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02 October 2023

Mr A Hermans
(Chairperson)
The Portfolio Committee on Trade, Industry and Competition

Per email:
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Dear Mr A Hermans

Subject: Comments and Recommendations in response to the invitation for the public to comment on the Companies Amendment Bill, 2023

The Banking Association South Africa ("BASA") and its members would like to thank the Portfolio Committee on Trade, Industry and Competition for allowing us an opportunity to engage with our members in respect of commenting on the Companies Amendment Bill 2023.

Our members have submitted their comments to BASA which we have articulated below as the banking sector comments and recommendations.

We look forward to engaging with you as required and we are available to address any aspects that may warrant further discussion.

Yours faithfully,

Nellia Musamba

Senior Specialist: Legislation & Regulatory Oversight

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ORGANISATION: BANKING ASSOCIATION SOUTH AFRICA

SUBMISSION DESCRIPTION: COMPANIES AMENDMENT BILL, 2023

#	Reference in Act/Bill/Document	Comment (Why Is It a concern?)	Proposed Wording/Change
GENERAL COMMENTS - BASA wish to express appreciation for the revised Bill, largely addressing comments and issues raised by the industry and business previously. - BASA is supportive of proposals to enhance the ease of doing business in South Africa and to implement long awaited corporate reform (e.g. proposed amendments to sections 45, 48, 90, 95 and 118). - We support the proposed amendments in the Second Amendment Bill and have no comments to it. - We, however, remain concerned about aspects of the amendments proposed in sections 30A and 135 as explained and motivated below. - We have therefore categorised our comments and proposals as follows: • Primary Focus (matters which we kindly request be reconsidered as a matter of principle and priority and which we are of the view could lead to complexities and difficulty for companies if implemented without further amendment. These are critical/ key matters for the industry and SA business and may hamper ease of doing business in South Africa); • Secondary Focus (matters which we regard as less critical, but significant enough to be reconsidered); and • Other comments and recommended edits (minor clarification points and edits proposed).			
PRIMARY FOCUS – CRITICAL MATTERS TO BE ADDRESSED (ITEMS 1 – 7) • **Section 30(A)- Company's Remuneration Policy and Remuneration Report** • **Section 135- Post-Commencement Finance (PCF)**			
SECTION 30A (Amendment Bill section 6) **DUTY TO PREPARE AND PRESENT COMPANY'S REMUNERATION POLICY AND REMUNERATION REPORT**			
1.	**Section 30A (1)** A public company or state-owned company must prepare and present the remuneration policy for directors and prescribed officers for approval	1. BASA notes that there is already a recommendation in terms of good governance practices as set out in King IV Principle 14 and the JSE listing requirements. Listed companies therefore	1. BASA supports a binding vote on the remuneration policy for directors and prescribed officers every 3 years as proposed in section 30A(1) and 30A (2). However, we suggest that a requirement that shareholders that have voted against the

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	by ordinary resolution, at the annual general meeting.	presently obtain non-binding votes at their AGMs for the remuneration policy and implementation report (level recommended under King/ JSE is 75% vote in favour of policy and report, respectively). 2. BASA notes that the inclusion of a remuneration policy and an implementation report must be approved by shareholders at an AGM. The consequences of shareholders not approving the remuneration policy is that the remuneration committee must explain at the following AGM how the concerns of the shareholders have been addressed. 3. BASA notes that the new proposed Section 30A (1) refers to a remuneration policy for directors and prescribed officers. Companies' remuneration policies cover remuneration matters for the whole group, including for all employees and directors. We note that the proposed amendment may likely result in companies splitting the "remuneration policy for directors and prescribed officers" from the comprehensive remuneration policy, attach it as an annexure to the remuneration policy and extract it for	remuneration policy should be required to provide their reasons to the company for rejecting the remuneration policy to provide for an informed understanding by the company of shareholder concerns in order to address these concerns. Please refer to our proposed amendment to section 30A(7) below.

