENERAL

Most of the proposed amendments to the Safe Deposit of Securities Act, 1992 (Act No. 85 of 1992) (“the Act”), contained in the Bill have become necessary as a result of the proposed insertion of section 91A in the Companies Act, 1973 (Act No. 61 of 1973). Section 91A applies to uncertificated securities as defined in that section. The definition reads as follows: “ ‘uncertificated securities’ means securities as defined in section 1 of the Stock Exchanges Control Act, 1985 (Act No. 1 of 1985), which are by virtue of this section transferable without a written instrument and are not evidenced by a certificate”. The purpose of section 91A is to bring about the dematerialisation of shares and the electronic transfer of membership in a company and ownership of such shares. The acquisition of membership of a company by a holder of such shares and the transfer of ownership of such shares will be effected by participants by way of electronic book entries in the accounts maintained by them. Share certificates will be cancelled and share transfer forms will not be used. The main object of section 91A is therefore to reduce the risk of fraud associated with a paper-based share transfer and settlement system.

2. PROPOSED AMENDMENTS

The proposed amendment of—

- (a) (i) the definition of “deposit” in section 1 of the Act extends that definition so as to include a deposit by means of an entry in a securities account or central securities account;
- (ii) the definition of “effekte” in the Afrikaans text is effected to bring it in line with the definition of “aandele” in the Stock Exchanges Control Act, 1985 (Act No. 1 of 1985);
- (iii) the definition of “Registrar” in section 1 of the Act is necessary in view of the extension of the application of the Act to equity securities whose listing is regulated under the Stock Exchanges Control Act, 1985, and not the Financial Markets Control Act, 1989 (Act No. 55 of 1989);
- (b) (i) section 2(2) of the Act which provides for the keeping of a securities account in respect of securities deposited by a depository institution or a participant with another depository institution or central securities depository, as the case may be, clarifies the fact that the securities account maintained by the depository institution or participant must then reflect the number or nominal value of the securities so deposited;
- (ii) section 2 by the insertion of subsection (2A) clarifies the fact that a participant must deposit and administer securities in terms of the rules of a central securities depository — matters such as the manner in which securities deposited with a central securities depository are to be transferred will be regulated in such rules;
- (iii) section 2 by the insertion of subsection (2B) clarifies the fact that in the event of an inconsistency between the records of a central securities depository and a participant regarding the securities deposited with the central securities depository by the participant, the records of the central securities depository shall, until the contrary is proved, be deemed to be correct;
- (c) (i) section 3(2) extends the manner in which the notice in question may be given so as to include, for example, electronic notices;
- (ii) section 3(3) limits the power of a client to refuse disclosure of the information in question to cases where the client is authorised by law to refuse. This amendment foresees the possibility that legislation may in future be introduced requiring nominees to disclose the identity of

persons on whose behalf they hold shares. In this case the clients should not be able to prevent the disclosure;

- (d) section 4 by the insertion of subsection (3A) excludes uncertificated securities from the operation of subsections (1), (2) and (3) which deal with co-ownership of securities of the same kind comprised in a securities repository or central securities repository. As information about uncertificated securities is recorded by a participant in a subregister which forms part of the relevant company's register of members, such securities are not susceptible to co-ownership (see proposed section 91A of the Companies Act, 1973.)
- (e) sections 5 and 6 are necessary as a result of the inclusion of uncertificated securities within the ambit of the Act. The addition of a new subsection (4) to section 6 makes it incumbent upon a depository institution to disclose information about a pledge or cession in *securitatem debiti* of securities or of an interest in securities to the issuer of those securities. The issuer is, in turn, required to disclose such information to any person who requests it. This amendment is intended to ensure that publicity in respect of a pledge or cession remains in the electronic environment of a central securities depository;
- (f) section 8 is necessary to clarify that section 8 only applies to certificated securities. Delivery of uncertificated securities is dealt with under the proposed section 91A of the Companies Act, 1973;
- (g) section 10(3) excludes uncertificated securities from the operation of that section for the reasons referred to in paragraph (d) above;
- (h) section 10(6) limits the power of a participant or client to refuse disclosure of the information in question to cases where the participant or client is authorised by law to refuse. See paragraph (c)(ii) above;
- (i) section 11(4) is effected for the reason referred to in paragraph (c)(i) above;
- (j) section 12 refines that section technically in a number of respects and makes provision for the delegation or assignment of the power or functions of a central securities depository to another person. However, the central securities depository is not divested of any power or function so delegated or assigned and such depository or the Registrar may cancel the delegation or assignment;
- (k) section 19 amends the short title of the Act. It was felt that the proposed title reflects the objects of the Act more accurately.

3. PARLIAMENTARY PROCEDURE

The State Law Advisers and the Department of Finance are of the opinion that this Bill must be dealt with in accordance with section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

4. PERSONS AND BODIES CONSULTED

- * Afrikaanse Handelsinstituut;
- * Association for the Advancement of Black Accountants;
- * Association of Black Securities and Investments Professionals;
- * Association of Bond Issuers of South Africa
- * Association of Chartered Certified Accountants;
- * Association of Corporate Treasurers of Southern Africa;
- * Association of General Banks;
- * Association of Law Societies of SA;
- * Association of Property Unit Trust Management Companies;
- * Association of Unit Trusts;
- * Association of Participation Mortgage Scheme Managers;
- * Bond Exchange of South Africa;
- * Business South Africa;
- * Council of Southern African Banks;
- * Central Depository Limited;

- * Consumer Council;
- * Consumer Institute of SA;
- * Department of Finance;
- * Fund Managers Association of South Africa;
- * Foundation for African Business and Consumer Services;
- * Free Market Foundation;
- * Institute of Financial Markets;
- * Johannesburg Stock Exchange;
- * Life Offices' Association of Southern Africa;
- * National African Federated Chamber of Commerce and Industry;
- * National Black Consumer Union;
- * National Black Consumer Forum;
- * Portfolio Committee on Finance (National Assembly)
- * Portfolio (Asset) Management Companies;
- * Public Accountants' and Auditors' Board;
- * Public Property Syndication Association;
- * Registrar of Banks
- * SA Chamber of Business;
- * SA Futures Exchange;
- * Select Committee on Finance (National Council of Provinces);
- * Shareholders' Association of SA
- * Southern African Institute of Chartered Secretaries and Administrators;
- * South African Reserve Bank;
- * South African National NGO Coalition;
- * The Association of Trust Companies in SA;
- * The SA Institute of Chartered Accountants; and
- * The Policy Board for Financial Services and Regulation.