

REPUBLIC OF SOUTH AFRICA

STOCK EXCHANGES CONTROL AMENDMENT BILL

(As amended by the *Portfolio Committee on Finance (National Assembly)*)

(MINISTER OF FINANCE)



[B 5B—98]

REPUBLIEK VAN SUID-AFRIKA

WYSIGINGSWETSONTWERP OP BEHEER VAN AANDELEBEURSE

(Soos gewysig deur die *Portefeuljekomitee oor Finansies (Nasionale Vergadering)*)

(MINISTER VAN FINANSIES)

[W 5B—98]

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GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

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

BILL

To amend the Stock Exchanges Control Act, 1985, so as to amend the definition of “stock-broker”; to further regulate restrictions on the management of investments; to regulate the use of the designation “stock-broker”; to delete an obsolete reference; to further regulate undesirable advertising or canvassing relating to securities; to dispense with the requirement that the Registrar must approve the appointment of auditors; to extend the matters which may be disclosed by a stock exchange; to amend certain provisions relating to penalties; and to extend the limitation on the liability of certain persons to a stock exchange and clearing house; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 1 of Act 1 of 1985, as amended by section 14 of Act 50 of 1986, section 24 of Act 51 of 1988, section 25 of Act 54 of 1989, section 38 of Act 55 of 1989, section 13 of Act 64 of 1990, section 29 of Act 97 of 1990, section 10 of Act 54 of 1991, section 56 of Act 104 of 1993, section 1 of Act 54 of 1995 and section 1 of Act 71 of 1996

1. Section 1 of the Stock Exchanges Control Act, 1985 (Act No. 1 of 1985) (hereinafter referred to as the principal Act), is hereby amended by the substitution in subsection (1) for the definition of “stock-broker” of the following definition: 10

“ ‘stock-broker’ means any natural person who is a member or who is an officer or employee of a member, and who is authorised and qualified under the rules of the stock exchange concerned to be a stock-broker **[and to carry on the business of the member]**;”.

Amendment of section 4 of Act 1 of 1985, as substituted by section 4 of Act 54 of 15 1995

2. Section 4 of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

“(1) No person **[shall] may, as a** regular feature of his or her business, undertake the management of investments on behalf of another person, and 20 for such management receive any remuneration in whatever form, **[other**

than fees charged by a member for the buying and selling of securities] unless he or she—

- (a) **[is a member authorised in terms of the rules to manage investments on behalf of another person]** is a person who has been approved by the Registrar or is a person who falls within a category of persons approved 5 by the Registrar;
- (b) has a written mandate to do so from the other person; and
- (c) complies with such conditions as the Registrar may from time to time determine by notice in the *Gazette*, which conditions may—
- (i) prohibit the management of investments referred to in subparagraphs (ii) and (iv) of the definition of ‘investments’ in subsection (7), if such investments are not subject to a regulatory regime deemed adequate by the Registrar for the protection of investors; and 10
- (ii) differ in respect of different groups or types of investment managers.; 15
- (b) by the insertion after subsection (I) of the following subsection:
 “(1 A) Subsection (1) does not apply to a member authorised in terms of the rules to manage investments on behalf of another person or a company which is registered as a management company in terms of the Unit Trusts Control Act, 1981 (Act No. 54 of 1981).”;
- (c) by the substitution in subsection (6) for subparagraph (iv) of paragraph (a) of the following subparagraph:
 “(iv) of a trust as defined in section 1 of the Trust Property Control Act, 1988 (Act No. 57 of 1988), created *inter vivos*, but not a business trust, and he 25 or she is the trustee concerned or a person administering such trust on behalf of that trustee; or”;
- (d) by the substitution for subsection (7) of the following subsection:
 “(7) For the purposes of this section—
- (a) ‘investments’ means— 30
- (i) securities **[whether listed or unlisted, or]** listed on a stock exchange;
- (ii) securities listed on a foreign exchange;
- (iii) units in a unit portfolio as defined in section 1 of the Unit Trusts Control Act, 1981 (Act No. 54 of 1981), or units ~~in any other form~~ 35 of participation in a collective investment scheme **approved by the Registrar of Unit Trust Companies in terms of that Act;**
- (iv) units or any other form of participation in a **collective investment scheme licensed or registered in a foreign country;**
- (v) any other instruments declared to be **[such]** investments for the 40 purposes of this section by the Registrar by notice in the *Gazette*; or
- (vi) funds intended for the **[purpose of buying such]** purchase of such securities, units, participation or other instruments;
- (b) ‘management of investments’ means—
- (i) **[in the case of a member, means]** the buying, **[and]** selling **[of** 45 **listed or unlisted securities]** or otherwise dealing with investments on behalf of another person **[in terms of an unlimited mandate to act on behalf of such other person; or];**
- (ii) **[in the case of a person who is not a member, means]** the buying and selling of listed and unlisted securities on behalf of another 50 person in terms of any mandate whether limited or unlimited, to act on behalf of such other person an offer or agreement regarding such buying, selling or dealing, irrespective of whether an investment manager is required to exercise his, her or its discretion; 55
- or
- (iii) the implementation on behalf of another person of a decision to buy, sell or deal with investments, but not—