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		purposes of passing the proposed resolution at the AGM.	
2.	**Section 30A(3)(d), (e) and (f)** (3) The remuneration report must consist of the following parts: (d) the total remuneration, including all salary and benefits, including employer contributions to benefit funds, short-term incentives or bonuses and long-term incentives, such as share options and any other type of long-term incentive awards which have been settled in the year under review in respect of an employee of the company with the highest total remuneration, be it the chief executive officer or any other prescribed officer in the company as may be specified in terms of section 30(4) and (6); (e) the total remuneration, including all salary and benefits, including employer contributions to benefit funds and incentives or bonuses, as recorded in the company's payroll record, of an employee as defined	1. Section 30A(3)(d), (e) and (f) require, *inter alia*, the disclosure of the full remuneration of both the highest paid employee and the lowest paid employee. It is to be noted that individual profiling of the lowest paid employee without context to reasons for such remuneration (such as job profile, responsibilities, or individual poor performance) could provide a distorted view of the remuneration gap. It is assumed that the provision is aimed at disclosures in respect of full-time employees and that the disclosure is in respect of the remuneration and not intended to provide for employees to be named. We propose that disclosures of specific names of employees (if this is at all required) are limited to named executive directors and prescribed officers because disclosing of additional information could lead to disclosure of competitive information and adverse personal security implications. 2. Philosophically, incentivising a reduction in remuneration at executive level is submitted not to be in the best interests of the company or the shareholders especially where there is	1. To the extent sections 30A(3)(d), (e) and (f) are retained in the final Bill, BASA proposes that they expressly state that the disclosure is to exclude the names of the employees, unless the highest paid employee is a director or prescribed officer whose remuneration is in any event disclosed in terms of 30(4)(a). 2. Furthermore, if sections 30A(3)(d), (e) and (f) are retained, we strongly recommend that the unvested long-term incentives be excluded from the remuneration to be disclosed as long-term incentives are subject to conditions which means that if these conditions are not met, the long-term incentives are without value, thus resulting in the disclosure not being accurate. 3. We recommend that consideration be given to whether a detailed guidance note should be introduced to ensure there is a consistent application of the new provisions across all companies. The guidance note could deal with matters such as employees not being required to be named, that the provision does not apply to non-South African employees and clarity relating to whether remuneration to be disclosed must include unvested shares.

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	by section 213 of the Labour Relations Act, 1995 (Act No. 66 of 1995), of the company, with the lowest total remuneration in the company; and f) the average remuneration of all employees, median remuneration of all employees and the remuneration gap reflecting the ratio between the total remuneration of the top five per cent highest paid employees and the total remuneration of the bottom five per cent lowest paid employees of the company.	scarcity of top executive talent and where personal security is a potential real risk. 3. In addition, it is proposed that employees, for purposes of this section 30A, be limited to employees employed by the company in South Africa. Thus, the remuneration of South African employees must be compared with the remuneration of other South African employees of a company, not with those working in other jurisdictions (e.g. the UK or Europe). 4. BASA is therefore not supportive of the inclusion of these disclosures in the absence of clear guidance to ensure consistency and addressing the concerns and issues raised above. We also question the assumption that these disclosures (without reference to, *inter alia*, the required context of remuneration being linked to performance for example) will lead to a narrowing of pay gaps. 5. We note that the provision is silent on whether remuneration is pre or post tax and that in the earlier explanatory notes there was an ask for preferences in this regard. BASA recommends that the remuneration be defined as the income before tax is deducted (thus "gross" income).	4. Furthermore, BASA is of the view that a fair representation of any disparity between top and bottom remuneration is to be depicted through the top 10% and bottom 10% rather (and not 5% as proposed in section 30A(f)).

