

COMMENTS MADE BY
THE LAW SOCIETY OF SOUTH AFRICA
ON THE
DRAFT COMPANIES AMENDMENT REGULATIONS 2023,
IN RESPECT OF
COMPANIES ACT, 2008 (ACT NO. 71 OF 2008)
GENERAL LAWS AMENDMENT ACT, 2022 (ACT NO. 22 OF 2022),

The Law Society of South Africa (LSSA) has considered the proposed Regulations and hereby make the following comments:

1. **section 1 Companies Act: definition of 'affected company':**
 - a. although this definition which was added by the General Laws (AML and CTF) Amendment Act 2022 ("GLAA 2022") is not under debate here, we strongly feel that it should exclude from its ambit any private company that is a regulated company purely as a result of a transfer of 10% or more within the past 24months (as envisaged in section 118(1)(c)(i)).
 - b. The pending Companies Amendment Bill intended to amend the section 118(1)(c)(i) threshold so that fewer small private companies fell beneath it. As this amendment has not been made yet, an enormous number of small, private companies are 'regulated companies' (and will transition in and out of being such every few years), and now, due to this definition of 'affected companies' must carry an onerous burden of keeping and filing registers of beneficial holders in terms of the other section amendments made under the GLAA 2022 and under the draft Companies Regulations 2022.
2. **Reg 2 (a):** re the word 'original': as many documents have no 'original' version in the formal sense (i.e.: all documents produced by CIPC and sent to companies are in electronic format) - this needs to be accommodated here. We are concerned that the CIPC may cause problems where a true original has not been seen, and it makes it difficult for Commissioners of Oaths who cannot confirm they have seen an original.
3. **Reg 5 (1A):** we are unsure if the Commission under this section can impose costs on a company or external company if it elects to verify any such item. We do not think it is accommodated in the Costs Table. Perhaps it must be made clear whether this is possible or not.
4. **Reg 5 (1A)(d):** The LSSA is concerned as to whether the Commission can, under the proposed regulation, delay the acceptance on file of any newly filed memorandum of incorporation or other similar constitutional or founding document. That would have a negative consequence on deals being implemented timeously. We would prefer clarity that this cannot

occur. The verification must be a separate process to the acceptance on file by the Commission.

5. **Reg 5 (2):**

- a. 'regulatory agency' is not defined. Is it meant to refer only to the Commission (as the 2nd reference to it in this regulation suggests), or also to entities such as Financial Intelligence Centre (the FIC) or the South African Revenue Service (SARS) We would prefer it be defined or replaced with the Commission.
- b. We are unsure if the regulatory agency, as referred to under this section, can impose costs on a company or external company if it elects to verify, or cause to be verified, any such item. We do not think it is accommodated in the Costs Table. Perhaps it must be made clear whether they can or not.
- c. We are very concerned about:
 - i. the protection of company's (and their shareholders' and beneficial shareholders') confidential information, when it is shared by the Commission with regulatory agencies, and/or service providers to which the regulatory agencies outsource the verification process; and
 - ii. generally, security of measures utilised by the Commission, those regulatory agencies and/or service providers to secure such information.

We assume all those role players will be obliged to comply with the applicable provisions of the Protection of Personal Information Act, when processing such personal information.

- d. re 'or to be filed': we do not understand why verification may be required on documents that are not yet filed?
 - e. **re Reg 5(2)(a)**: this wording should say 'to the best of his/her knowledge and belief'. Such person may have been provided the information by shareholders or beneficial shareholders and cannot be required to confirm it is truthful and complete information.
6. **Reg 30(7A)**: a company or external company that has already filed an item at the Commission should be required under this regulation to file it again. For example- where an amendment to an MOI or directors has been filed. This regulation needs to record same.
7. **Reg 30(9)**: we are very concerned that the public can view copies of company's annual returns filed with the Commission.
 - a. for affected companies (see section 33 and 56): the annual return needs to include a disclosure about beneficial holders- which will contain all their personal information such as email addresses, home street addresses and identity document or passport numbers;
 - b. for non-affected companies (see section 33 and 50 and draft Regulation 32(3)): the annual return needs to include their securities register, and their securities register

needs to record the details of the beneficial holders – so will also contain such personal information.

8. **Reg 30(10)**: this should be amended so the Minister of Trade and Industry and the Financial Intelligence Centre should APPROVE the conditions that the Commission want to impose under this regulation. The Commission should not have the current power as recorded here.
9. **Reg 32(3)(b)**: we are very concerned that the public can view a company's annual returns filed with the Companies and Intellectual Property Commission, because information pertaining to the beneficial ownership of a company will contain very personal information which should not be disclosed to the public in conflict with legislation pertaining to the disclosure of personal information and access to the information. Furthermore, how far down the line must the information pertaining to beneficial ownership or ultimate beneficial ownership be disclosed to the Companies and Intellectual Property Commission, i.e. direct shareholding or ultimate parent shareholding, because the list can be *ad infinitum*. It is also not clear from Regulation 32(3A)(b) as to why there is a distinction drawn between effected and unaffected companies, if both affected and unaffected companies must supply information pertaining to a change of beneficial ownership to the Companies and Intellectual Property Commission.
10. **Reg 32A(5)**:
 - a. the default position should be that the identity number, email address and residential address must be regarded as confidential and kept confidential by the Commission. It is unfair and too risky to leave it up to each and every company to request that same is kept confidential, and also a much heavier administrative burden on the Commission to follow such instructions (will the Commission redact such information from the annual returns that the public or others can view);
 - b. this regulation is vague as to whether the Commission is then obliged to keep such information confidential -and that this obligation overrides any other person's right to view or access such information that this Companies Act (or other legislation?) may contain?
 - c. if the wording is left as is, the home street address should be added in to the regulation.
11. **Reg 32B(1)**: the 5 business day period is very short, and if difficult for small companies to comply with , will foster a culture of non-compliance. We recommend a 15 or 30 business day period instead. (The same applies to most other time periods included in these draft regulations).