COMMENTS BY THE LAW SOCIETY OF SOUTH AFRICA
ON THE COMPANIES AMENDMENT BILL [B-2021]

The Law Society of South Africa (LSSA) constitutes the collective voice of the approximately 30 000 attorneys within the Republic. It brings together the Black Lawyers Association, the National Association of Democratic Lawyers and nine provincial attorneys' associations, in representing the attorneys' profession.

The LSSA has considered the Companies Amendment Bill [B-2021] (the Bill) and wishes to comment as follows:

Please note that, in those cases where no comment is made on any particular provision of the Bill, the LSSA is either in agreement with the provision, or did not have sufficient time to consider it because of the very tight timelines. Accordingly, if an extension to comment is granted, the LSSA would wish to have the opportunity to carry on considering its comments by withdrawing these comments and submitting its comments by the extended date.

In order to make it clear what changes the LSSA is proposing, the changes proposed in the Bill have been accepted and then the LSSA's changes reflected in the usual manner, i.e. deletions from the text proposed by the Bill have been shown in square brackets and insertions in the text proposed by the Bill have been underlined.

1. CLAUSE 1, AMENDING SECTION 1 OF THE COMPANIES ACT

1.1 Definition of "securities"

1.1.1 The proposed definition of "securities" introduces the term "debentures", which term is not defined in the Companies Act. It is suggested that reference to "debt instrument"

wherever it appears in sections 43 and 161 of the Companies Act should be changed to "debenture" to align with the proposed definition of "securities". The definition of "debt instrument" in section 43(1)(a) should then be replaced by a definition of "debenture".

1.1.2 Proposed definition of "debenture"

There is very little clarity on what a debenture is, not only in South Africa, but also in England. That may the reason why legislatures have been loathe to try to define the term. However, we think that it is necessary to define debentures now in view of the proposed limitation in the definition of securities. We propose the following: –

""Debenture" means a written acknowledgement of debt issued by a company for one or more loans made to the company, whether on a secured or unsecured basis, which acknowledgement designates the debt/s as debenture/s and specifies the terms applicable, including that the debenture/s is/are freely tradeable."

We appreciate that by providing that it will only be a debenture if so designated by the company, that does somewhat put it in the company's hands as to whether it will be treated as a security or not, although the debenture holder will also have a key interest and will put pressure on the company, but otherwise the change to securities to narrow it will be frustrated because debentures could include so many instruments which should not be subject to the Companies Act.

1.2 Definition of "true owner"

1.2.1 It is noted that the proposed definition of "true owner" refers to "natural person" only. Taking into consideration that one of the objectives of the introduction of the definition of "true owner" is to comply with South Africa's international obligations as far as money laundering and terrorism are concerned, we believe that the proposed definition will not cover all required possibilities. It might not be a natural person who is in actual control of the company, e.g. where there is a company, different intermediaries and a trust at the end of the chain. For this reason, we submit that it will be prudent to create a deeming provision in the Act. We suggest that such deeming provision be inserted as a new section 56A (refer to paragraph 7) below. The reason for this is because we think that

there should be a separation between the concept of holder of beneficial interest and true owner as they serve different purposes.

1.2.2 Should our proposal regarding a new section 56A be accepted, it is suggested that reference to the last owner in the chain in the definition of "true owner" be deleted.

1.2.3 Since Latin phrases have fallen into disuse, it is suggested that the words "ejusdem generis" be replaced.

1.2.4 Proposed amendments

''true owner' means a natural person, who would in all the circumstances be considered or be deemed to be the ultimate and true owner of the relevant securities, whether by reason of being capable either directly or indirectly (via the intermediation of others in the chain of holders of beneficial interest in the relevant securities) of directing the registered holder with regard to the securities or because of being a person for whose benefit the securities enure or for any other reason, not limited to the preceding categories **[ejusdem generis]**, [**which could be the registered holder itself, or if the registered holder is not the true owner or the only true owner, would be the last person in the chain of any holders of beneficial interest in the relevant securities]**;.