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		6. In addition, we would like to point out that the requirements set out in subsection 3(d) is based on "single-figure" remuneration. Given that this includes the value of long-term incentives settled in the year (and therefore awarded in previous performance periods), this may result in considerable volatility in outcomes from year to year. This will make it difficult for shareholders to discern trends or reasonably assess how income differentials are being addressed over time.	
3.	**Section 30A(6)** (6) The implementation report and the remuneration policy are construed as separate documents with separate voting requirements, which must be approved by ordinary resolution.	1. Section 30A (6) requires that the "Implementation Report" and the "Remuneration Policy" be subject to binding approvals by ordinary resolutions. Implementation of a policy is the function of good corporate governance and is best dealt with through King IV as opposed to being legislated for in the Companies Act. In addition, the AGM vote occurs after salary increases have been made, short term incentives have been paid and long-term incentives have been awarded in terms of a previously approved remuneration policy. 2. If a binding vote is required on the implementation report, this would result in retrospective voting on the implementation of	BASA proposes amended wording below: (6) The implementation report and the remuneration policy are construed as separate documents with separate voting requirements, which will require: ~~must be~~ (i) *in respect of the remuneration policy, approval* ~~approve~~d by ordinary resolution ; *and* *(ii) in respect of the implementation report, approval by way of a non-binding advisory vote at the same level as an ordinary resolution.*

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		the approved remuneration policy of the previous year. The implementation report deals with the implementation of payment of remuneration and benefits of directors and employees in the 12 months preceding the AGM, which implementation is based on the remuneration policy approved at the previous AGM. To require a binding vote on payments that have been made is not feasible, as a company cannot undo payments made to directors and employees if the implementation report is not approved. 3. Please refer to **Annexure A**, which illustrates the adverse consequences for companies should the implementation report be implemented as proposed by the Legislature. The annexure illustrates the concerns and issues of BASA regarding the proposed binding vote on the implementation report and the harsh consequence of requiring remuneration committee members to become ineligible to serve as remuneration committee members for a period of 3 years. 4. Further to the above, South Africa's requirements in this regard may be out of line with those of other jurisdictions as it would be the first country to enforce a binding vote on	

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		the implementation report for listed companies.	
4.	**Section 30A(7)** 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.	BASA strongly recommends that in the interest of meaningful engagement with dissenting shareholders and expedient addressing of concerns of shareholders, these dissenting shareholders should be obliged to participate in engagement with the company. We believe that such an obligation would address any potential abuse by shareholders of the vote on the remuneration policy.	BASA proposes the following amendments to the subsection: Section 30A(7) *"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 and shareholders who voted against the approval of the remuneration policy shall be obliged to present reasons for voting against and to engage with the company when requested."*
5.	Section 30A(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).	This should align with section 30A(2). We propose insertion of the word "material" in respect of the changes made to the remuneration policy.	BASA proposes the following amendments to the subsection: Section 30A(8) *"Any material changes to the remuneration policy may be implemented once the approval of the shareholders is obtained, by ordinary resolution in terms of subsection (7)."*
6.	**Section 30(A)(9)** (9) Where the implementation report is not approved by ordinary	1. The provision contemplates that should the implementation report be rejected at an AGM; the non-executives will immediately cease being members of the remuneration committee and will not be	1. BASA recommends the continuation of a non-binding advisory vote for the implementation report that requires at least 50% of shareholders to vote in favour (ordinary resolution level).

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	resolution as contemplated in subsection (6)– (a) the remuneration committee or the directors' committee responsible for remuneration matters of the company must, in the next annual general meeting, present an explanation on the manner in which the shareholders' concerns have been taken into account; and	afforded an opportunity to provide an explanation on a failed implementation report in the year following its failure. BASA proposes that the non-executives be afforded an opportunity to provide an explanation on a failed implementation report and only cease being members of the remuneration committee on a second failure event of the report. 2. Practically, the provision (as it presently drafted in the Bill) will increase the risk to board memberships and will serve to reduce the already small pool of directors prepared and skilled to sit on these remuneration committees. 3. The removal of committee members may result in directors not being willing to serve on the board resulting in poor retention and attraction of competent directors and consequently leading to high turnover of directors. There is already a skills and depth shortage in South Africa and the proposed amendment may create issues for companies to attract and retain skilled directors. 4. BASA is furthermore concerned that this may require extending the size of boards	2. We propose (as the preferred option to avoid the risks set out in our rationale for the proposal for the removal of the proposed amendment) removal of the requirement that members of the remuneration committee shall not be eligible to serve on the remuneration committee for a period of three years. Therefore, our proposed wording is as follows: **Section 30A(9)** (9) Where the implementation report is not approved by way of *the non-binding advisory vote* ~~ordinary resolution~~ as contemplated in subsection (6)– (a) *the company will engage with the dissenting shareholders and dissenting shareholders shall be obliged to engage the company upon invitation to do so;* ~~*(a) the remuneration committee or the directors' committee responsible for remuneration matters of the company must, in the next annual general meeting, present an explanation on the manner in which the shareholders' concerns have been taken into account;*~~

