

REPUBLIC OF SOUTH AFRICA

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# COMPANIES THIRD AMENDMENT BILL

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*(As introduced in the National Assembly as a section 75 Bill)*

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(MINISTER OF TRADE AND INDUSTRY)

[B 137—98]

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REPUBLIEK VAN SUID-AFRIKA

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# DERDE MAATSKAPPYWYSIGINGS- WETSONTWERP

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*(Soos ingedien in die Nasionale Vergadering as 'n artikel 75-wetsontwerp)*

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(MINISTER VAN HANDEL EN NYWERHEID)

[W 137—98]

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## GENERAL EXPLANATORY NOTE:

Words underlined with a solid line indicate insertions in existing enactments.

# BILL

To amend the Companies Act, 1973, so as to provide for a further category of offers of shares not being offers to the public, namely employee share schemes; and to provide for matters connected therewith.

**B**E IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

### Amendment of section 144 of Act 61 of 1973, as substituted by section 8 of Act 35 of 1998

1. Section 144 of the Companies Act, 1973, is hereby amended by the addition of the following paragraph:

“(g) if it is an employee share scheme as contemplated in section 144A.”.

### Insertion of section 144A in Act 61 of 1973

2. The following section is hereby inserted in the Companies Act, 1973, after section 144:

#### “Employee share scheme

**144A.** (1) In this section, unless the context indicates otherwise—

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|---|----|
| (a) ‘employee share scheme’ means a scheme established by a company for the purpose of offering participation therein to employees of the company either— | 15 |
| (i) by means of the sale of shares in the company; or   |    |
| (ii) by the grant of options on shares in the company, solely to <i>bona fide</i> employees of the company, whether by means of a trust or otherwise;     |    |
| (b) ‘compliance officer’ means a compliance officer appointed by a company in respect of its employee share scheme in accordance with subsection (2); and | 20 |
| (c) ‘specified shares’ means shares, including options on shares, which are offered to employees of the company in terms of an employee share scheme.     | 25 |
| (2) Every company which establishes an employee share scheme shall—   |    |
| (a) appoint a compliance officer who shall be accountable to the directors of the company;  |    |

- (b) state in its annual financial statements the number of specified shares which it has allotted during that financial year in terms of its employee share scheme.
- (3) A compliance officer who is appointed in respect of any employee share scheme shall— 5
- (a) be responsible for the administration of that scheme;
- (b) furnish or cause to be furnished in writing to any employee who receives an offer of specified shares in terms of that employee scheme— 10
- (i) full particulars of the nature of the transaction, including the risks arising therefrom;
- (ii) information relating to the company, including its latest annual financial statements, the general nature of its business and its profit history over the last three years; and 15
- (iii) full particulars of any material changes which take place in respect of any information furnished in terms of subparagraph (i) or (ii);
- (c) ensure that copies of the documents containing the information referred to in paragraph (b)(i) and (ii) are lodged with the Registrar within 20
- 30 days after the employee share scheme has been established;
- (d) lodge a certificate with the Registrar within 60 days after the end of each financial year to the effect that he or she has complied with the obligations in terms of this section during such year and attach thereto any documents containing particulars contemplated in paragraph 25
- (b)(iii), issued during such year.”.

#### Short title

3. This Act is called the Companies Third Amendment Act, 1998.

## **MEMORANDUM ON THE OBJECTS OF THE COMPANIES THIRD AMENDMENT BILL, 1998**

Before section 144 of the Companies Act, 1973 (Act No. 61 of 1973) ("the Act"), was amended by the Companies Amendment Act, 1998 (Act No. 35 of 1998), it provided in rather unsatisfactory terms for those offers of shares which were not regarded as being offers to the public and thus did not require the registration of a prospectus. This led to a spate of "private placings" and other share offers during recent years in which investors lost millions of rands. The latter Act rectified that situation. However, it has now transpired that a very important category of share offers is not being adequately catered for, namely, offers of shares to employees in terms of share incentive schemes.

In terms of section 144, employee share schemes which are in common use by listed companies (and which need to be further encouraged), require a full prospectus. This is extremely onerous on companies and impractical as the maximum validity period of a prospectus is four months only, while employee share schemes extend over much longer periods. This would almost certainly result in the discontinuance of employee share schemes and will be detrimental to employee empowerment.

Employees do need protection when they are offered shares in public companies and this protection must be given, but on a basis other than requiring the registration of a prospectus. In this regard the Companies Third Amendment Bill, 1998, in the first instance seeks to amend section 144 by exempting companies from issuing a prospectus in respect of employee share schemes. The Bill also proposes to insert a new self-contained provision (section 144A) in the Act to provide employees with suitable protection when they are offered shares in terms of an employee share scheme. The protection will be as follows:

- (a) The company will be obliged to distribute amongst its employees an information document relating to the employee share scheme containing appropriate information relating to the company itself and specifically the rights attached to the shares as well as a description of the transaction including a description of the risks arising from such transaction.
- (b) Schemes of this kind often extend over considerable periods of time and this factor, together with the changing economic outlook of a company, might necessitate appropriate updating of information to employees. This will be an additional obligation of the company.
- (c) The company will be required to appoint a compliance officer who will be responsible for ensuring that the company complies with its obligations in terms of this provision. He or she will be required to certify on an annual basis to the Registrar of Companies that he or she has complied with his or her obligations in terms thereof.
- (d) The company will furthermore be obliged to inform the Registrar of Companies of an intended employee share scheme and provide details thereof. A copy of the information document as well as the updated documents will also be required to be submitted to the Registrar.
- (e) The company will further be obliged to set out in its annual financial statements details of all issues of shares during that year to employees in terms of the employee share scheme and that the company has complied with its obligations in terms of this provision.

### **CONSULTATION**

The Standing Advisory Committee on Company Law identified the problem addressed in the Bill. Some law firms and attorney's associations also commented on the hardship it could cause to employee share ownership schemes.

### **PARLIAMENTARY PROCEDURE**

The Department of Trade and Industry is of the view that this Bill must be dealt with

in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