2. CLAUSE 4, AMENDING SECTION 26

2.1 Comment

2.1.1 Clause (c) : Replace the words "… beneficial interest **of** the company …" with "… beneficial interest **in** the company …" in subsection (f).

Should our proposal of a new section 56A be accepted, a new subsection (g) should be inserted, reading "the register of the disclosures of the true owner/s of the company as mentioned in section 56A."

2.1.2 Clause (d): Reference should also be made to the new subsection (g) as proposed above.

2.1.3 Clause (e): The proposed subsection (2A) appears to be superfluous, since, in terms of the amended Section 26(2), the records referred to in subsections (1)(c) and (d) are not permitted to be copied and inspected.

2.2 Proposed amendment

Section 26 of the principal Act is hereby amended -

(a) …

(b) …

(c) by the deletion in subsection (1) of the word "and" at the end of paragraph (d) and by the addition of the following paragraphs:

"(e) the securities register of a profit company, or the members register of a non-profit company that has members, as mentioned in section 24(4);and

(f) the register of the disclosure of beneficial interest in **[of]** the company as mentioned in section 56(7)(a).

(g) the register of the disclosures of the true owner/s of the company as mentioned in section 56A.

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

"(2) A person not contemplated in subsection (1) has a right to inspect and copy the information contained in the records referred to in subsection(1)(a),(b),(cA),(e), **[and]** (f) and (g), upon payment of no more than the prescribed maximum charges for any such inspection and copy.

(e) [by the insertion after subsection (2) of the following subsection:

(2A) The right to inspect and copy information contained in the records referred to in subsection 1(c) and (d), as contemplated in subsection (2), shall not apply to a private company, non-profit company or personal liability company, wherein- (a) an annual financial statement is internally prepared in a company with a Public Interest Score of less than 100; or (b) an annual financial statement is independently prepared in a company with a Public Interest Score of less than 350.]

(f) …

(g) …

(h) …

(i) …

(j) …

3. CLAUSE 6, INSERTING SECTION 30A

3.1 Comment

3.1.1 Do state-owned companies prepare their own remuneration policies, or are they prepared by National Treasury?

3.1.2 Subsection (1): It is suggested that subsection (1) should deal only with the initial remuneration policy to be approved, to read: "A public company or state-owned company must prepare a remuneration policy for directors and prescribed officers by no later than 12 months after this section comes into effect and present such policy for approval by ordinary resolution at the first annual general meeting after the policy is prepared".

Note however our comment regarding state-owned companies above.

3.1.3 Subsection (2): We propose that subsection (2) be amended to read as follows: "The remuneration policy, once approved as contemplated in subsection (1), must be presented every three years for approval by ordinary resolution at the annual general meeting within that three year period. In addition, an approved remuneration policy must be presented for approval by ordinary resolution if any material change in the policy is proposed to be introduced during that three year period."

3.1.4 Subsection (3)(b): Should our proposals in 3.1.2 and 3.1.3 be accepted, reference to subsection (1) must be deleted, as subsection (1) would only deal with the initial policy.

3.1.5 Subsection 3(c): The word "implementation" should read "remuneration".

3.1.6 Subsection 4(a) should be deleted as it is matter of internal policy how the report gets prepared.

3.1.7 Subsection 4(c) should be deleted. The report comprises factual information.

3.1.8 Subsection (5): This subsection should be deleted. Voting on the report cannot constitute voting on the policy.

3.1.9 Subsection (6): The word “implementation” should be “remuneration”. Further, the words “… which shall be approved by ordinary resolution” should be deleted.

3.1.10 Subsection (7): This subsection is unclear and should be redrafted. It should provide that, until a new remuneration policy is approved, the previous policy approved in terms of Section 30A, or a policy approved by way of non-binding vote from shareholders before section 30A came into force, will be applicable. If there is neither an approved policy under section 30A, nor a policy approved by non-binding vote, the policy will be deemed to be the policy which results in the remuneration paid to the directors and prescribed officers before section 30A comes into effect.

3.1.11 Subsection (8): The words “by ordinary resolution in terms of subsection (7)” should be deleted.

3.1.12 Subsection (9):

3.1.12.1 “implementation” should be “remuneration” wherever it appears in this subsection.

