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REPUBLIEK VAN SUID-AFRIKA

# STAATSKOERANT

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# GOVERNMENT GAZETTE

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KANTOOR VAN DIE STAATSPRESIDENT

STATE PRESIDENT'S OFFICE

No. 1444.

29 Junie 1990

No. 1444.

29 June 1990

Hierby word bekend gemaak dat die Staatspresident sy goedkeuring gegee het aan die onderstaande Wet wat hierby ter algemene inligting gepubliseer word:—

It is hereby notified that the State President has assented to the following Act which is hereby published for general information:—

No. 69 van 1990: Tweede Maatskappywysigingswet, 1990.

No. 69 of 1990: Companies Second Amendment Act, 1990.

## COMPANIES SECOND AMENDMENT ACT, 1990

Act No. 69, 1990

## GENERAL EXPLANATORY NOTE:

- [ ] Words in bold type in square brackets indicate omissions from existing enactments.
- \_\_\_\_\_ Words underlined with solid line indicate insertions in existing enactments.

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# ACT

To amend the Companies Act, 1973, so as to further regulate the powers and duties of the Securities Regulation Panel; to make new provision regarding the prohibition of certain dealings in securities; to amend the obligation on certain persons to furnish information; to provide for the compulsory acquisition of the securities of a minority in an affected transaction; and to provide for effective enforcement of the rules of the panel; and to provide for matters connected therewith.

*(Afrikaans text signed by the State President.)*  
*(Assented to 21 June 1990.)*

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

Amendment of section 440A of Act 61 of 1973, as inserted by section 4 of Act 78 of 1989

- 5 1. Section 440A of the Companies Act, 1973 (hereinafter referred to as the principal Act), is hereby amended—
- (a) by the substitution in subsection (1) for the definition of “acquisition” of the following definition:
- 10 “‘acquisition’, in relation to [shares or other] securities of any company, means the acquisition of [shares or other] securities in such company by any means whatsoever, including purchase or subscription;”;
- (b) by the substitution in subsection (1) for the definition of “acting in concert” of the following definition:
- 15 “‘acting in concert’ means, subject to subsection (2)(a), acting in pursuance of an agreement, arrangement or understanding (whether formal or informal) between two or more persons pursuant to which they or any of them co-operate [to obtain control of a company by any means whatsoever, including the acquisition by any of them of shares or other securities in such company or the redemption of shares in, or the
- 20 reduction of the share capital of, any such company] for the purposes of entering into or proposing an affected transaction;”;
- (c) by the substitution in subsection (1) for the definition of “affected transaction” of the following definition:
- 25 “‘affected transaction’ means any transaction (including a transaction which forms part of a series of transactions) or scheme, whatever form it may take, [pursuant to] which—
- (a) taking into account any [shares] securities held before such transaction or scheme, has or will have the effect of—
- 30 (i) vesting control of any company (excluding a close corporation) [vests] in [(a)] any person, or [(b)] two or more persons acting in

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- concert, in whom control did not vest prior to such transaction or scheme; or
- (ii) any person, or two or more persons acting in concert, acquiring, or becoming the sole holder or holders of, all the securities, or all the securities of a particular class, of any company (excluding a close corporation); or
- (b) involves the acquisition by any person, or two or more persons acting in concert, in whom control of any company (excluding a close corporation) vests on or after the date of commencement of section 1 (c) of the Companies Second Amendment Act, 1990, of further securities of that company in excess of the limits prescribed in the rules;";
- (d) by the substitution in subsection (1) for the definition of "offeree company" of the following definition:
- "offeree company" means any company [the control of which changes or is proposed to be changed or is acquired pursuant to] the securities or part of the securities of which is or is to be the subject of any affected transaction or proposed affected transaction;";
- (e) by the substitution in subsection (1) for the definition of "rules" of the following definition:
- "rules" means the rules made or amended from time to time by the panel and approved by the Minister and published by him by notice in the Gazette;";
- (f) by the substitution in subsection (1) for the definition of "security" of the following definition:
- "security" means any shares in the capital of a company and includes stock and debentures convertible into shares and any rights or interests in a company or in or [to] in respect of any such shares, stock or debentures, and includes any 'financial instrument' as defined in the Financial Markets Control Act, 1989 (Act No. 55 of 1989);";
- (g) by the substitution for paragraph (aa) of subsection (2) (a) (ii) of the following paragraph:
- "(aa) any of its directors or holders of its securities who are beneficial owners as referred to in section 440G (1);"; and
- (h) by the substitution for subsection (3) of the following subsection:
- "(3) When the panel makes or amends rules, it shall, not less than one month before submitting the rules to the Minister for his approval, publish the text of the proposed rules in the Gazette, together with a statement of its intention to so submit such rules."