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		and will result in disruption and a lack of continuity. 5. We therefore remain of the view that the implementation report should not be subject to a binding vote but rather a non-binding advisory vote. To the extent the non-binding advisory vote is more than 50%, the company should be obliged to engage the dissenting shareholders to address the issue. 6. The practical consequences of the implementation report failing to achieve a binding vote are unclear as the remuneration would already have been paid under the remuneration policy creating a timing problem. 7. Where the Remco members are required to step down, the committee loses the institutional knowledge making it impractical for the new members to have to explain the rational for the previous implementation report. 8. To the extent that the requirement for a binding vote remains, the proposal is to codify a requirement on the dissenting shareholders to explain the rational for the negative vote that the company may	

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		address the issues. Should this fail then the dissenting votes will not carry.	
7.	**Section 30A(9)(b)** (b) the non-executive directors who serve on the committee responsible for remuneration may continue to serve as directors but are not eligible to serve on the remuneration committee for a period of three years after such non-approval.	1. The consequences for non-executive directors of the remuneration committee appear to be quite harsh. 2. BASA suggests that parliament should consider whether shareholder disapproval indicates that these directors have fallen short of their fiduciary duties, or whether this serves as a reasonable indication that these directors are not competent to uphold their positions. 3. The impact of doing away with an entire committees' members could be dire for the following reasons: • How will a new committee account to stakeholders without having been involved in prior Remuneration Committee's decisions? • What would the timeline be for the non-executive directors (NEDs) to step down. Remuneration skills are scarce, a company may not be able to easily replace committee members with suitable replacements from the current board due to shortages in the required skills, resulting in several new NEDs requiring to be hired	1. **Preferred Option :** (b) t*he remuneration committee or the directors' committee responsible for remuneration matters of the company must, in the next annual general meeting, present an explanation on the manner in which the shareholders' concerns have been taken into account*~~; and~~ ~~(b) the non-executive directors who serve on the committee responsible for remuneration may continue to serve as directors but are not eligible to serve on the remuneration committee for a period of three years after such non-approval.~~ 2. **Should the Preferred Option of BASA not carry support,** we propose that section 30A(9)(b) be amended to provide that if the implementation report is not approved at the next AGM, then the proposed ineligibility provisions will apply (2 strike rule instead of 1 strike) and the period of ineligibility will apply for a maximum period of 1 year. ***Alternative Option proposed wording and principle***

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		to the current board (which may already be at capacity). • Further, new directors may not wish to serve on this committee due to perceived personal reputational risk, making it even more difficult to attract the correct skills to this committee. 4. Further, in relation to banks, section 64C of the Banks Act provides that the remuneration committee of a bank shall consist only of non-executive directors of the bank or controlling company of a bank. It would not be practical for these individuals to step down as it would decrease the pool of individuals that may act as Remco members of a bank. BASA will be seeking guidance from the PA of the SARB on these requirements should the proposed amendments as regards ineligibility of Remco members to serve as proposed in the Bill be implemented. 5. BASA members are therefore aligned with comments by the following commentators: • Dr Ronel Nienaber, Chair of the IoDSA Remuneration Committee Forum, provides that there are important details that need to	(9)(b) *should the implementation report contemplated in clause 30A(9)(b) not be approved for a second subsequent year,* the non-executive directors who-serve on the committee responsible for remuneration may continue to serve as directors but are not eligible to serve on the remuneration committee for a period of ~~3 years~~ 1 year after such non-approval.

