

REPUBLIC OF SOUTH AFRICA

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# COMPANIES SECOND AMENDMENT BILL

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*(As amended by the Portfolio Committee on Finance (National Assembly))*

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(MINISTER OF FINANCE)

[B 49B—98]

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REPUBLIEK VAN SUID-AFRIKA

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# TWEEDE MAATSKAPPY- WYSIGINGSWETSONTWERP

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*(Soos gewysig deur die Portefeuljekomitee oor Finansies (Nasionale Vergadering))*

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(MINISTER VAN FINANSIES)

[W 49B—98]

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GENERAL EXPLANATORY NOTE:

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

# BILL

To amend the Companies Act, 1973, so as to make provision for uncertificated securities; and to provide for matters connected therewith.

**B**E IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

**Insertion of section 91A in Act 61 of 1973**

1. The following section is hereby inserted in the Companies Act, 1973, after section 91:

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**“Uncertificated securities**

**91A.** (1) In this section—

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| (a) ‘ <b>central securities depository</b> ’ means a central securities depository as defined in section 1 of the Custody and Administration of Securities Act, 1992 (Act No. 85 of 1992);                                                                            | 10 |
| (b) ‘ <b>participant</b> ’ means a depository institution accepted by a central securities depository as a participant in terms of the Custody and Administration of Securities Act, 1992 (Act No. 85 of 1992);                                                       |    |
| (c) ‘ <b>subregister</b> ’ means the record of uncertificated securities administered and maintained by a participant, which forms part of the relevant company’s register of members as referred to in this Act;                                                     | 15 |
| (d) ‘ <b>uncertificated securities</b> ’ 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. | 20 |
| (2) (a) This section shall apply to uncertificated securities, notwithstanding any provision to the contrary contained in this Act or in any other law, the common law, an agreement or any articles.                                                                 |    |
| (b) Where any provision of this Act is not expressly or impliedly amended by this section, this Act shall apply in respect of uncertificated securities in the same manner as it applies to securities in certificated form.                                          | 25 |
| (3) (a) A company shall enter in its register of members, in respect of every class of securities, the total number of securities held in uncertificated form.                                                                                                        |    |

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| (b) A subregister which shall form part of the relevant company's register of members shall, notwithstanding subsection (4)(d), contain the details referred to in sections 105 and 133: Provided that no name of any person for whom a participant holds uncertificated securities as nominee shall form part of the subregister;                                                             | 5  |
| (c) A participant shall be responsible for entering the information referred to in sections 105 and 133 in a subregister and for ensuring the correctness of all transfers of uncertificated securities effected by the participant.                                                                                                                                                           | 10 |
| (d) A participant shall, at the request of a company and against payment of such fee as may be prescribed by the Minister from time to time, furnish that company with such details of uncertificated securities in the company as are reflected in the subregister maintained by the participant.                                                                                             | 15 |
| (e) (i) A person who wishes to inspect a subregister may do so only through the relevant company in terms of section 113.                                                                                                                                                                                                                                                                      | 20 |
| (ii) A company shall, within seven days of the date of a request for inspection, be required to produce a subregister which reflects at least the details referred to in paragraph (c) at the close of business on the day on which the request for inspection was made.                                                                                                                       | 25 |
| (f) (i) Every person for whom a participant holds uncertificated securities shall receive a regular statement from such participant setting out the number and identity of the uncertificated securities held on such person's behalf.                                                                                                                                                         | 30 |
| (ii) The cost and frequency of each statement shall be determined by regulation but shall not be borne by the person for whom the uncertificated securities are held.                                                                                                                                                                                                                          | 35 |
| (4) (a) Transfer of ownership in an uncertificated security shall be effected upon the debiting and crediting, respectively, of both the account in the subregister from which the transfer is effected and the account in the subregister to which transfer is to be made, in accordance with the rules of a central securities depository.                                                   | 40 |
| (b) A transferee shall, upon the entry of his, her or its name in a subregister, become a member of and be recognised as a member by the company in respect of the uncertificated securities registered in his, her or its name.                                                                                                                                                               | 45 |
| (c) Transfer of ownership and membership in accordance with paragraphs (a) and (b) shall occur notwithstanding any fraud or illegality which may affect the uncertificated securities in respect of which the transfer was effected or which may have resulted in the transfer being effected, except in the case of a transferee who was a party to or had notice of the fraud or illegality. | 50 |
| (d) Section 133 shall not apply to the transfer of ownership of uncertificated securities and also not to the acquisition of membership of a company as a result of such transfer.                                                                                                                                                                                                             | 55 |
| (e) A company shall be liable to a participant for such fee as may be prescribed by the Minister from time to time in respect of the transfer of ownership of uncertificated securities in the company.                                                                                                                                                                                        | 60 |
| (5) (a) Only a participant may effect the transfer of uncertificated securities in a subregister maintained by it.                                                                                                                                                                                                                                                                             |    |
| (b) A participant shall transfer uncertificated securities in a subregister administered and maintained by it, only on receipt of an instruction to transfer sent and properly authenticated in terms of the rules of a central securities depository or by order of court.                                                                                                                    |    |
| (c) Nothing in this section shall prejudice any power of a participant to effect transfer to a person to whom the right to any uncertificated securities of a company has been transmitted by operation of law or agreement.                                                                                                                                                                   |    |
| (6) Section 114 shall not apply to a subregister.                                                                                                                                                                                                                                                                                                                                              |    |
| (7) (a) Subject to paragraph (b), a company shall not issue certificates evidencing, or purporting to evidence, title to uncertificated securities of the company, and sections 96 and 140 shall not apply to uncertificated securities.                                                                                                                                                       |    |