- (aa) the giving of advice on the merits of such transactions without receiving funds or assets from a client; or
- (bb) the performance of the functions of a company or institution which is registered as trustee under the Unit Trusts Control Act, 1981 (Act No. 54 of 1981); and
- (c) [**'an unlimited mandate' means a mandate to act on behalf of another person without it being necessary to obtain further authority or consent from such other person to effect any transaction in securities under such mandate**] **'business trust' means a trust *inter vivos* created for the purpose of carrying on a business for profit-making, which purpose is achieved through the combination of capital contributed by the beneficiaries themselves and through the administration or management of the capital by trustees on behalf of and for the benefit of the beneficiaries.**”

Amendment of section 12 of Act 1 of 1985, as amended by section 29 of Act 51 of 15 1988, section 38 of Act 55 of 1989, section 12 of Act 7 of 1993, section 59 of Act 104 of 1993 and section 12 of Act 54 of 1995

3. Section 12 of the principal Act is hereby amended by the substitution in subsection (1) for subparagraph (i) of paragraph (d) of the following subparagraph:

“(i) may carry on the business referred to in section 4 unless authorised to do so in 20 terms of the **rules [and unless he complies with the provisions of section 4]**”.

insertion of section 15 in Act 1 of 1985

4. The following section is hereby inserted in the principal Act after section 14:

“Use of designation ‘stock-broker’ and related designations 25

15. (1) A stock-broker may use the designation ‘stock-broker’, ‘stock-broker (South Africa)’ or ‘stock-broker (S. A.)’.

(2) No person who is not a stock-broker may—

(a) hold himself or herself out as, or allow himself or herself to be held out as, a stock-broker; or

(b) use any designation referred to in subsection (1) or any other name, title, description or symbol, or perform any act, implying or tending to induce the belief that he or she is a stock-broker.

(3) Any person to whom the rules of a foreign stock exchange recognised by the Registrar by notice in the *Gazette* apply, and whose business is substantially similar to that of a stock-broker in terms of this Act, may use any designation referred to in subsection (1), provided that the country where the designation was obtained is indicated after the designation.”

Amendment of section 22 of Act 1 of 1985, as substituted by section 22 of Act 54 of 1995 40

5. Section 22 of the principal Act is hereby amended by the substitution for subsection (5) of the following subsection:

“(5) In determining the amount paid or owing by any buyer to a member for the purposes of this section, the purchase price payable in respect of the listed securities sold by the member on behalf of the buyer or the purchase price payable by the member to the buyer for listed securities sold by the buyer to the member but not yet delivered to the member, **[as well as any funds or listed securities deposited with a member in terms of the rules for the purposes of a bear sale]** shall not be taken into account.”