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		be carefully considered if this amendment is passed. For example, if the implementation report is not passed, would the members have to step down immediately? This would potentially mean that the new members of the remuneration committee would find themselves having to engage with the shareholders to understand their concerns without any insight into the rationale for the previous decisions of the remuneration committee. Further, Nienaber questions whether there would be any other consequences beyond the members of the remuneration committee having to stand down, such as an additional action calling for a clawback of monies already paid. • Professor Parmi Natesan, CEO of the IoDSA, states that the consequences of the proposed amendment to section 30(A)(9) would be undesirable and impractical on many levels and states the following: "It would mean that those board members with specialist remuneration skills (already in short supply) would be no longer available to serve on RemCo—this at a time when boards are under pressure to reduce in size. The former RemCo members could suffer	

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		considerable reputational damage anyway," she further provides that: "One could also foresee that shareholders could hold boards hostage by threatening to vote down the implementation report if their demands are not met." • Ansie Ramalho, Chair of the King Committee, is of the view that a vote on the implementation report is neither constructive nor instructive and states that: "The intention behind King IV in providing for a non-binding advisory vote on remuneration implementation was to furnish the opportunity for engagement between the board and shareholders as a constructive avenue for airing views and resolving differences. A binding vote makes sense for the remuneration policy because it is forward-looking, but it does not make sense when it comes to the implementation report, which is why no other jurisdiction in the world has implemented it. The implementation report is like the financial statements: it presents historical information and similarly should simply be presented to the AGM, but not voted on."	

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Section 135 POST-COMMENCEMENT FINANCE (PCF) (Amendment Bill section 17)			
8.	**Section 135 (1A)** (1A) To the extent that any amounts due to the landlord, subject to a contract by the company which is placed in business rescue proceedings, are not paid to the landlord during business rescue proceedings, in respect of and not exceeding the aggregate for all public utility services, such as, the company's share of rates and taxes, electricity, water, sanitation and sewer charges paid by the landlord to third parties during the business rescue period referred to in this section, is regarded as post-commencement financing and will be paid as contemplated in subsection (1).	BASA does not support this amendment and states the concerns below. 1. Firstly, amounts owing in relation to the lease agreement results from a lease agreement concluded between the lessor and the company, prior to business rescue. As such, the rental and related amounts under the lease agreement are an existing obligation and not necessarily "costs of the business rescue proceedings". The amendment is aimed at owning post commencement of the business rescue. This may create challenges from other existing creditors who have existing agreements and are owed amounts under those agreements "in relation to sustaining the business" post commencement (e.g., internet services, insurance and the like which continue post the business rescue under a pre-business rescue arrangement). 2. Other creditors may also have to carry holding costs which are not afforded the same privilege of having their costs designated as post-commencement finance. This amendment appears to support assisting local municipalities collection of rates with no regard to other sectors.	BASA suggests that the wording be clarified to explicitly state that these costs or expenses payable by the landlord to the third-party service provides (mainly local municipalities etc) *exclude the rental due to the landlord.*

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		3. Also, the landlord would still not be able to claim arrear rental as this is specifically excluded in this amendment and prohibited under the legal moratorium. The landlord could cancel the lease but the practicality of evicting a tenant is not straightforward and entails more legal action subject to court sanction and, the landlord needs to pay the stipulated statutory expenses for same to be considered PCF. 4. Further, this inclusion does not serve the interests of the company in business rescue and could potentially impact on the ability of a business rescue practitioner taking action to turn the entity around. It is possible that a scenario may arise where landlords do not negotiate favourably with the business rescue practitioners on lease agreements, will not exercise their right to cancel the lease, and will continue to accrue post commencement finance claims by making monthly payments of costs giving them an advantage in the business rescue process which is to the detriment of the process. 5. Lastly, landlords have rights available to them, including the right to cancel lease agreements where they feel their interests are not being served in a business rescue and business rescue	

