

REPUBLIC OF SOUTH AFRICA

COMPANIES AMENDMENT BILL

(As amended by the Portfolio Committee on Trade and Industry (National Assembly)
(The English text is the official text of the Bill)

(MINISTER OF TRADE AND INDUSTRY)

[B 35B—2001]

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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 allow the electronic lodgement of and access to all documents which have been or are required to be lodged in terms of this Act; to provide for the payment of fees in respect of documents so lodged; to further regulate the acquisition by a company of its own shares; to amend certain obsolete provisions; and to effect certain textual alterations; 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 1 of Act 82 of 1992, section 1 of Act 35 of 1998 and section 2 of Act 37 of 1999 5

1. Section 1 of the Companies Act, 1973 (hereinafter referred to as the principal Act), is hereby amended—

(a) by the substitution in subsection (1) for the definition of “ ‘books or papers’ and ‘books and papers’ ” of the following definition:

“ ‘books or papers’ and ‘books and papers’ include accounts, deeds, writings, electronic data reduced to paper format and other documents;”;

(b) by the insertion after the definition of “director” of the following definition:

“ ‘electronic’ includes created, recorded, transmitted or stored in digital or other intangible form of electronic, optical or similar means;”;

(c) by the substitution in subsection (1) for the definition of “prospectus” of the following definition:

“ ‘prospectus’ means any prospectus, notice, circular, advertisement or other invitation, irrespective of whether it is done in non-electronic or any electronic manner, offering any shares of a company to the public;”;

and

(d) by the insertion after subsection (1) of the following subsections:

“(1A) Subject to subsection (1B), the performance of the acts denoted by any of the following words or expressions, namely—

(a) ‘give notice’;

(b) ‘issue, distribute, deliver or cause it to be done’;

(c) ‘lodge’;

(d) ‘lodge in the prescribed form’;

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- (e) 'lodge in the prescribed manner';
 - (f) 'lodge under cover of';
 - (g) 'notify in the prescribed form';
 - (h) 'payment of prescribed fee';
 - (i) 'publish';
 - (j) 'registration'; and
 - (k) 'written application',
- and any word or expression derived therefrom, must be regarded as including all electronic methods of performing such acts.
- (1B) (a) Subsection (1A) shall not apply to a section of this Act until the Registrar publishes a notice in the *Gazette* making it applicable to that section.
- (b) Different dates may be determined by the Registrar in respect of the application of subsection (1A) to different sections of this Act."

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 and section 2 of Act 70 of 1984

2. Section 9 of the principal Act is hereby amended—
- (a) by the insertion after subsection (1) of the following subsection:
- "(1A) Subject to subsection (4), any person may, on payment of the prescribed fee, through any electronic medium approved by the Registrar—
- (a) inspect any document which has been lodged with the Registrar under this Act and converted into electronic format; or
- (b) obtain a copy of or extract from any such converted document."
- and
- (b) by the substitution in subsection (2) for the words following upon paragraph (b) of the following words:
- "no fee referred to in subsection (1) or (1A) shall be payable."

Amendment of section 10 of Act 61 of 1973, as amended by section 2 of Act 31 of 1986

3. Section 10 of the principal Act is hereby amended—
- (a) by the substitution in subsection (1) for paragraph (c) of the following paragraph:
- "(c) in such other manner, including such electronic form of transfer of money, as the Registrar may direct."
- (b) by the substitution for subsection (2) of the following subsection:
- "(2) No document, form, return or notice in respect of which any fee or payment is laid down under this Act, shall be complete unless proof of payment of the prescribed fee, additional fees (if any) or other moneys has been [delivered to] acknowledged as having been received by the Registrar."

Amendment of section 15 of Act 61 of 1973, as amended by section 1 of Act 111 of 1976 and section 2 of Act 59 of 1978

4. Section 15 of the principal Act is hereby amended by the substitution in subsection (1) for paragraph (bA) of the following paragraph:
- "(bA) providing for the reproduction of any records in the Companies Registration office or the office of the Master by microfilm, microcard, miniature photographic process, the conversion into electronic format in such a way as to allow such records to be reconverted without changing their original contents or any other process deemed suitable by the Minister;"

Amendment of section 46 of Act 61 of 1973, as amended by section 10 of Act 83 of 1981

5. Section 46 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) An order under section 45 for the change of a name or translated name of a company or a shortened form of a name or translated name of a company or a name referred to in section 43(2) shall be issued by the Registrar in writing and sent by registered post to the company at its registered office or postal address, or to the person referred to in section 43(2) at his or her last-known address, and shall require such company or such person to comply with the order within two months from the date of its issue.”.