Amendment of section 39 of Act 1 of 1985, as substituted by section 36 of Act 54 of 1995 and amended by section 10 of Act 71 of 1996

6. Section 39 of the principal Act is hereby amended-

- (a) by the insertion after subsection (1) of the following subsection:
 “(1 A) (a) No person other than a member of a foreign stock exchange recognised by the Registrar for the purposes of this section by notice in the Gazette, an officer or employee of such a member, such a foreign stock exchange or an employee of such a foreign stock exchange, may in any matter or by any means, either for himself, herself or for any other person, directly or indirectly advertise or canvass for any business relating to the buying and selling of securities listed on a foreign stock exchange so recognised. 5 10
- (b) No person may in any matter or by any means, either for himself, herself or for any other person, directly or indirectly advertise or canvass for any business relating to the buying and selling of securities listed on a foreign stock exchange not recognised by the Registrar in terms of paragraph (a).”; 15
- (b) by the substitution for subsection (2) of the following subsection:
 “(2) No person other than a person approved by the Registrar in terms of section 4(1) [shall in any matter] or exempted from the provisions of that section by section 4(1 A), may by any means [either for himself or for any other person, directly or indirectly] advertise or canvass for or market the 20
 business referred to in section 4(1).”; and
- (c) by the insertion after subsection (2) of the following subsections:
 “(2A) (a) No person may, without the approval of the Registrar, advertise or canvass for or market the business referred to in section 4(1), carried on outside the Republic, 25
 (b) The Registrar may grant the approval referred to in paragraph (a) subject to such conditions as may be necessary for the protection of investors.
 (2B) An advertisement, marketing material or any other means of marketing contemplated in subsections (2) and (2A) shall comply with the requirements determined by the Registrar by notice in the Gazette.” 30

Amendment of section 42 of Act 1 of 1985, as substituted by section 38 of Act 54 of 1995 and amended by section 11 of Act 71 of 1996

7. Section 42 of the principal Act is hereby amended—

- (a) by the deletion of subsections (3) and (4); and
- (b) by the substitution for subsections (5), (6) and (7) of the following subsections, respectively: 35
- “(5) When [the Registrar has in terms of subsection (4) refused to approve or has withdrawn his approval of the appointment of an auditor, or whenever for any other reason] an auditor vacates his or her office as auditor of a member or stock exchange, the member concerned or stock exchange in question shall appoint [some other] another person as auditor [but again subject to the approval of the Registrar]. 40
- (6) Where the auditor of a member or stock exchange is a partnership, such auditor shall for the purposes of subsection (5) be deemed not to have vacated [his] its office by reason of a change in the composition of the partnership, as long as not less than half the number of the partners in the reconstituted partnership are persons who were, as at the date when the appointment of the partnership as auditor was [last approved by the Registrar] made, partners therein. 45
- (7) If an auditor who has been removed from office by a member or stock exchange is Of the OPiniOn that SUCH removal was for improper reasons, such auditor shall forthwith inform the Registrar thereof by facsimile or by registered post. 50

Substitution of section 45A of Act 1 of 1985, as inserted by section 42 of Act 54 of 1995

8. The following section is hereby substituted for section 45A of the principal Act:

“Disclosure of information by stock exchange

45A. Notwithstanding the provisions of’ any other law, a stock exchange 5
may enter into an agreement with any other exchange or organisation of
stock exchange supervisors, whether domestic or foreign, to disclose
information relating to a security, a company whose securities are listed on
an exchange, a particular transaction, a member, an officer or employee of 10
a member or a buyer and seller of listed securities, if such information will
be of importance to the relevant [domestic or foreign] exchange or
organisation of stock exchange supervisors and the disclosure will not be
against the public interest.”

Amendment of section 48 of Act 1 of 1985, as substituted by section 45 of Act 54 of 1995 and amended by section 14 of Act 71 of 1996 15

9. Section 48 of the principal Act is hereby amended—

(a) by the substitution for paragraph *(d)* of subsection (1) of the following paragraph:

“(d) contravenes or fails to comply with a provision of section 19(3), 36,37, 39 or 42(1), (2) [(3), (4)] or (5);” and 20

(b) by the substitution for paragraph *(h)* of subsection (1) of the following paragraph:

“(h) contravenes a provision of section 15(2) or (3),40 or 41 ,“.