- (b) Any person who wishes to withdraw his, her or its uncertificated securities held by a participant and to obtain a certificate in respect of all or part of those securities, shall notify the participant thereof, in which case—
- (i) the participant shall within seven days notify the relevant company to provide such a certificate and shall remove the details of the uncertificated securities so withdrawn from the subregister maintained by the participant; 5
  - (ii) the company shall, immediately on receipt of such a notice from a participant, enter the relevant person's name and details in respect of his, her or its holding in the company's register of members and indicate on such register that the securities so withdrawn are no longer held in uncertificated form; 10
  - (iii) the company shall within 14 days of receipt of the notice referred to in subparagraph (ii) prepare and deliver to the relevant person a certificate in respect of the securities so withdrawn, and notify the central securities depository that the securities are no longer held in uncertificated form; and 15
  - (iv) transfer of ownership or acquisition of membership in respect of the securities so withdrawn shall not be capable of being effected through a central securities depository while they remain in certificated form. 20
- (8) A person who takes any unlawful action in consequence of which any of the following events occur in a register or subregister, namely—
- (a) the name of any person remains in, is entered in, or is removed or omitted; 25
  - (b) the number of uncertificated securities is increased, reduced, or remains unaltered; or
  - (c) the description of any uncertificated security is changed, shall be liable to any person who has suffered any direct loss or damage arising out of such action. 30
- (9) (a) A person who gives an instruction to transfer uncertificated securities shall warrant the legality and correctness of any such instruction.
- (b) The person referred to in paragraph (a), shall indemnify the company and the participant effecting the transfer against any claim and against any direct loss or damage suffered by them arising out of such a transfer by virtue of an instruction referred to in paragraph (a). 35
- (c) A participant who transfers uncertificated securities other than pursuant to an instruction to transfer that was sent and properly authenticated in terms of the rules of a central securities depository, shall indemnify the company against any claim made upon it and against any direct loss or damage suffered by it arising out of such transfer and such participant shall, in addition, indemnify any person who suffers any direct loss or damage arising out of such transfer, against such loss or damage. 40
- (10) (a) Subject to subparagraph (b), when any new offer of securities is made by a company, the offeree may elect whether all or any part of the securities offered to him, her or it must be issued in certificated or uncertificated form. 45
- (b) A company shall only issue or allot uncertificated securities to a person who is already a client of a participant or for whom a participant has agreed to act. 50
- (11) The Minister may make regulations regarding matters which are supplementary and ancillary to the provisions of this section and which are not inconsistent with another provision of this Act.
- (12) Any person—
- (a) other than a participant, who effects the transfer of uncertificated securities in contravention of subsection (5)(a); 55
  - (b) who takes any unlawful action contemplated in subsection (8); or

(c) who, without proper authority, accesses any computer system or record maintained by a participant or a central securities depository, shall be guilty of an offence and liable on conviction to a fine not exceeding R500 000 or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.".