Amendment of section 50 of Act 61 of 1973, as amended by section 12 of Act 83 of 1981, section 1 of Act 29 of 1985 and section 4 of Act 35 of 1998

6. Section 50 of the principal Act is hereby amended by the substitution in subsection (1) for paragraph (c) of the following paragraph:

“(c) shall have its name and registration number mentioned in legible characters in all notices and other official publications of the company, including notices or other official publications in electronic format, and in all bills of exchange, promissory notes, endorsements, cheques, and orders for money or goods purporting to be signed by or on behalf of the company and in all letters, delivery notes, invoices, receipts, and letters of credit of the company”.

Amendment of section 63 of Act 61 of 1973, as amended by section 4 of Act 76 of 1974, section 3 of Act 29 of 1982, section 2 of Act 29 of 1985, section 4 of Act 31 of 1986 and section 2 of Act 78 of 1989

7. Section 63 of the principal Act 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 **[two copies]** a copy thereof certified by a notary public as a true **[copies]** 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, **[impress]** place his or her seal on **[one]** the copy [thereof], and endorse thereon the date of registration and the certificate provided for in section 64.”; and

(b) by the addition to subsection (4) of the following proviso:

“: Provided that the Registrar may change such registration number in order to rectify duplications of such numbers or to achieve any other objective which it is necessary or expedient to achieve for the proper maintenance of the register of companies”.

Repeal of sections 73A, 73B, 73C and 73D of Act 61 of 1973

8. Sections 73A, 73B, 73C and 73D of the principal Act are hereby repealed.

Amendment of section 76 of Act 61 of 1973, as amended by section 5 of Act 76 of 1974, section 3 of Act 82 of 1992 and section 6 of Act 37 of 1999

9. Section 76 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) Where a company which is not a banking institution in terms of the Banks Act, **[1965 (Act No. 23 of 1965)]** 1990 (Act No. 94 of 1990), issues shares at a premium, whether for cash or otherwise, a sum equal to the aggregate amount or value of the premiums on those shares shall be transferred to an account to be called the ‘share premium account’, and the provisions of this Act relating to the **[reduction of the]** share capital of a company shall, except as provided in this section, apply as if the share premium account were paid-up share capital of the company.”.

Amendment of section 87 of Act 61 of 1973, as substituted by section 11 of Act 37 of 1999

10. Section 87 of the principal Act is hereby amended by the substitution in subsection (2) for paragraph (a) of the following paragraph:

“(a) if, and to the extent that, the shares are acquired ~~[in terms of the]~~ by special resolution passed in terms of section [85(3)] 85(1) and the approval by such special resolution is a specific approval contemplated in section 85(2);”.

Amendment of section 94 of Act 61 of 1973, as amended by section 6 of Act 70 of 1984

11. Section 94 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection:

“(2) Any such signatures may be affixed to or placed on the certificate by autographic, ~~[or]~~ mechanical or electronic means.”.

Amendment of section 98 of Act 61 of 1973, as amended by section 4 of Act 64 of 1977, section 15 of Act 69 of 1989, section 6 of Act 35 of 1998, section 15 of Act 37 of 1999 and section 80 of Act 53 of 1999

12. Section 98 of the principal Act is hereby amended by the substitution in subsection (1) for paragraph (b) of the proviso of the following paragraph:

“(b) where any such shares are redeemed otherwise than out of the proceeds of a fresh issue, there shall, out of profits which would otherwise have been available for dividends, be transferred to a reserve fund, to be called the ‘capital redemption reserve fund’, a sum equal to the nominal amount of the shares redeemed, or if shares of no par value, to the book value of the shares redeemed, and the provisions of this Act relating to ~~[the reduction of]~~ the share capital of a company shall, except as provided in this section, apply as if the capital redemption reserve fund were share capital of the company;”.