Substitution of section 52A of Act 1 of 1985, as substituted by section 15 of Act 71 of 1996 25

10. The following section is hereby substituted for section 52A of the principal Act:

“Limitation of liability

52A. No stock exchange, clearing house, executive officer, employee or
representative of a stock exchange or clearing house, or any member of a
committee or subcommittee of the committee, shall be liable for any loss 30
sustained by or damage caused to any person as a result of anything done or
omitted by the stock exchange, clearing house, executive officer, employee,
representative or member in the bona fide or negligent, but not grossly
negligent, exercise of any power or carrying out of any duty or performance
of any function under or in terms of this Act or the rules.” 35

Short title and commencement

11. This Act shall be called the Stock Exchanges Control Amendment Act, 1998, and shall come into operation on a date fixed by the President by proclamation in the Gazette.

MEMORANDUM ON THE OBJECTS OF THE STOCK EXCHANGES
CONTROL AMENDMENT BILL, 1998

The abovementioned Bill contains proposals for the amendment of the Stock Exchanges Control Act, 1985 (Act No. 1 of 1985) ("the Act"), and can be explained as follows:

1. Clause 1

It is proposed that the words "and to carry on the business of the member" in the definition of stock-broker in section 1 be deleted as not all persons who may be authorised and qualified in terms of the rules of a licensed stock exchange to be a stock-broker would necessarily also be authorised to carry on the business of a member.

2. Clause 2

- (a) The proposed amendment of section 4(1) further regulates the power of the Registrar to determine conditions in respect of investment managers so as to enable him or her to prohibit the management of foreign investments in specific circumstances.
- (b) Members of a stock exchange and management companies registered under the Unit Trusts Control Act, 1981 (Act No. 54 of 1981), are in the proposed subsection (1A) exempted from the provisions of section 4. The reason for the exemption is that members are regulated by the rules of a stock exchange and management companies have to comply with the strict requirements of the Unit Trusts Control Act, 1981.
- (c) The meaning assigned to the word "trust" in section 1 of the Trust Property Control Act, 1988 (Act No. 57 of 1988), is assigned to the same word in section 4(6) (a)(iv) of the Act. A business trust, however, is excluded from the definition.
- (d) The proposed amendment of section 4(7) seeks to extend the definitions of "investments" and "management of investments" significantly. "Investments" is defined so as to exclude unlisted securities but to include the following:
 - (i) Securities listed on a stock exchange or listed on a foreign exchange;
 - (ii) units in a unit portfolio as defined in section 1 of the Unit Trusts Control Act, 1981, or units or any other form of participation in a collective investment scheme approved by the Registrar of Unit Trust Companies; and
 - (iii) units or any form of participation in a collective investment scheme licensed or registered in a foreign country.

Units in a unit portfolio or collective investment scheme are at present not included in the definition of "securities" in section 1. It is, however, common knowledge that a substantial part of the business of investment managers consists of the buying and selling of units on behalf of their clients. Units in off-shore funds or collective investment schemes are included in the definition of investments in the light of the expected upsurge of cross-border activities of investment managers as a result of the **relaxation of exchange control**.

In the definition of "management of investments" the provision which related to the case of a member is, for the reason referred to in 2(b) above, deleted. It is proposed that not only the actual buying and selling of investments, but also any dealing with investments on behalf of another person, the offering and agreeing to manage investments, irrespective of whether an investment manager is required to exercise his discretion in such management, and the implementation of a decision to invest, should constitute "management of investments". The mere giving of advice on the merits of such buying and selling without receiving funds or assets and the performance of the functions of a company or institution which is registered as a trustee under the Unit Trusts Control Act, 1981, are, however, excluded from the ambit of "management of investments".