3.1.12.2 Is this subsection not meant to deal with the policy, and not the report?

31.12.3 Subsection (9)(b) is unclear, as it does not state whether non-executive directors are required to stand down for re-election as board members or as members of the directors’ committee responsible for remuneration. This should be clarified. If it is meant that they must stand down as board members, we believe that this is too draconian. Furthermore, for the entire remuneration committee to step down may lead to unintended consequences, including loss of institutional memory. It is suggested that provision rather be made for one-half of the non-executive directors to be replaced by other non-executive directors, to ensure some continuity.

31.12.4 Subsection 9 should be amended to make it obligatory in instances where there is no remuneration policy approved in terms of section 30A, to present a remuneration policy at every annual general meeting until same is approved. Thereafter, it can be presented for approval every three years or whenever any

material change in the policy is made. It is suggested that a subsection (c) be inserted in this regard. Also refer to our comment on subsection (7).

3.2 Proposed amendment

6. The following section is hereby inserted in the principal Act after section 30:

"Duty to prepare and present the company's remuneration policy and the remuneration report

30A.(1) A public company or state-owned company must prepare a remuneration policy for directors and prescribed officers not later than the first 12 months after this section comes into effect and present such policy for approval by ordinary resolution at the first annual general meeting after the policy is prepared. **[A public company or state-owned company must prepare and present the remuneration policy for directors and prescribed officers for approval by ordinary resolution, at the annual general meeting.]**.

(2) The remuneration policy, once approved as contemplated in subsection (1), must thereafter be presented every three years for approval by ordinary resolution at an annual general meeting falling within that three-year period. In addition, an approved remuneration policy must be presented for approval by ordinary resolution if any material change in the policy is proposed to be introduced during that three-year period. **[as contemplated in subsection (1) must be presented thereafter for approval by ordinary resolution at the annual general meeting and every three years or whenever any material change to the remuneration policy is made]**.

(3) The remuneration report must, in the prescribed manner, consist of the following parts:

(a) background statement;

(b) the company's remuneration policy [**as contemplated in subsection (1)]**, which must be set out in a separate part of the remuneration report;

(c) a remuneration **[an implementation]** report containing details of remuneration and benefits received by each director or prescribed officer as required in terms of section 30(4), (5) and (6) of this Act;

(d) …

(e) …

(f) …

(4) The remuneration report must be –

[(a) approved by the board of the company];

(b) presented to the shareholders at the annual general meeting; **[and]**

[(c) voted by the shareholders for approval as contemplated in subsection (6)].

[(5) The voting on the remuneration report as contemplated in subsection (4) shall constitute the voting on the remuneration policy as contemplated in subsection (1) and (2) and the implementation report as contemplated in subsection (6)].

(6) The <u>remuneration</u> **[implementation]** report and the remuneration policy shall be construed as separate documents with separate voting requirements **[which shall be approved by ordinary resolution]**.

(7) <u>Until a new remuneration policy is approved, the previous policy approved in terms of Section 30A, or a policy approved by way of non-binding vote from shareholders before section 30A came into force, will be applicable. If there is neither an approved policy under section 30A, nor a policy approved by non-binding vote, the policy will be deemed to be the policy which results in the remuneration paid to the directors and prescribed officers before the new remuneration policy is approved</u>. **[Where the remuneration policy is not approved by ordinary resolution, it must be presented at the next annual general meeting or at the shareholders' meeting called for this purpose, until the approval of the remuneration policy is obtained.]**

(8) Any changes to the remuneration policy may be implemented once the approval of the shareholders is obtained. **[by ordinary resolution in terms of subsection (7)]**.

(9) Where the <u>remuneration policy</u> **[implementation report]** is not approved by ordinary resolution as contemplated in subsection (6) –

(a) the remuneration committee or the directors' committee responsible for remuneration matters of the company shall, in the following annual general meeting, present an explanation on the manner in which the shareholders' concerns have been taken into account; and

(b) <u>One-half of</u> the non-executive directors that serve on the directors' committee responsible for remuneration shall be required to stand down for re-election every year of such rejection of the <u>remuneration policy</u> **[implementation report]**".