Amendment of section 105 of Act 61 of 1973

13. Section 105 of the principal Act is hereby amended by the substitution in subsection (4) for the words preceding the proviso of the following words:

“The register of members may be kept either by making entries in bound books or by recording the particulars required in any other manner, including the electronic recording of such particulars, and, in the case of a person who has ceased to be a member, also by microfilm or microcard or by miniature photographic or electronic process or by any other process which accurately reproduces and forms a durable or sustainable medium for recording and reproducing such particulars”.

Amendment of section 106 of Act 61 of 1973

14. Section 106 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection:

“(2) The index, which may be in the form of a card index ~~[and]~~ or in any electronic format which accurately reproduces the required information, shall be deemed to be a part of the register of members, and shall in respect of each member, contain a sufficient indication to enable the account of that member in the register to be readily found.”.

Amendment of section 113 of Act 61 of 1973, as amended by section 6 of Act 59 of 1978

15. Section 113 of the principal Act is hereby amended by the substitution for the expression “twenty-five cents”, wherever it occurs, of the expression “R10”.

Amendment of section 126 of Act 61 of 1973, as amended by section 13 of Act 83 of 1981

16. Section 126 of the principal Act is hereby amended by the substitution for subsection (3) of the following subsection:

“(3) Any signature referred to in subsection (2) may be affixed to or placed on a debenture or debenture certificate by autographic, **[or]** mechanical or electronic means.”. 5

Amendment of section 132 of Act 61 of 1973

17. Section 132 of the principal Act is hereby amended by the substitution in paragraph (d) for subparagraph (i) of the following subparagraph: 10

“(i) introduces or inserts into or engraves or makes upon any plate, wood, stone or other material, including any electronic material or process, any certificate as to any interest in a company or any share warrant or coupon or document purporting to be such interest, share warrant or coupon issued or made by any particular company in pursuance of this Act or to be a blank certificate, share 15
warrant or coupon so issued or made or to be a part of such a certificate, share warrant or coupon; or”.

Amendment of section 136 of Act 61 of 1973

18. Section 136 of the principal Act is hereby amended by the substitution in subsection (1) for paragraph (b) of the following paragraph: 20

“(b) A certification shall for **[the]** purposes of this section be deemed to be signed if it purports to be authenticated by the signature or initials of any person whether by autographic, electronic or mechanical means, unless it is shown that the signature or initial is not that of a person authorized to certify transfer of securities on behalf of the company.”. 25

Amendment of section 141 of Act 61 of 1973

19. Section 141 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) No person shall either orally or in writing (including any newspaper advertisement or any advertisement in electronic format) make an offer of shares for sale to the public or issue, distribute or publish any such material which in its form and context is calculated to be understood as an offer as aforesaid unless it is accompanied by a written statement containing the particulars required by this section to be included therein.”. 30

Amendment of section 157 of Act 61 of 1973

20. Section 157 of the principal Act is hereby amended by the substitution in subsection (1) for the words preceding paragraph (a) of the following words: 35

“Every newspaper or other advertisement **[whatsoever]** in any format, including electronic format, offering or calling attention to an offer or intended offer of shares of a company to the public shall be deemed to be a prospectus issued by the person responsible for publishing or disseminating the advertisement (and all enactments and rules of law as to the contents of prospectuses and as to the liability in respect of statements in and omissions from prospectuses or otherwise relating to prospectuses shall apply and have effect accordingly), unless it contains no more information than the following:” 40
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Amendment of section 171 of Act 61 of 1973

21. Section 171 of the principal Act is hereby amended by the substitution in subsection (1) for the words preceding paragraph (a) of the following words:

“A company shall not issue or send, irrespective of whether it is in electronic or any other format, to any person in the Republic any trade catalogue, trade circular or business letter bearing the company’s name unless there is stated thereon or therein in a form capable of retrieving therefrom in respect of every director—”. 50

Amendment of section 192 of Act 61 of 1973

22. Section 192 of the principal Act is hereby amended by the substitution in subsection (2) for the proviso of the following proviso:

“: Provided that a private company may, instead of publishing the said notice in a newspaper, send it by registered post, or by electronic post if so authorized by its articles, to the members not later than three days after the adjournment.”. 5