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**Short title**

2. This Act is called the Companies Second Amendment Act, 1998.

## **MEMORANDUM ON THE OBJECTS OF THE COMPANIES SECOND AMENDMENT BILL, 1998**

### **1 INTRODUCTION**

1.1 In South Africa, both the transfer of shares and the settlement of share transactions are essentially paper-based. The physical handling of share certificates and transfer deeds plays an important role in this regard. The unprecedented increase in transactions effected on the Johannesburg Stock Exchange (“the JSE”) in recent years has brought increased risks such as delayed settlement and tainted scrip. It has also meant that the settlement system has, up to now, not conformed in significant respects with the G-30 recommendations on clearing and settlement despite the fact that the JSE now has a world-class automated trading system.

1.2 In order to address these concerns, the JSE has for the past 18 months in co-operation with the major industry participants been investigating the possibility of dematerialising shares in a Central Securities Depository (“CSD”). The introduction of section 91A into the Companies Act, 1973 (Act No. 61 of 1973), is imperative in order to permit the dematerialisation of securities. It will permit share certificates to be dematerialised and membership in a company and ownership of dematerialised shares to be electronically transferred without the necessity of completing or filing any paper.

1.3 The amendment to the Companies Act, 1973, is proposed simultaneously with amendments to the Safe Deposit of Securities Act, 1992 (Act No. 85 of 1992), the Stamp Duties Act, 1968 (Act No. 77 of 1968), and the Marketable Securities Tax Act, 1948 (Act No. 32 of 1948). It is also proposed that an Uncertificated Securities Tax Act be introduced to deal with the duty of transactions in securities.

### **2 THE PROPOSED SECTION 91A**

#### *2.1 Subsection (1)*

2.1.1 The definitions of “central securities depository” and “participant” refer to definitions contained in the Safe Deposit of Securities Act, 1992. It is necessary to refer to these definitions in view of the fact that both the CSD and the participants play a crucial role in dematerialisation.

2.1.2 The definition of “subregister” clarifies the fact that a participant’s record of uncertificated securities will form part of a company’s main register of members. This definition, read together with subsections (3)(c) and (4)(b), establishes the important fact that once a person is recorded in that person’s own name in a participant’s subregister, that person will be recognised by the company for all purposes as a member of the company. Such a person will thus be able to exercise his or her rights as a member directly against the company and not only indirectly through a participant.

2.1.3 The definition of “uncertificated securities” clarifies which securities are uncertificated securities and are thus subject to section 91A. The word “uncertificated” and the word “dematerialisation” are internationally accepted terms for the concepts dealt with in this legislation.

#### *2.2 Subsection (2)*

This subsection makes it clear that section 91A will apply to uncertificated securities and will regulate uncertificated securities notwithstanding anything to the contrary in any law, the common law, an agreement or any articles. The Companies Act, 1973, will, however, apply to uncertificated securities except to the extent expressly amended by section 91A. The proposed section 91A does not require securities to be issued or maintained in uncertificated form, but that once they are in uncertificated form, section 91A will apply to them.

#### *2.3 Subsection (3)*

2.3.1 This subsection sets out certain of the obligations of a company and of a participant in respect of uncertificated securities. This subsection provides that it is the participant and not the company who is responsible for maintaining certain statutory information in respect of uncertificated securities. The participant is also responsible for

ensuring the correctness of transfers of uncertificated securities effected by it. In so doing, the participant acts as agent of the person who has deposited securities with the participant and not as agent of the company which issued the uncertificated securities.

2.3.2 Section 91A does not affect the right of shareholders and other members of the public to inspect the register of a public company at the company's office. As a participant will, in terms of section 91A, be responsible for keeping the subregister, it will be obliged to give details in respect of such subregister to the company so that the company will, in turn, be able to produce a consolidated share register on request from any person.