<u>(c) Where there is no remuneration policy approved in terms of section 30A, the remuneration committee or the directors' committee responsible for remuneration matters of the company shall present a remuneration policy at every annual general meeting until same is approved. Thereafter, it can be presented for approval every three years or whenever any material change in</u>

the policy is made.

4. CLAUSE 10, AMENDING SECTION 40

4.1. Comment

The word “trusted” in the proposed section 40(5A) definition of “stakeholder” is subjective and we propose that it be deleted, and the wording of the provision be amended for the sake of clarity.

4.2. Proposed amendment

(5A) for the purposes of subsection (5) and (6),

(a) ‘Stakeholder’ means a **[trusted]** third party who -

(i) will act as stakeholder for both the company and the subscribing party and not as the agent of either; and

(ii) has no interest in the company or the subscribing party. For the purposes hereof only, the legal advisor, accountant or auditor of the company shall qualify as having no interest in the company.

5. CLAUSE 11, AMENDING SECTION 45

5.1. Comment

The LSSA believes that the proposed amendment in clause (b) does not go far enough. It should cover financial assistance to any group companies.

5.2 Proposed amendment

(2A) The provisions of this section shall not apply to the giving by a company of financial assistance to, or for the benefit of **[its subsidiaries]**:

(a) any company in a group of companies of which it is the holding company;

(b) its ultimate holding company or any intermediate holding company, subject to the common law that the board is satisfied that there is a reasonable benefit to the company in giving such financial assistance;

(c) any company forming part of the same group of companies as it is a member of.

6. CLAUSE 12, AMENDING SECTION 48

6.1. Comment

6.1.1 The LSSA is of the view that, if a pro rata offer is made pursuant to subsection (8)(b)(i), there should be no need for the additional requirement of a special shareholders' resolution in respect of the directors. Furthermore, provision should be made for the acquisition of shares from a wholly owned subsidiary.

6.1.2 The proposed subsection (8) should not apply if shares are being acquired but no consideration is made by the company. Provision should be made for re-acquisitions, without any consideration. It is suggested that a new subsection (9) be inserted, to address this issue.

6.1.3 A new subsection (10) should also be inserted to deal with re-acquisitions where no scheme of arrangement is proposed pursuant to section 114.

6.2. Proposed amendments

(8) A decision by the board of a company as contemplated in subsection (2)(a) must be approved by a special resolution of the shareholders of the company -

(a) Unless subsection 8(b)(i) is applicable, if any shares are to be acquired by the company from -

(i) a director of the company;

(ii) a prescribed officer of the company; or

(iii) a person related to a director of the company or a prescribed officer;

or

(b) if it entails the acquisition of shares in the company, other than shares acquired as a result of —

(i) a pro rata offer made by the company to all shareholders of the company or a particular class of shareholders of the company, notwithstanding that the pro rata offer made to all shareholders may also include shareholders who are one or more of the persons referred to in paragraph (a) above; or

(ii) transactions effected on a recognised stock exchange on which the shares of the company are traded; **[or]** and

(iii) an acquisition from a wholly owned subsidiary.

(9) The provisions of subsection (8) do not apply if shares are being acquired but no consideration is given for them by the company. In addition, no mandatory offer as contemplated in section 123 is triggered by the acquisition of shares as contemplated in subsection (8)(b)(i).

(10) Unless an acquisition by the company of its securities is being done pursuant to section 114, none of the provisions of section 114 apply.

7. CLAUSE 13, AMENDING SECTION 56 AND INSERTING A NEW SECTION 56A

7.1 Comment

While both section 56 and the proposed section 56A deal with disclosures, the definition of “beneficial interest” serves a purpose unrelated to money laundering and terrorism, i.e. for shareholders and the public to identify who actually controls the company, as well as the rights and entitlements of persons having a beneficial interest in terms of sections 26 and 31 of the Act. Section 56 thus has a much wider cast. For this reason, we think that section 56 should deal with beneficial interests, but a different section (i.e. section 56A) should deal with the true owner.