Amendment of section 211 of Act 61 of 1973, as substituted by section 13 of Act 59 of 1978

23. Section 211 of the principal Act is hereby amended by the substitution for subsection (7) of the following subsection: 10

“(7) Any company which publishes, whether in non-electronic or electronic format, and every director or officer of the company who knowingly is a party to the publication of, the name of any person as a director of the company when such person is not a director or has not validly been appointed as director of the company, shall be guilty of an offence.”. 15

Amendment of section 249 of Act 61 of 1973

24. Section 249 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) Any person who in any statement, return, report, certificate, financial statement or other document required by or for the purposes of any provision of this Act, whether in non-electronic or electronic format, makes a statement which is false in any material particular, knowing it to be false, shall be guilty of an offence.”. 20

Amendment of section 250 of Act 61 of 1973

25. Section 250 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection: 25

“(1) Any director or officer of a company or any other person who conceals, destroys, mutilates, falsifies or makes any false entry in or, with the intent to defraud or deceive, makes any erasure in any book (including any minute book), register, document, financial record or financial statement of any company, irrespective of whether it is or has been kept in electronic format, shall, subject to the provisions of subsection (2), be guilty of an offence.”. 30

Amendment of section 302 of Act 61 of 1973, as amended by section 23 of Act 76 of 1974

26. Section 302 of the principal Act is hereby amended by the addition to subsection (1) of the following proviso: 35

“: Provided that, if so authorized by a company’s articles, a copy of its financial statements may be made available in electronic format to all persons who have agreed thereto in writing”.

Amendment of section 441 of Act 61 of 1973, as substituted by section 19 of Act 35 of 1998

27. Section 441 of the principal Act is hereby amended by the substitution in subsection (1) for paragraph (h) of the following paragraph:

“(h) in section 168, 185, 256(6), 312(4), **[or]** 331(1) or 333(1), to a fine;”.

Substitution of certain expression in Act 61 of 1973 45

28. The principal Act is hereby amended by the substitution for the expression “certified post”, wherever it occurs, of the expression “registered post”.

Repeal of section 3 of Act 18 of 1990

29. Section 3 of the Companies Amendment Act, 1990, is hereby repealed.

Short title

30. This Act is called the Companies Amendment Act, 2001.

MEMORANDUM ON THE OBJECTS OF THE COMPANIES AMENDMENT BILL, 2001

1. Approximately four years ago the South African Companies Registration Office (Sacro), in co-operation with the South African Revenue Service (Sars), departments of state, other regulators and the private sector, embarked on the development of a completely electronic and computerised system for the incorporation of companies and the registration of corporate information in respect of such companies. The development phase has now been finalised and Sacro is now ready to finalise the implementation of the system.

2. The Bill therefore seeks to amend the Companies Act, 1973 (Act No. 61 of 1973) ("the Act"), so as to make provision for the lodgement of documents and disclosure of information in respect of companies by means of the electronic process. The new matters that the Bill seeks to introduce in the Act relate to—

- * the phasing in of the electronic lodgement of corporate forms;
- * the phasing in of the electronic payment of fees prescribed by the Act; and
- * the electronic disclosure of corporate information.

3. In addition to the abovementioned proposals, the Bill also seeks to allow—

- * a company to keep a register of its members and an index to such register in an electronic format;
- * a company to sign certain documents by electronic means, in addition to the current autographic and mechanical means; and
- * a company to send its annual financial statements by electronic mail to its members who have consented thereto in writing.

4. The Bill also seeks to remove obsolete provisions and references, and to rectify an incorrect cross-reference, in the Act.

5. Consultation

The system has, over several years, been developed in ongoing co-operation with Sars and in consultation with departments of state, other regulators and the private sector. They include the following:

- * The Deeds Office;
- * the Department of Finance;
- * the National Treasury;
- * the Registrar of Banks;
- * the South African Reserve Bank;
- * the Banking Council;
- * the accounting and legal professions.

All the participants support the implementation of the system.

6. Financial implications for State

The Bill will have no financial implications which have not yet been properly provided for and expended under previous and current budgets.

7. Parliamentary Procedure

The State Law Advisers and the Department of Trade and Industry are of the opinion that this Bill must be dealt with in accordance with the procedure established by 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.

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