

**PRESENTATION TO THE  
PORTFOLIO COMMITTEE ON  
TRADE, INDUSTRY AND  
COMPETITION  
NATIONAL ASSEMBLY  
COMPANIES AMENDMENT BILL  
2023**

Public hearings: 18 October 2023



THE BANKING  
ASSOCIATION  
SOUTH AFRICA



# INTRODUCTION

**The Banking Association of South Africa (BASA) would like to thank the Honourable Chairperson and Committee for the opportunity to partake in the public hearing process in respect of the Companies Amendment Bill and Second Companies Amendment Bill.**

**BASA advances the interests of the banking industry with its regulators, legislators and stakeholders to make banking sustainable, profitable and better able to contribute to the social and economic development and transformation of South Africa.**

**As the national association for 32 domestic and international banks operating in South Africa, BASA advocates the views of the banks on legislation, regulation and socio-economic issues that affect and impact the industry and financial stability in South Africa.**



# SUPPORT FOR LEGISLATIVE REFORM

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- ❑ BASA appreciates the revised Companies Amendment Bill (“**Bill**”) and confirms our support for the proposed amendments in the Second Companies Amendment Bill.
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- ❑ BASA has submitted detailed written comments in respect of the Bill in a submission to the Portfolio Committee on Trade, Industry and Competition dated 2 October 2023 (“**BASA submission**”) and notes that the Bill largely addresses comments and issues raised by the industry and business in previous drafts.
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- ❑ We support the measures to enhance ease of doing business in South Africa and to implement long awaited corporate reform, as proposed in respect of for example sections 16, 40, 45, 48, 90, 95 and 118.
  - ❑ Our presentation today therefore focusses specifically on **two of the proposed amendments to section 30A** of the Companies Act (as further explained in the BASA submission).
  - ❑ The two areas of priority which require re-consideration in our view, are:
    - section 30A(6), which requires that the implementation report be approved by a binding resolution; and
    - section 30A(9) which provides that should the implementation report not be approved, then the non-executive directors who serve on the committee responsible for remuneration will not be eligible to serve on the remuneration committee for a period of three years after such non-approval.

# SECTION 30A(6)-BASA CONCERN

## Proposed amendment:

- ❑ Section 30A(6) provides, *inter alia*, that the implementation report must be approved by ordinary resolution.

## BASA concern:

- ❑ The requirement that the implementation report be subject to a **binding** approval by way of ordinary resolution may create practical and labour challenges as this in essence requires retrospective voting by shareholders on the implementation of payment of remuneration to directors and prescribed officers in respect of the 12 months preceding the AGM.
- ❑ The implementation report forms part of the remuneration report (refer proposed requirement in section 30A(3)) which must be separately voted on by shareholders in terms of section 30A(4),(5) and (6) as proposed.
- ❑ The implementation report is in practice based on the principles set out in the remuneration policy which had been approved by shareholders at the previous AGM.
- ❑ The vote by the shareholders occurs after salary increases, short term incentives and long-term incentives have been paid/ awarded in terms of such previously approved remuneration policy.
- ❑ South Africa's requirements in this regard would be out of line with those of other jurisdictions as it would be the first country to enforce a binding vote on the implementation report for listed companies. This would result in South Africa having more stringent remuneration governance compared to other jurisdictions, which may hinder business development and investment growth in South Africa.



# SECTION 30A(6)- BASA RECOMMENDATION

## **BASA Recommendation:**

We recommend that approval should, in respect of the implementation report, continue to be by way of a non-binding advisory vote as per current requirements and practice.

# SECTION 30A(9)-BASA CONCERN

## Proposed amendment:

- ❑ The proposed amendment contemplates *inter alia* that in the event that the implementation report is rejected at an AGM, the non-executive directors who serve on the remuneration committee must immediately cease being members of the remuneration committee and will not be eligible to serve on the remuneration committee for a period of three years after such non-approval.