We suggest that a section 56A be inserted to create a deeming provision in respect of “true owner”.

7.2 Amendment of Section 56

Should our proposal regarding the insertion of a new section 56A be accepted, the following amendments to Section 56 are proposed:

7.2.1 Reference to “true owner”, wherever it appears in section 56, should be removed.

7.2.2 Clause (c) amending section 56(3) is unclear and it is suggested that it be redrafted. All the holders of beneficial interests, including intermediaries should be disclosed.

7.2.3 Clause (d) amending section 56(4). It is proposed that subsection 3(a) be amended to provide for the disclosure to be made in writing to the company when the person first becomes a registered holder. Further, it is unclear why reference is made to a central securities depository. There should also be no charges in this section.

7.2.4 Clause (g) substituting section 56(7). The phrase "together with another person" in subsection (b) is too broad and we suggest that it be amended to read "together with one or more related parties".

7.2.5 Should there be a separate "true owner" provision as per our proposal regarding a new section 56, will it still be necessary to have a deeming provision in respect of beneficial interest? The intention of section 56(2) appears to be to identify the true owner. Section 56(2) places a very onerous burden on companies, because of the many rights given to holder of beneficial interests e.g. furnishing of financial statements. Therefore, we suggest that this subsection be deleted.

<u>Proposed amendment</u>

13. Section 56 of the principal Act is hereby amended –

(a) …

(b) by the insertion after subsection (2) of the following subsection:

["(2A) For the purposes of subsections (3) to (7), a person is also regarded to have a beneficial interest in a security, if that person is a true owner in terms of this Act."]

(c) by the substitution for subsection (3) of the following subsection: "(3) <u>If a security of a company is registered in the name of a person who is not the holder of the beneficial interest, the registered holder must disclose to the company all the holders of beneficial interests, including intermediaries</u>. For this purpose each person in the chain from the registered holder is deemed to be a holder of a beneficial interest and is obliged to notify the registered holder of his/her/its relevant information. **[If a security of a company is registered in the name of a person who is not a holder or who is the only holder of the beneficial interest in that security in the same company held by that person, that registered holder of security must disclose -]**

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

(4) The information required in terms of subsection (3) must –

[(a)] be disclosed in writing to the company on registration of the registered holder, and within five business days after the end of every month during which a change has occurred in the information as contemplated in subsection (3). **[or more promptly or frequently to the extent so provided by the requirements of a central securities depository; and**

(b) otherwise be provided on payment of a prescribed fee charged by the registered holder of securities on demand by the company.]

(e) by the substitution for subsection (5) of the following subsection:

"(5) Unless a company knows the identity of all the persons who hold a beneficial interest in its securities directly or indirectly, the company must each quarter of the year require the registered holder of any of its securities of which any beneficial interest holder is in doubt, and any person which it has any cause to believe is a beneficial interest holder**, [including the true owner]**, to –

(a) …

(f) ….

(g) by the substitution in subsection (7) for the following subsection: "(7) Every company must—

(a) establish and maintain a register of the disclosures made in terms of this section; and

(b) publish in its annual financial statement, if it is required to have such statements audited in terms of section 30(2), a list of persons who in aggregate, alone or together with one or more related parties **[another person]** hold beneficial interests amounting 5% or more of the total number of securities of that class, issued by the company or any such percentage as may be prescribed by the Minister.

7.3 Proposed new Section 56A

The following new section 56A is proposed:

Determination of the true owner and disclosure of that information

56A

(1) This section is for the purpose of enabling South Africa to comply with its international obligations.