40 Amendment of section 440C of Act 61 of 1973, as inserted by section 4 of Act 78 of 1989

2. Section 440C of the principal Act is hereby amended—

- (a) by the substitution for paragraph (b) of subsection (1) of the following paragraph:
- "(b) supervise dealings in securities [in accordance with the provisions of this Chapter] that are contemplated in this Chapter.";
- (b) by the substitution in subsection (4) for the words preceding paragraph (a) of the following words:
- "Subject to the provisions of this Chapter, [The] the rules shall make provision for—";
- (c) by the addition to subsection (4) of the following paragraphs:
- "(e) the effective monitoring of compliance with, and enforcement of, the rules;
- (f) the dissolution of the panel."; and
- (d) by the deletion of subsection (7).

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**Substitution of section 440F of Act 61 of 1973, as inserted by section 4 of Act 78 of 1989**

3. The following section is hereby substituted for section 440F of the principal Act:

5           **“Prohibition of insider trading**

**440F. (1) Any person who, whether directly or indirectly, knowingly deals in a security on the basis of unpublished price-sensitive information in respect of that security, shall be guilty of an offence if such person knows that such information has been obtained—**

10           **(a) by virtue of a relationship of trust or any other contractual relationship, whether or not the person concerned is a party to that relationship; or**

**(b) through espionage, theft, bribery, fraud, misrepresentation or any other wrongful method, irrespective of the nature thereof.**

15           **(2) For the purposes of this section—**

**(a) ‘unpublished price-sensitive information’, in respect of a security, means information which—**

**(i) relates to matters in respect of the internal affairs of a company or its operations, assets, earning power or involvement as offeror or offeree company in an affected transaction or proposed affected transaction;**

20           **(ii) is not generally available to the reasonable investor in the relevant markets for that security; and**

**(iii) would reasonably be expected to affect materially the price of such security if it were generally available;**

25           **(b) ‘generally available’ means available in the sense that such steps have been taken, and such time has elapsed, that it can reasonably be expected that such information as referred to in paragraph (a) is or should be known to such investor as referred to in subparagraph (ii) of paragraph (a).**

30           **(3) If at criminal proceedings at which an accused is charged with an offence under subsection (1), it is proved that—**

**(a) the accused was in possession of unpublished price-sensitive information in respect of the security in question at the time of the alleged commission of the offence; or**

35           **(b) unpublished price-sensitive information was obtained in the manner contemplated in subsection (1) (a) or (b),**

**he or it shall be deemed, unless the contrary is proved, in the case of—**

40           **(i) paragraph (a), to have knowingly dealt in that security on the basis of such information;**

**(ii) paragraph (b), to have known that such information was so obtained.**

45           **(4) (a) Any person who contravenes subsection (1) shall be liable to any other person for any loss or damage suffered by that person as a result of such contravention.**

**(b) In the case of dealings in a security on a stock exchange or a financial market as defined in section 1 of the Financial Markets Control Act, 1989 (Act No. 55 of 1989), the plaintiff shall not need to prove intention or negligence towards him or it in an action contemplated in paragraph (a).**

50           **(5) The provisions of this section shall not apply to dealings in members’ interest in a close corporation.**

55           **(6) Subject to subsection (5), the Minister may, on the advice of the panel, by notice in the *Gazette* exempt any class of persons from the**

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provisions of this section on such conditions and to such extent as he may deem fit, and may at any time in like manner revoke or amend any such exemption.”.

Amendment of section 440G of Act 61 of 1973, as inserted by section 4 of Act 78 of 5 1989

4. Section 440G of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) The panel may require by notice in the Gazette that [Every] every person who is or becomes directly or indirectly the beneficial owner of more than 10 per cent, or such other percentage as may be prescribed by the panel by notice in the Gazette, of any class of any equity security (other than a security exempted in terms of the rules) which is dealt with on a stock exchange, or who is a director or an officer of the issuer of such security, [shall] lodge, at the time of the listing of such security on a stock exchange, or within 10 days after he or it becomes such beneficial owner, director or officer, a statement with the panel [(and, if such security is listed on a stock exchange, also with the stock exchange)] of the amount of all equity securities of such issuer of which he or it is the beneficial owner, and within 10 days after the close of each calendar month thereafter, if there has been any change, in such manner as may be determined by the panel by notice in the Gazette, in such ownership during such month, [shall] file with the panel [(and, if such security is listed on a stock exchange, also with the stock exchange)] a statement indicating [his ownership at the close of the calendar month and] such change in his or its ownership as has occurred during the calendar month.”.

