



**ICGN**

International Corporate Governance Network  
*Inspiring good governance & stewardship*

29 October 2021

Mr. Desmond Ramabulana  
Department of Trade, Industry and Competition  
Private Bag X84  
Pretoria 0001  
South Africa

Email: [companiesamendmentact@thedtic.gov.za](mailto:companiesamendmentact@thedtic.gov.za)  
For Attention: Mr. Desmond Ramabulana

Re: Comment Letter on the Draft Companies Amendment Bill, 2021.

Dear Mr. Ramabulana,

The International Corporate Governance Network (ICGN) appreciates the significant time and effort the Department of Trade, Industry and Competition (DTIC) has undertaken to ensure that all interested stakeholders have the opportunity to comment on the most recent version of the Companies Amendment Bill. We understand that the language in the Bill has been revised due to the extensive number of comments received since September 2018. We believe this is a wise approach given how much the governance and stewardship landscapes have changed since May 2011, the date of the original Companies Bill's implementation. As a matter of interest, ICGN offered comments on the consultation paper setting forth revisions to the Code for Responsible Investing in South Africa (CRISA) in January 2021. The ongoing efforts in South Africa to update its governance and stewardship laws are admirable.

By way of background, ICGN is led by investors responsible for assets under management in excess of US\$59 trillion. We are a leading authority on global standards of corporate governance and investor stewardship. Our membership is based in more than 50 countries and includes companies, advisors and other stakeholders. ICGN's mission is to promote high standards of professionalism in governance for investors and companies alike in their mutual pursuit of long-term value creation contributing to sustainable economies world-wide.

We offer two types of comments on the Companies Amendment Bill, the first set being more substantive and the second set being more technical in nature.

With regard to the three prime categories of policy objectives sought to be addressed by the proposed amendments in the Companies Amendment Bill, ICGN has adopted Global Governance Principles and Global Stewardship Principles to support similar policy objectives and has provided comments as follows:

1. The ease of doing business. Section 1.10.2., whether and how the changes contemplated will impact on the ease of doing business and the objective of eliminating unnecessary red tape.

ICGN recognizes that "company law should, among other factors, be clear, user friendly, consistent with well-established principles and not be overly burdensome on the conduct of business." (Company Amendment Bill, Section 2.2.1) ICGN would add that whilst company law should provide clear language, based on strong business principles, it is also important that the law ensures that the investments of capital made by global investors are protected. ICGN believes that the law should require a board of directors to operate in good faith and ensure the long-term interests of the company, as set forth in the ICGN Global Governance Principles (Rev. 2021):

- Principle 1 Board's Role and Responsibilities. The board should promote the long-term best interests of the company by acting on an informed basis, with good faith, care and loyalty, for the benefit of shareholders, while having regard to relevant stakeholders.<sup>1</sup>

2. The achievement of equity as between directors and senior management on the one hand, and shareholders and workers on the other hand as well as addressing public concerns regarding high levels of inequalities in society. (Company Amendment Bill, Section 1.10.3.) The proposals would provide greater transparency on pay gaps and the power and responsibilities of shareholders and directors in this regard as well as specific mechanisms to deal with these issues.

ICGN agrees that the principle of equity between senior management, including the Chief Executive Officer, and the workforce, is essential to recruit and retain top talent. Investors are keenly aware of, and generally do not support, high CEO to worker pay ratios and executive compensation packages that are not tied to the long-term growth for investors.

ICGN would support the requirement for better, more transparent disclosure, which provides the rationale for the alignment with the remuneration package. Setting an objective benchmark should provide investors and stakeholders with the knowledge they need to engage on remuneration issues. We would refer you to the ICGN Global Governance Principles again:

- Principle 5 Remuneration. Remuneration should be designed to equitably and effectively align the interests of the CEO, executive officers and workforce with a company's strategy and purpose to help ensure long-term sustainable value preservation and creation. Aggregate remuneration should be appropriately balanced with the payment of dividends to shareholders and retention of capital for future investment and the level of quantum should be defensible relative to social considerations relating to income inequality.<sup>2</sup>

3. The efforts to counter money laundering and terrorism. (Company Amendment Bill, Section 1.10.4.) The language focuses on the new provisions on beneficial ownership in light of the global effort to address anti-money laundering and financing of terrorism as well as on appropriate triggers for disclosure and the content of the disclosure.

ICGN agrees that global efforts to counter money laundering and terrorism are significant measures in the Bill. We note, too, that to accomplish these efforts, the Bill contains language on the disclosure of *ultimate* beneficial ownership in the shares of a company. As noted, capital markets across the world and countries are concerned and have been taking necessary steps to avert corruption. The ICGN Global Governance Principles set out the requirements for the board and management with respect to corruption and other criminal actions:

- Principle 4.1 Anti-corruption. The board should ensure that management has implemented appropriately stringent policies and procedures to mitigate the risk of bribery and corruption or other malfeasance. Such policies and procedures should be communicated to shareholders and relevant stakeholders.<sup>3</sup>

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<sup>1</sup> ICGN Global Governance Principles (Rev. 2021), Principle 1, p. 8.  
[https://www.icgn.org/sites/default/files/ICGN%20Global%20Governance%20Principles2021\\_0.pdf](https://www.icgn.org/sites/default/files/ICGN%20Global%20Governance%20Principles2021_0.pdf)

<sup>2</sup> ICGN Global Governance Principles (Rev. 2021), p. 20.

<sup>3</sup> ICGN Global Governance Principles (Rev. 2021), p. 18.