The definition of "an unlimited mandate" has become superfluous due to the abovementioned proposed amendments of section 4. It is therefore proposed that the definition be deleted.

As reference is made to a business trust in section 4(6)(a)(iv), it is proposed that that expression be defined.

3. Clause 3

The amendment of section 12 is necessary as a result of the amendments proposed in clause 2.

4. Clause 4

The proposed new section 15 permits a stock-broker, ~~as defined~~ in section 1, to use the designation “stock-broker”. Any person who is not a stock-broker is prohibited to use that designation or to pretend that he or she is a stock-broker. Provision is also made for the use of the designation “stock-broker” by persons who are stock-brokers under the rules of a foreign stock exchange.

5. Clause 5

It is proposed that the words “as well as any funds or listed securities deposited with a member in terms of the rules for the purposes of a bear sale” in section 22 be deleted as they refer to cover for bear sales which is no longer applicable as a result of Directive BZ 4.6 of the Johannesburg Stock Exchange. Directive BZ 4.6 requires that prior to the entering of an order for a bear sale in the order book, the member must ensure that all the securities which are the subject of the bear sale are covered under a securities borrowing agreement so as to facilitate settlement.

6. Clause 6

A provision similar to that in section 39(I) is proposed in respect of the case where the business referred to in that section relates to the buying and selling of listed securities on a foreign exchange. The canvassing without the approval of the Registrar for the business of management of investments carried on outside the Republic is furthermore prohibited. The Registrar may grant his or her approval of such canvassing subject to conditions. Marketing material in respect of the management of investments, whether earned on in or outside the Republic, must comply with the requirements determined by the Registrar by notice in the *Gazette*.

7. Clause 7

The proposed amendment of section 42 is aimed at dispensing with the requirement that the Registrar must approve the appointment of auditors. It is believed that section 42(1) and (2) regulates the appointment of auditors adequately.

8. Clause 8

The object of the proposed amendment of section 45A is to authorise a stock exchange also to enter into an agreement with organisations of stock exchange supervisors to disclose information. It also seeks to extend the matters which may be so disclosed to a security and to a company whose securities are listed on an exchange.

9. Clause 9

The amendment of section 48 is necessary as a result of the amendments proposed in clauses 4 and 7(a).

10. Clause 10

The object of the proposed amendment of section 52A is to clarify the fact that a stock exchange and clearing house will not, subject to certain qualifications, be liable for any

loss or damage caused to a person as a result of anything done or omitted by the stock exchange or clearing house. The principle of such an amendment is currently contained in section 12(1A) of the Safe Deposit of Securities Act, 1992 (as amended by the Safe Deposit of Securities Amendment Act, 1996 (Act No. 70 of 1996)).

PARLIAMENTARY PROCEDURE

The State Law Advisers are of the opinion that this Bill must be dealt with in accordance with 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,

PERSONS AND BODIES CONSULTED

- * Association of General Banks;
- * Association of Law Societies of South Africa;
- * Association of Property Unit Trust Management Companies;
- * Association of Unit Trusts;
- * Association of Black Securities and Investments Professionals;
- * Association of Participation Mortgage Scheme Managers;
- * Association for the Advancement of Black Accountants;
- * Bond Exchange of South Africa;
- * Council of South African Banks;
- * Central Depository Limited;
- * Consumer Council;
- * Fund Managers Association of South Africa;
- * Foundation for African Business and Consumer Services;
- * Free Market Foundation;
- * Johannesburg Stock Exchange;
- * Life Offices' Association of Southern Africa;
- * National African Federated Chamber of Commerce;
- * Policy Board for Financial Services and Regulation;
- * Portfolio (Asset) Management Companies;
- * Public Accountants' and Auditors' Board;
- * Public Property Syndication Association;
- * Registrar of Banks;
- * South African Futures Exchange;
- * Shareholders' Association of South Africa;
- * The Association of Trust Companies in South Africa; and
- * The South African Institute of Chartered Accountants.