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		practitioners should be considering whether landlord expenses can be paid during business rescue as part of their assessment on the viability of a business rescue for the entity in question.	
9.	**Section 135(3) (a) & 135 3(b)** (3) After payment of the practitioner's remuneration and expenses referred to in section 143, post-commencement financing, and other claims arising out of the costs of the business rescue proceedings, all claims contemplated– (a) in subsection (1) will be treated equally, but will have preference over– (i) all claims contemplated in subsection (2), irrespective of whether or not they are secured; and (ii) all unsecured claims against the company,~~; or~~ in subsection (1A) will rank below the claims contemplated in subsection (1), but ahead of all the	1. Post-commencement financing (PCF) and advancing more funding into a distressed entity may be a risky proposition and the existing preferences (ranking of claims) poses a scenario of the PCF to be recovered as very unlikely. 2. The addition of this wording, read with the subsections of this paragraph makes it unclear what the ranking of claims in a business rescue are. The reading appears to mean PCF is to be paid before the claims set out in the subsections however, but both subsections (a) and (b) deal with claims that are also regarded as being PCF. 3. The reading of these amendments still leads to uncertainty around ranking as it remains ambiguous. What is required is that this section set out a clear ranking of all claims, be it the various types of PCF (including secured and unsecured) as well as secured and unsecured creditors. 4. The drafting is currently unclear whether other PCF will rank below these landlord claims	1. The new ranking of the expenses in relation to the lease agreement and the landlord (should this amendment be approved) must be clear that it can never out rank secured pre commencement debt and secured post-commencement debt. E.g., a secured creditor will not be parting with secured proceeds to make any PCF claim, the same principle must apply to this new layer of costs or expenses paid by the landlord. 2. This should ideally be set out in a clearly numbered listed ranking progressing numerically from first ranking to last. 3. BASA's proposal is that the PCF wording should be removed as it creates ambiguity by requiring that it is paid before the payment waterfall (which also includes PCF payments). We support that the existing wording in the Act be left unamended and that there be the insertion of a new clause 135(3)(c), as follows. ***S135 (3).***

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	secured and unsecured claims against the company; and	whether secured or not. The latter position is unacceptable and does not serve to further the success of a business rescue. It is unclear why landlord claims should be afforded this higher ranking against other claims. It is furthermore not justified that these landlord claims rank ahead of secured claims.	*"After payment of the practitioner's remuneration and expenses referred to in section 143, ~~post-commencement financing,~~ and other claims arising out of the costs of the business rescue proceedings, all claims contemplated–"* a. b. *(c) in subsection (1A) will rank below secured claims contemplated in subsection (2) but will be treated equally with all unsecured claims contemplated in subsection (2) against the company.*
SECONDARY FOCUS (ITEMS 8 – 12) • Section 45 (2A) – Financial Assistance • Section 72 (7A)(a) – composition of Social and Ethics committee • Section 72(9A)- Appointment of Social and Ethics Committee. • Section 72(10A)- Vacancies in the Social Ethics Committee. • Section 166(2A) (b)- Alternative dispute resolution.			
10.	**Amendment Bill section 10 Financial Assistance** **Section 45 (2A)** (2A) The provisions of this section do not apply to the giving by a	This proposed change is welcomed, however, from a practical application perspective, the current proposed carveout is too narrow and should be broadened to include foreign subsidiaries.	BASA proposes that Section 45(2A) be further amended as follows: *"(2A)The provisions of this section do not apply to the giving by a company of financial assistance to, or for the benefit of its subsidiaries. **For purposes of***

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	company of financial assistance to, or for the benefit of its subsidiaries.	Alternatively, BASA would like clarification on whether the term "subsidiaries" as contemplated in section 45(2A) would include foreign subsidiaries. Our understanding/ interpretation is that the definition of a subsidiary in terms of the Act refers to a "company" that meets the requirements set out in section 3. The definition of "company" however does not include foreign companies, hence clarification is sought.	***this section (2A), "subsidiary" shall include foreign companies".***
11.	**Amendment Bill section 13** **Section 72(7A)(a)** (a) in the case of a public company and state-owned company, all the members must be directors who are not involved in the day-to-day management of the business of the company and must not have been so involved at any time during the previous three financial years; and	We are of the opinion that if an executive director has certain skills, knowledge and experience which would add value to the committee, the board/shareholders should be able to select them to serve on this committee for as long as the majority of the members are not involved in the day-to day management of the company/ non-executive directors.	BASA proposes the following amendments to the subsection: …In the case of a public company and state-owned company, ~~*all*~~ *the majority of* the members must be directors who are not involved in the day-to-day management of the business of the company and must not have been so involved at any time during the previous three financial years; and
12.	**Section 72(9A)** (9A)Thereafter– (a) at each annual general meeting of a public company or state-owned company, such company must elect a social and ethics committee; or	1. This provision introduces undue complexity. As a general principle, the election of members of committees intended to support the board being by shareholders, could potentially have a negative and/or disruptive impact on the proper functioning of the board and the engagement between the board and its committees. This is also not aligned with	BASA supports the existing regime for the appointment of the social and ethics committee members where in terms of Regulation 43(3), the board must appoint the members of the social and ethics committee. We therefore propose the following deletion: ~~Section 72(9A)~~ ~~*"(9A) Thereafter–*~~

