Proposed amendments to the Companies Act: more questions than answers?

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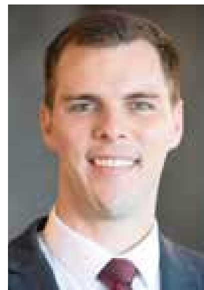
THE Companies Amendment Bill was published for public comment on September 21 last year. Although there is no proposed timeline for the implementation of the bill, it is important to consider the impact that the proposed amendments will have on corporate governance.

The bill seeks to reduce the amount of red tape for certain transactions and to provide clarity on various ambiguous provisions of the Companies Act, 71 of 2008. This article provides a high-level analysis on a few of the noteworthy proposed amendments and whether they do, in fact, achieve their intended outcome.

Intra-group financial assistance: The bill purports to lessen the transactional burden on companies providing financial assistance to their subsidiaries by excluding them from the ambit of section 45(2) of the Act. The effect of this is that shareholders will not be required to pass a special resolution to authorise the financial assistance. In addition, the board will not be required to resolve that the company would satisfy the solvency and liquidity test and that the terms of the agreement are fair and reasonable.

There are a number of issues with this proposed amendment. The definition of a subsidiary company in the Act



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is extremely broad and includes subsidiaries which are not wholly-owned as well as subsidiaries which are indirectly controlled by the company in question. Is the exclusion intended to be applicable only to companies that control their subsidiaries directly or also to companies that control their subsidiaries indirectly? It appears to apply to both. The proposed amendment also applies to subsidiaries that are not wholly-owned, which may open the door to dubious transactions which are not brought to the attention of the minority shareholders.

Share buybacks: It is proposed that a special resolution of the shareholders will need to be passed when shares are acquired by a company from its directors, prescribed officers or any person related to them, as well as when the company buys back shares from any other party. The only exception is when the buyback is on a pro rata basis or where the purchase is carried out on an exchange. The proposed amendment, unfortunately, creates more ambiguity and the implementation of it is overly onerous. It is submitted that the intention was to target only share buybacks from directors, prescribed offers and related parties and in circumstances where this was in respect of a pro rata offering or an exchange, the exemption would apply. The draft provision, however, mistakenly encompasses all share buybacks.

Amendments to the Memorandum of Incorporation: The confusion regarding when the amendments to a Memorandum of Incorporation (MOI) come into effect are clarified in the bill. Changes to the name of a company will be effective upon the Companies and Intellectual Property Commission (CIPC) issuing a registration certificate. Any other change to the MOI will be effective 10 business days after the amendment is filed with the CIPC, unless the amendment has been rejected during the window period. There will no longer be a provision for selecting a later date. Parties to any transaction agreement will need to be mindful of these time lines when negotiating the agreement.

Challenging the shareholding: The bill proposes that "any interested party" is entitled to apply to court to validate the irregular allotment, creation or issue of shares, if it is just and equitable to do so. It does not clarify the meaning of "just and equitable". What is the position if the existing shareholders do not wish to be shacked up with a shareholder who they do not trust?

The proposed amendments may have created more questions than answers. It remains to be seen what further amendments will be made before the bill comes into effect.

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