Substitution of section 440J of Act 61 of 1973, as inserted by section 4 of Act 78 of 1989

5. The following section is hereby substituted for section 440J of the principal Act:

“**Limitation of liability**

30 440J. [No person] The panel, any committee or member thereof, or its executive director, shall not be liable in respect of anything done in good faith in the exercise or performance of a power or duty conferred or imposed by or under this Chapter.”.

Insertion of sections 440K, 440L, 440M and 440N in Act 61 of 1973

35 6. The following sections are hereby inserted after section 440J of the principal Act:

“**Compulsory acquisition of securities of minority in affected transaction**

40 440K. (1) (a) If an offer for the acquisition of securities under an affected transaction involving the transfer of securities or any class of securities of a company to an offeror, has within four months after the date of the making of such offer been accepted by the holders of not less than nine-tenths of the securities or any class of securities whose transfer is involved (other than securities already held at the date of the issue of the offer by, or by a nominee for, the offeror or its subsidiary), the offeror may at any time within two months after 45 the date of such acceptance give notice in the prescribed manner to any holder of such securities who has not accepted the said offer, that he or it desires to acquire his or its securities, and where such notice is given, the offeror shall be entitled and bound to acquire 50 those securities on the terms on which under the affected transaction the securities of the holders who have accepted the offer, were or are

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to be transferred to the offeror, unless on an application made by such holder within six weeks from the date on which the notice was given, the Court—

- 5 (i) orders that the offeror shall not be so entitled and bound; or  
(ii) imposes conditions of acquisition different from those of the offer.
- 10 (b) If the said offer has not been accepted to the extent necessary for entitling the offeror to give notice under subsection (1) (a), the Court may, on application by the offeror, issue an order authorizing him to give notice under that subsection if the Court is satisfied that—
- 15 (i) the offeror has after reasonable enquiry been unable to trace one or more of the persons holding securities to which the offer relates;
- (ii) the securities whose transfer is involved, by virtue of acceptances of the offer, together with the securities held by the person or persons referred to in subparagraph (i), amount to not less than the minimum specified in subsection (1) (a); and
- 20 (iii) the consideration offered is fair and reasonable, but the Court shall not issue an order under this paragraph unless it considers that it is just and equitable to do so having regard, in particular, to the number of holders of securities who have been traced but who have not accepted the offer.

25 (2) Where a notice has been given by the offeror under subsection (1) and the Court, on an application made by a holder of the securities who has not accepted the offer, has not ordered as contemplated in subsection (1) (a), the offeror shall, on the expiration of six weeks from the date on which the notice was given, or, if an application to the Court by such holder is then pending, after the application has been disposed of, transmit a copy of the notice to the offeree company, together with an instrument of transfer executed on behalf

30 of such holder by any person appointed by the offeror, and pay or transfer to the offeree company the amount or other consideration representing the price payable by the offeror for the securities which by virtue of this section he or it is entitled to acquire, and, subject to the payment of the stamp duties ordinarily payable, the offeree company shall thereupon register the offeror as the holder of those securities: Provided that an instrument of transfer shall not be required for any security for which a share warrant is for the time being outstanding.

35 (3) Where, in pursuance of an affected transaction referred to in subsection (1), securities of an offeree company were or are to be transferred to a person and those securities, together with any other securities of the said offeree company held by, or by a nominee for, the offeror or its subsidiary at the date of the acceptance of the offer in question, comprise or include nine-tenths of the securities in the offeree company or of any class of those securities, then—

- 40 (a) the offeror shall within a month from the date of such acceptance (unless he or it has already complied with this requirement under subsection (1)) give notice of that fact in the prescribed manner to the holders of the remaining securities or of the remaining securities of that class, as the case may be, who have not accepted the offer under the affected transaction in question; and
- 45 (b) any such holder may within three months from the giving of the notice to him require the offeror to acquire the securities in question,
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60 and where a holder gives notice under paragraph (b) in relation to any securities, the offeror shall be entitled and bound to acquire those securities on the conditions on which under the affected transaction the securities of the holders who have accepted the offer were or are to be transferred to him or it, or on such other conditions as may be agreed

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upon or as the Court on the application of either the offeror or the holder may think fit to order.