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	(b) a social and ethics committee must be appointed annually by the board of the company where such company is any other company, not being a public company or state-owned company, required to have a social and ethics committee.	corporate governance recommendations under King IV. The Board is entitled to delegate certain functions to the social and ethics committee and other committees. As such, the Board should have the power to appoint such members and, in terms of governance principles, the Board has the duty to hold them to account. 2. Furthermore, it is not clear from the wording in section 72(10) whether the members of the social and ethics committee would only be elected from the existing board members, and whether the board would have the power to nominate members of the social and ethics committee for appointment by shareholders. 3. Having consideration to the already onerous requirements imposed on boards in terms of board composition (size, diversity, skills, and knowledge), a requirement that shareholders must elect the members of the social and ethics committee may cause undue strain on the capacity of existing directors. This is especially true for banks who are required to have a number of additional statutory committees under the Banks Act with independent members, and board members often operate at full capacity.	~~*(a) at each annual general meeting of a public company or state-owned company, such company must elect a social and ethics committee; or*~~ ~~*(b) a social and ethics committee must be appointed annually by the board of the company where such company is any other company, not being a public company or state-owned company, required to have a social and ethics committee."*~~

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		4. We recommend removal of the requirement for shareholders to elect the members of the social and ethics committee. 5. In this regard, BASA proposes that the Company engages with shareholders in good faith at the AGM advising them of the composition of the Social and Ethics Committee and the manner in which vacancies are filled. 6. We submit that the provisions of section 72(5B) which allows the Minister to publish minimum qualification requirements for members of the social and ethics committee, should be sufficient to ensure that such members are enabled to perform functions under the Act and Regulations.	
13.	**Section 72 (10A)** (10A) Where a vacancy arises in the social and ethics committee, the board must appoint a person within 40 days after the vacancy arises, to fill such vacancy.	It is not clear whether the "40 days" refers to business or calendar days. We believe that the function will however continue, If a vacancy exists, the committee should still be able to perform its day-to-day functions until the vacancy is filled with the approval or ratification of the board or the next meeting of the committee	BASA suggests the below: *"(10A) Where a vacancy arises in the social and ethics committee, the board must appoint a person within 40* ***business*** *days after the vacancy arises, to fill such vacancy."*
14.	**Alternative dispute resolution** **Section 166 (2A) (b)**	BASA notes that arbitration being conducted by the same member of the company's tribunal who previously attempted to resolve the matter	BASA proposes excluding members of the Companies Tribunal who have attempted to resolve the matter through mediation and conciliation from the next step of the process rather than making it objectionable.

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	(b) A party who wants to object to the arbitration also being conducted by a member of the Companies Tribunal who had attempted to resolve the matter through mediation or conciliation, may do so by filing an objection in that regard with the Companies Tribunal.	through mediation and conciliation could result in biased arbitration proceedings.	
OTHER COMMENTS AND RECOMMENDED EDITS (ITEMS 13 – 16) • Section 16 (9)(b)- Amending MOI • Section 26 (5)- Access to Company Records • Section 40 (6) (6A)(a)- Consideration for shares • Section 194 (1A)(b)(i) – Appointment of Companies Tribunal			
15.	**Amendment Bill Section 2** **Amending Memorandum of Incorporation** **Section 16 (9)(b)**: (b) in any other case, ~~on the later of~~ – (i) 10 business days after receipt of the Notice of Amendment by the Commission, unless endorsed or rejected with reasons by the Commission prior to the expiry of the	1. It is unclear what the word "endorsed" means as the CIPC does not "stamp" the Notice of Amendment when approving same. Suggest replacing "endorsed" with "accepted". 2. Further, when would the commission consider the documents to be received by them for the calculation to commence. This will allow uncertainty as there could be debate around receipt and as a result, debate around when the amendment is effective. We propose	BASA proposes the following amendment: 1. Section 16 (9)(b): *"(b) in any other case, –* *(i) 10 business days after filing ~~receipt~~ of the Notice of Amendment by the Commission, unless accepted ~~endorsed~~ or rejected with reasons by the Commission prior to the expiry of the 10 business days period; or"*