## Substantive Amendments

According to the Overview of Provisions, Clause 6 “proposes the insertion of section 30A into the Act by imposing the duty to prepare and present a directors’ remuneration policy and remuneration report, the manner of compiling the report. The implementation report to be presented and the required approval at the company’s annual general meeting and the consequences to follow where the report fails to receive the required approval at the annual general meeting.” [Revised Companies Amendment Bill- 1\\_October2021.pdf \(thedtic.gov.za\)](#), p. 37.

ICGN has reviewed the proposed language and would recommend the following changes to Clause 6. We also raise questions with respect to certain provisions, which may help inform the review and clarify the intention of the provisions:

- Clause 6, 30A(5)- Delete this sub-clause and replace with the wording, “The remuneration implementation report contemplated in subsection (3) must be presented thereafter for approval by ordinary resolution at each annual general meeting” [should it be accepted that a binding vote on the remuneration implementation report would introduce legal uncertainty and not be acceptable then this clause should be amended accordingly].
- Clause 6, 30A(9)- Clarity is needed regarding the legal status of the directors who would be required to stand down for re-election as shareholders do not vote for the appointment of remuneration committee members. They vote “for” or to “withhold” from the nominated directors on the proxy ballot. Would these directors therefore have to stand down as directors of the Board?

As a way to consider a response to this question, the ICGN Global Governance Principles (Rev. 2021) provide guidance on the director election process. The ICGN Principle 3.7, states:

Principle 3.7 Director election process. Directors should be elected to the board preferably on an annual basis, or stand for election once every three years, and be accountable to shareholders by approval of a majority of shares voted in favour on each resolution. Boards should disclose the process for director election / re-election along with information about board candidates which includes: a) board member identities and rationale for appointment; b) core competencies, qualifications, and professional background; c) recent and current board and management mandates at other companies, as well as significant roles on non-profit/charitable organisations; d) factors affecting independence, including relationship/s with controlling shareholders; e) length of tenure; f) board and committee meeting attendance; and g) any shareholdings in the company.<sup>4</sup>

- Clause 6, 30A(9)- ICGN would ask for clarification in the Amendment what is the legal status of the remuneration paid to the chief executive officer or other prescribed officer referred to in the remuneration implementation report, if the remuneration implementation report is not approved by ordinary resolution? If shareholders haven’t approved the way remuneration has been implemented in a retrospective manner, is the payment of all remuneration still legally valid and binding? Could this conflict with other laws relating to Contract or Employment Law, as examples? We would appreciate consideration of these questions.

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<sup>4</sup> ICGN Global Governance Principles (Rev. 2021), p. 17.

ICGN has provided guidance on remuneration in the Global Governance Principles, Principle 5.7, which says:

Principle 5.7 Annual Remuneration report. The Remuneration Committee should use careful judgement on the awarding of annual remuneration for the CEO and executives and disclose how judgements were determined in the Annual Remuneration Report. Any significant changes to executive remuneration structures should be explained to shareholders, accompanied with a compelling rationale. Shareholders should have an advisory vote on the annual remuneration report. In the absence of local legal requirements for a binding vote or equivalent, and in cases where a significant minority of shareholders (e.g., 20%) vote against a report, a binding vote should be triggered the following year.<sup>5</sup>

- Clause 6, 30A(9)- Given the legal uncertainty introduced by the suggestion of a binding resolution for the remuneration implementation report outlined above, we suggest an alternative mechanism for holding the Board accountable for the remuneration implementation report. The mechanism would be akin to the existing provisions of the King IV Code, in the form of an advisory, non-binding vote on the implementation report with the continued consequence of compulsory shareholder engagement if more than 25% of shareholders vote against the resolution. However, in addition, the Head of Remcom, notwithstanding his or her retirement by rotation, shall be forced to *stand down* for re-election as a director at the AGM immediately following the AGM at which the remuneration implementation report received a vote against of more than 25% of shareholders.
- Insert a new clause between clause 14 and 15, Section 65(3)(a). Insert the words “including, but not limited to, matters of an environmental, social and/or governance nature” after the words “exercise voting rights”.
- Section 65(3)(a)- ICGN offers the following comments.
  - In recent years there has been a spate of incidents where companies have refused to table a shareholder resolution, as envisaged in this section, on the basis that the board of the company has indicated that environmental, social or governance (“ESG”) issues are not a matter in respect of which shareholders are entitled to exercise voting rights; and

It is now widely accepted that ESG issues are material to the value of a company and shareholders as a provider of capital to the company have a direct and substantial interest in ensuring that ESG issues are addressed by the board, and as such, are matters upon which they are entitled to exercise voting rights; and

Therefore, the addition of the above words in this section makes this fundamental shareholder right abundantly clear.

### Technical Changes

- Clause 6, Section 30A(1), After the words “remuneration policy” insert the words “and remuneration implementation report”.

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<sup>5</sup> ICGN Global Governance Principles (Rev. 2021), p. 22.

- Clause 6, 30A(2), Suggest definition of “material” or cross reference to other legislation where it is defined.
- Clause 6 ,30A(3), Insert the word “implementation” after the word “remuneration” and insert the words “as contemplated in subsection (1)” after the word “report”.
- Clause 6, 30A(4), Insert the word “implementation” after the word “remuneration”.
- Clause 6, 30A(6), Insert the word “remuneration” before the words “implementation report”.
- Clause 6, 30A(9), Insert the word “remuneration” before the words “implementation report”.

Thank you for the opportunity to provide our perspective on these emerging corporate governance issues. We appreciate the continued dialogue. If you would like to follow up with us with questions or comments, please contact me or ICGN’s Policy Director George Dallas by email at [george.dallas@icgn.org](mailto:george.dallas@icgn.org).

Yours faithfully,



Kerrie Waring  
Chief Executive Officer

C: George Dallas, ICGN Policy Director  
Robert Lewenson, ICGN Board of Governors  
Catherine McCall, Chair, Global Stewardship Committee