(4) Any sum, and any dividend or other sum accruing from any other consideration, received by the offeree company under this section shall be paid into a separate bank account with a banking institution registered under the Banks Act, 1965 (Act No. 23 of 1965), and any such sums, dividend or any other consideration so received shall be held in trust by the offeree company for the person entitled to the securities in respect of which the said sums, dividend or other consideration was received.

(5) In this section any reference to a 'holder of securities who has not accepted the offer' includes any holder who has failed or refused to transfer his securities to the offeror in accordance with the affected transaction.

#### Restriction in respect of affected transaction

440L. Subject to any exemption by the panel, no person shall enter into or propose an affected transaction, except in accordance with the rules.

#### Actions

440M. (1) If any person who is not exempted from compliance with the rules acts in contravention of any of the rules, the panel may apply to the Court for an order compelling such person to comply with the relevant rule, and the Court may in its discretion issue such an order.

(2) If the panel has reason to suspect that any person who is not exempted from compliance with the rules—

- (a) is likely to act in contravention of any of the rules; or
- (b) has so contravened any of the rules, or that such a contravention is likely to be continued or repeated,

the panel may apply to the Court for an order—

- (i) prohibiting the anticipated contravention referred to in paragraph (a);
- (ii) prohibiting the continuation or repetition of a contravention referred to in paragraph (b); or
- (iii) prohibiting the person concerned from continuing with an affected transaction or proposed affected transaction.

(3) If it is proved to the satisfaction of the Court, in the case of an application for an order referred to in—

- (a) subsection (2) (i), that there is a reasonable likelihood that the rule in question will be contravened by the person concerned as contemplated in subsection (2) (a);
- (b) subsection (2) (ii), that there is a reasonable likelihood that a contravention will be continued or repeated as contemplated in subsection (2) (b);
- (c) subsection (2) (iii), that there is a reasonable likelihood that a contravention has been committed or is being continued as contemplated in subsection (2) (b),

the Court may issue the relevant order applied for.

(4) Any person who contravenes any of the rules shall be liable to any other person for any loss or damage suffered by that person as a result of such contravention.

(5) The provisions of this section shall not affect the right to any remedy which any person may otherwise have.

#### Application of Maintenance and Promotion of Competition Act, 1979

440N. The provisions of the Maintenance and Promotion of Competition Act, 1979 (Act No. 96 of 1979), shall not apply to anything done by the panel in the exercise or performance of a power or duty conferred or imposed by or under this Chapter."



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Amendment of section 441 of Act 61 of 1973, as amended by section 30 of Act 111 of 1976, section 29 of Act 64 of 1977, section 27 of Act 59 of 1978, section 16 of Act 84 of 1980, section 30 of Act 83 of 1981, section 11 of Act 29 of 1985, section 15 of Act 31 of 1986 and section 5 of Act 78 of 1989

- 5 7. Section 441 of the principal Act is hereby amended—
- (a) by the substitution for paragraph (a) of subsection (1) of the following paragraph:
- 10 “(a) in section 440F (1) [or 2], to a fine not exceeding R500 000 or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment;”;
- (b) by the substitution for paragraphs (d) and (e) of subsection (1) of the following paragraphs, respectively:
- 15 “(d) in section 37, 143, 145, 145A, 146, 146A, 147 (2) (a), 148, 149, 153 (4), 156, 162, 169, 218, 219 [230, 231, 232, 233], 255, 256 (5), 260, 284, 320 (2), 424 or 440D (3) or (4), to a fine not exceeding R8 000 or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment;
- 20 (e) in section 15A, 38, 141, 153 (3), 165, 222 [224], 226, 234, 237, 238, 249 (1), 250, 251 or 275, to a fine not exceeding R4 000 or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment;”;
- (c) by the substitution for paragraph (h) of subsection (1) of the following paragraph:
- 25 “(h) in section 168, 185, 256 (6), 312 (4) [320 (1)] or 331 (1), to a fine not exceeding R4 000;”.

**Short title and commencement**

8. (1) This Act shall be called the Companies Second Amendment Act, 1990, and shall come into operation on a date fixed by the State President by proclamation in the *Gazette*.
- 30 (2) Different dates may be so fixed in respect of different provisions of this Act.