(2) A natural person is deemed to be the true owner of securities in a company if the natural person is:

(a) a trustee of a trust, wherever set up, and

(i) the securities enure ultimately for the benefit of one or more of the trust beneficiaries; or

(ii) the trustee/s of the trust is/are capable, either directly or indirectly (via the intermediation of others in the chain of holders of beneficial interest in the relevant securities), of directing the registered holder with regard to the securities; or

(b) a beneficiary, whether vested or discretionary, of a trust, wherever set up, and

(i) the securities enure ultimately for the benefit of one or more the trust beneficiaries; or

(ii) the trustee/s of the trust is/are is capable, either directly or indirectly (via the intermediation of others in the chain of holders of beneficial interest in the relevant securities), of directing the registered holder with regard to the securities; or

(c) a member of a juristic person, wherever set up, which is the last in the chain of holders of beneficial interests in the company, and either

(i) the securities in the company ultimately enure for the benefit of one or more of the members of the juristic person; or

(ii) such juristic person is capable, either directly or indirectly (via the intermediation of others in the chain of holders of beneficial interest in the relevant securities), of directing the registered holder with regard to the securities; or

(d) a partner in a partnership, wherever set up, which partner's name is not disclosed in the ordinary course, and the disclosed partner of which is the last in the chain of holders of beneficial interest in the company, and either

(i) the securities in the company ultimately enure for the benefit of one or more of the partners of the partnership, disclosed or undisclosed; or

(ii) the disclosed partner is capable, either directly or indirectly (via the intermediation of others in the chain of holders of beneficial interest in the relevant securities), of directing the registered holder with regard to the securities; or

(e) a related party of the true owner.

(3) If a security of a company is registered in the name of a person who is not the true owner of that security, that registered holder must disclose to the company:

(a) the identity of the true owner; and

(b) the number and class of securities held by the true owner.

Likewise, the holders of intermediate beneficial interests must disclose that information to any intermediate holder, the registered holder and the company.

(4) The information required in terms of subsection (3) must be disclosed in writing to the company on registration of the registered holder, and within five business days after the end of every month during which a change has occurred in the information.

(5) Unless a company knows the identity of the true owner/s of its securities, the company must at three-monthly intervals require the registered holder of any of its securities of which any beneficial interest holder is in doubt or unknown, and any person which it has any cause to believe is the holder of a beneficial interest or the true owner to:

(a) confirm whether the registered holder is the beneficial interest holder of the securities in the company, and if not, to provide details of all the holders of beneficial interests in the securities and the true owner and the extent of their holding during the preceding quarter and any preceding period for which the details are not known by the company.

(b) provide particulars of the extent of the beneficial interest held during the three years preceding the date of the notice; and

(c) disclose the identity of each person with a beneficial interest in the securities held by that person.

(6) The information required in terms of subsection (5) must be provided not later than 10 business days after receipt of the notice from the company.

(7) Every company must establish and maintain a register of the disclosures made in terms of this section.

7.4 Extraterritorial jurisdiction in respect of Section 56 and the proposed new Section 56A

It should be made clear that section 56 and the proposed new section 56A have extraterritorial jurisdiction.

8. CLAUSE 16, AMENDING SECTION 90

8.1 Comment

Provision should be made for convening of a special meeting in certain circumstances.

8.2. Proposed amendment

"(1A) A company referred to in section 84(1)*(c)*(i), or a company that is required only in terms of its Memorandum of Incorporation to have its annual financial statements audited as contemplated in section 34(2) and 84(1)*(c)*(ii), must appoint an auditor at a shareholder's meeting at which the requirement first applies to the company, and annually at the shareholders meeting thereafter, or at a specially convened meeting of shareholders if the appointment of the auditor at the forthcoming annual general meeting will not permit sufficient time for the due completion of the annual financial statements.

9. CLAUSE 18, AMENDING SECTION 118

9.1. Comment

The meaning of "indirect shareholders" is not clear. It will be more appropriate to refer to "holders of beneficial interests", instead of "shareholders with a direct or indirect shareholding".

Ten shareholders / holders of beneficial interests provide, in our view, too low a threshold and it is suggested the number be increased to twenty.

9.2. Proposed amendments

18. Section 118 of the principal Act is hereby amended –
(a) by the substitution in subsection (1)(c) for subparagraph (i) of the following subparagraph:
(i) it has twenty **[ten]** or more holders with a beneficial interest **[shareholders with a direct or indirect shareholding]** in the company and meets or exceeds the financial threshold of annual turnover or asset value determined in terms of section 118(2), provided that the Panel may exempt any particular transaction affecting a private company in terms of section 119(6);