#### *2.4 Subsection (4)*

This subsection determines the exact moment in which transfer of both ownership in and membership in respect of uncertificated securities is considered to have occurred. The subsection ensures that the time at which membership is acquired and at which ownership is transferred is the same and is necessary in order to avoid doubt and to determine the moment at which complete and irrevocable delivery versus payment of uncertificated securities will occur.

#### *2.5 Subsection (5)*

While the previous subsection deals with transfer of ownership and membership, this subsection deals with transfer of the uncertificated securities themselves. These securities will be reflected in an electronic form in the electronic securities accounts maintained by a participant. As the signature of paper transfer deeds is inappropriate in an electronic environment, this subsection provides that transfer may only be effected by a participant and then only on receipt of an instruction to transfer sent and properly authenticated in terms of the rules of a CSD or by order of court. This is to ensure that although the relevant member of the company will no longer sign a transfer deed prior to transfer being effected out of that person's name, the maximum level of protection is maintained prior to a transfer of uncertificated securities being effected.

#### *2.6 Subsection (6)*

In view of the fact that settlement of uncertificated securities will happen on a rolling basis every day on which the JSE is open for trading, it is not possible for a subregister to close in the manner contemplated in section 114 of the Companies Act, 1973. A company which wishes to prepare a register as at a certain date will be able to obtain a complete record as at the end of that day, including a record of all electronic transfers which occurred on that day. Such record will thus reflect the transfers of all shares purchased at least five days previously (as settlement will occur on T + 5). This means that the register will often be more up to date than existing registers which only reflect transfers once the relevant documents have been lodged for transfer. This may be some time after the initiating purchase transaction.

#### *2.7 Subsection (7)*

2.7.1 As the whole intention of the dematerialisation of securities is to eliminate the need for paper certificates and transfer deeds, this subsection prevents a company from issuing certificates evidencing, or purporting to evidence, title to uncertificated securities.

2.7.2 A person may, however, withdraw uncertificated securities from the CSD and obtain a certificate in respect of such securities. Subsection 7(b) sets out the procedure to be followed in this regard.

#### *2.8 Subsection (8)*

This subsection determines the liability to be borne by anyone who takes unlawful action as set out in this subsection.

#### *2.9 Subsection (9)*

This subsection determines the warranties and indemnities which are deemed to have been given by any person who gives an instruction to transfer uncertificated securities and who effects such a transfer other than in terms of an instruction to transfer, sent and properly authenticated in terms of the rules of a CSD. Read together with the warranty and indemnity contained in the Safe Deposit of Securities Act, 1992, these provisions ensure that no person will suffer any direct loss or damage if uncertificated securities are transferred without such person's consent.

#### *2.10 Subsection (10)*

This subsection ensures that new issues made subsequent to the commencement of the dematerialisation process will be able to be made directly in dematerialised form if the person to whom the securities are offered so elects. The subsection seeks so to limit the opportunities for fraud in respect of the paper-based securities as far as possible.

#### *2.11 Subsection (11)*

This subsection empowers the Minister to make regulations for any matter supplementary or ancillary in respect of uncertificated securities.

### **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**

The proposal to dematerialise securities has been developed by the JSE in co-operation with the major banks, the Banking Council, the Fund Managers' Association, the Shareholders' Association, the Transfer Secretaries, the Financial Services Board and the South African Reserve Bank. In addition, the legislation has been informally presented to the parliamentary Portfolio Committees on Finance and on Trade and Industry as well as to the Select Committee on Finance of the NCOP. Copies of the legislation were provided by the FSB to all parties whom the FSB consulted about the proposed amendments to the Safe Deposit of Securities Act, 1992, and the JSE has provided copies to all persons to whom presentations on the proposed dematerialisation have been made (approximately 1400 persons and institutions including the Law Society, the Merchant Bankers' Association, the Institute of Corporate Treasurers, the Institute of Chartered Secretaries, the Institute of Chartered Accountants, Sanlam and Old Mutual). The legislation is also available on the STRATE web-site, the web-site of the JSE team managing the dematerialisation.