## BASA concern:

- ❑ The proposed amendment imposes quite harsh consequences on non-executive directors serving as members of remuneration committees and does not afford them an opportunity to provide an explanation on a failed implementation report in the year following its failure.
- ❑ Practically, it increases the risks in respect of board memberships in that it may contribute to reduce the already small pool of directors prepared and skilled to serve on remuneration committees. South Africa experiences skills and depth shortages and the proposed amendment may create challenges for companies to attract and retain appropriately skilled directors.
- ❑ Presently, shareholders of listed companies have powerful rights and protections through existing mechanisms in the JSE Listings Requirements.
- ❑ All board members are elected by shareholders and there is a provision that non-executive directors are required to stand-down for re-election by shareholders at each AGM. Shareholders therefore have the ability to remove the entire remuneration committee within a three-year period, as they come up for re-election. The stand-down of remuneration committee members after one strike, may therefore not be necessary in respect of listed companies.

# SECTION 30A(9)- cont.

## BASA concern (cont.):

- ❑ The “one strike” approach (immediate ineligibility after one failed vote) is extremely burdensome compared to other jurisdictions. Some jurisdictions follow a two-strike approach, which ensures that companies engage with shareholders after the first failed vote to understand their concerns and make necessary changes to their remuneration practices to avoid a second strike.
- ❑ The immediacy of members ceasing to form part of the remuneration committee on non-approval of the implementation report after “one strike” could be dire for the following reasons:
  - The timeline proposed for being not eligible to serve on the remuneration committee, being 3 years, is problematic given the scarcity of appropriate skills in South Africa.
  - Proposed new directors may not wish to serve on this committee due to the perceived personal reputational risk (perception of failure to comply with fiduciary duties if votes fail), adding to the shortage of skills issue.
  - The committee will lose institutional knowledge and consequently make it impractical for new members to engage meaningfully with dissenting shareholders and to explain rational for the previous implementation report.
  - It would therefore introduce significant disruption, uncertainty and risk to the ongoing governance of the company.
- ❑ The ineligibility of skilled remuneration committee members may over time lead to increase in the size of boards with significant impact on the cost of governance and other inefficiencies.
- ❑ 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, which directors must be approved by the Prudential Authority prior to their appointment to the board/s. It may create difficulty for banks to comply with the requirements of the Prudential Authority / Banks Act in finding sufficiently skilled, fit and proper candidates to fill vacancies created by the proposed amendment.

# SECTION 30(A)(9)- BASA RECOMMENDATION

## **BASA Recommendation – Preferred Option:**

- ❑ We propose (as the preferred option to avoid the risks/ concerns set out in previous slides) 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.
- ❑ We strongly recommend that in the interest of meaningful engagement with dissenting shareholders and expedient addressing of substantive concerns of shareholders, these dissenting shareholders should be obliged by the Act to participate in engagement with the company.
- ❑ We therefore recommend that a requirement be included in section 30A providing for:
  - an obligation on shareholders with minimum percentage holding and that voted against the approval of the implementation report, to disclose their votes and the reasons therefore (which must be relevant and substantive) to the company within a reasonable period after the AGM, to enable the company to meaningfully engage with dissenting shareholders ; and
  - a requirement for the remuneration committee to engage with dissenting shareholders who have disclosed their vote and the reasons therefore and to address their concerns;failing such engagement, the failed vote shall have no force or effect on the company.

## **BASA Recommendation – Alternative Option:**

- ❑ Section 30A(9)(b) be amended to provide that if the implementation report is not approved at the second subsequent/ 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 only to not exacerbate the skills scarcity issue.





# SUMMARY AND CONCLUSION

- ❑ Support in principle for:
  - a binding vote on remuneration policy; and
  - disclosures in respect of remuneration.
  
- ❑ Recommendations as regards sections 30A(6) and 30A(9):
  - a non-binding advisory vote on implementation report;
  - remuneration committee members not to be required to step-down/ become ineligible to serve on Remco as consequence of failed vote, alternatively Remco members only to step-down after second subsequent failed vote and for limited period of 1 year ; and
  - obligations imposed on shareholders to provide reasons for dissent and obligation to engage with company after AGM/ voting.



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THANK YOU