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	10 business days period ~~the date on, and time at, which the Notice of Amendment is filed~~;	replacing the word "receipt" with "filing" as the word "filing" is defined in the Act.	
16.	**Amendment Bill Section 4** **Access to company records** **Section 26(5)** Where a company receives a request in terms of subsection (4)(b) it must within 10 ~~14~~ business days comply with the request by providing the opportunity to inspect or copy the register or the records concerned to the person making such request.	The proposed 10 business day period is too short, and the existing 14 business day period remains reasonable and appropriate. The rationale for BASA's view is that The nature of some requests may require internal consultation and assessment given extensive new requirements in respect of POPIA.	BASA supports the comments made in the 2021 submission and suggest current *14-day* period be *retained* in subsection 26(5).
17.	**Amendment Bill section 9** **Consideration for shares** **Section 40 (6) (6A)(a)** (6A) For the purposes of subsections (5) and (6)– (a) **'stakeholder'** means a trusted third party, who has no interest in the company or the subscribing party, who may be in the form of an attorney, notary public or escrow agent	It is unclear who/what a "trusted" third party refers to. We suggest that the 3rd party be one that is professionally registered or regulated.	BASA proposes the following amendments to the subsection: (6A) For the purposes of subsections (5) and (6)– (a) '**stakeholder**' means a trusted third party *registered and regulated by a professional body* ~~,~~ who has no interest in the company or the subscribing party, who may be in the form of an attorney, notary public or escrow agent.

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18.	**Amendment Bill section 21** **Appointment of Companies Tribunal** **Section 194(1A)(b)(i)** In order to assist him or her with the functions contemplated in this subsection, the chairperson may appoint– (i) a Chief Operating Officer for a period of five years, who may be reappointed for a further period of five years; and	The Chief Operating Officer (COO) is appointed for a period of five years which may further be extended to another 5 years. The COO may therefore be in office for an aggregate period of ten years, at a time.	BASA suggests managing the extension term for the COO and supports including further or additional approvals required to extend the COO's term, this is important especially if the term is to be significantly long as stipulated in S194 (1A) b.

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Annexure A

Practical example of proposed Section 30A amendments- illustration of concerns and rationale for BASA's preferred option (i.e. removal of provision that Remco members should not be eligible for appointment if vote in favour of implementation report is not passed)

2023	2024	2025	2026	2027	2028
S30A comes into effect					
	Remuneration Policy (RemPol) approved by shareholders for 3 years until 2027				
		Implementation report (IR) not carried in 2025	Implementation report not carried in 2026		
Board composition: 12 members (9 NEDs, 3 EDs) Remco members: 4 NEDs					
SA will be the first country to enforce a binding vote on the IR; Investor confidence in SA will be compromised due to governance issues i.e. IR not carried; Remco members stepped down		4 Remco members step down for 3 years until 2028 <u>Impact:</u> IR already actioned in prior year - can't reverse actions; Must Remco members step down immediately after AGM - 'new' Remco members will not be totally *au fait* with Remco discussions to consult with shareholders All other Board Committees to be revised / reconstituted (impacts succession planning, member capacity, work-flow and responsibilities, etc.	New 4 Remco members step down for 3 years until 2029 <u>Impact:</u> All other Board Committees (and sub-committees) to be revised / reconstituted again	There is only one NED remaining (out of 9 NEDs) who can serve on RemCom <u>Consequences:</u> Board to be expanded (cost, time, skills, capacity, availability, independence, etc.)	