

SCHEDULE 5

TRANSITIONAL ARRANGEMENTS

Interpretation

1. (1) In this Schedule—

(a) “**general effective date**” means the date on which section 1 of this Act came into operation; and

(b) “**previous Act**” means the Companies Act, 1973 (Act No. 61 of 1973).

(2) A reference in this Schedule—

(a) to a section by number, is a reference to the corresponding section of—

(i) the previous Act, if the number is followed by the words “of the previous Act”; or

(ii) this Act, in any other case; or

(b) to an item or a subitem by number is a reference to the corresponding item or subitem of this Schedule.

(3) Despite any other provision of this Act—

(a) the Minister, by notice in the *Gazette*, may determine a date on which the Commission may assume the exercise of any particular function or power assigned to it in terms of this Act; and

(b) until a date determined by the Minister in terms of paragraph (a)—

(i) the Commission may not perform that particular function or exercise that particular power; and

(ii) the Minister has the authority to, and bears the responsibility of, exercising any such function or performing any such power assigned by this Act to the Commission.

Continuation of pre-existing companies

2. As of the general effective date, every pre-existing company that was, immediately before that date,—

(a) incorporated or registered in terms of the Companies Act, 1973 (Act No. 61 of 1973); or

(b) recognised as an “existing company” in terms of the Companies Act, 1973 (Act No. 61 of 1973),

continues to exist as a company, as if it had been incorporated and registered in terms of this Act, with the same name and registration number previously assigned to it, subject to item 4.

Pending filings

3. (1) Any matter filed with the Registrar under the Companies Act, 1973 (Act No. 61 of 1973), before the effective date and not fully addressed at that time, must be concluded by the Registrar in terms of that Act, despite its repeal.

(2) Any conversion of a company to a close corporation in terms of section 27 of the Close Corporations Act 1984 (Act No. 69 of 1984), filed with the Registrar before the effective date and not fully addressed at that time must be concluded by the Registrar in terms of that Act, despite the repeal of that section.

(3) A company that is incorporated and registered in terms of subitem (1) is regarded to—

(a) have been registered in terms of the previous Act; and

(b) be a pre-existing company for all purposes of this Act.

Memorandum of Incorporation and Rules

4. (1) Every pre-existing company—

(a) incorporated in terms of section 21 of the previous Act is deemed to have amended its Memorandum of Incorporation as of the general effective date to expressly state that it is a non-profit company, and to have changed its name in so far as required to comply with section 11(3)(b);

(b) the Articles of which imposed personal liability on its directors or past directors, as contemplated in section 53(c) of the previous Act, is deemed to have amended its Memorandum of Incorporation as of the general effective date to expressly state that it is a personal liability company, and to have changed its name in so far as required to comply with section 11(3)(b);

(c) registered in terms of the previous Act, and falling within the definition of a state-owned company in terms of this Act, is deemed to have amended its Memorandum of Incorporation as of the general effective date to have changed its name in so far as required to comply with section 11(3)(b); or

(d) limited by guarantee, other than in terms of section 21 of the previous Act—

(i) may file a notice within 20 business days after the general effective date electing to become a profit company, as from the general effective date, and to change its name in so far as required to comply with section 11(3)(b); or

(ii) if it fails to file a notice in terms of subparagraph (i), is deemed to have amended its Memorandum of Incorporation as of the general effective date to expressly state that it is a non-profit company, and have changed

its name in so far as required to comply with section 11(3)(b).

(2) At any time within two years immediately following the general effective date, a pre-existing company may file, without charge—

(a) an amendment to its Memorandum of Incorporation to bring it in harmony with this Act; and

(b) if necessary, a notice of name change and copy of a special resolution contemplated in section 16, to alter its name to meet the requirements of this Act.

(3) If, before the general effective date, a pre-existing company had adopted any binding provisions, under whatever style or title, comparable in purpose and effect to the rules of a company contemplated in section 15(3), those provisions continue to have the same force and effect—

(a) as of the general effective date, for a period of two years, or until changed by the company; and

(b) after the two year period, to the extent that they are consistent with this Act.

(4) During the period of two years immediately following the general effective date—

(a) if there is a conflict between a provision of this Act, and a provision of a Pre-existing company's Memorandum of Incorporation, the latter provision prevails, except to the extent that this Schedule provides otherwise; and

(b) despite Chapter 7, until a pre-existing company has filed an amendment contemplated in subitem (2), neither the Commission nor the Panel may issue a compliance notice to that company with respect to conduct that is—

(i) inconsistent with this Act; but

(ii) consistent with that company's Memorandum of Incorporation.

Pre-incorporation contracts

5. Section 21 does not apply with respect to a pre-existing company.

Par value of shares, treasury shares, capital accounts and share certificates

6. (1) Section 35(2) does not apply to a bank, as defined in the Banks Act, 1993 (Act No. 124 of 1993), until a date declared by the Minister, after consulting the member of the Cabinet responsible for national financial matters.

(2) Despite section 35(2) any shares of a pre-existing company that have been issued with a nominal or par value, and are held by a shareholder immediately before the effective date, continue to have the nominal or par value assigned to them when issued, subject to any regulations made in terms of subitem (3).

(3) The Minister, in consultation with the member of the Cabinet responsible for national financial matters, must make regulations, to take effect as of the general

effective date, providing for the transitional status and conversion of any nominal or par value shares, treasury shares, and capital accounts of a pre-existing company, but any such regulations must—

(a) preserve the rights of shares holders associated with such shares, as at the effective date, to the extent doing so is compatible with the purposes of this item; or

(b) provide for the company to compensate its shareholders for the loss of any such rights.

(4) A failure of any share certificate issued by a pre-existing company to satisfy the requirements of section 51(1) to (4)—

(a) is not a contravention of that section; and

(b) does not invalidate that share certificate.

Company finance and governance

7. (1) A person holding office as a director, prescribed officer, company secretary or auditor of a preexisting company immediately before the effective date, continues to hold that office as from the effective date, subject to the company's Memorandum of Incorporation, and this Act.

(2) A person contemplated in subitem (1) who, in terms of this Act, is ineligible to be, or disqualified from being a director, company secretary or auditor, is regarded to have resigned that office as from the effective date.

(3) As from the general effective date, a pre-existing company is deemed to have a number of vacancies on the board equal to the difference between—

(a) the minimum number of directors required by or in terms of this Act; and

(b) the actual number of directors of that pre-existing company immediately before the general effective date, if that number is less than the minimum referred to in paragraph (a).

(4) A vacancy in the office of director, company secretary or auditor of a pre-existing company as from the effective date, irrespective whether arising by operation of subitem (2) or (3), or otherwise, is to be filled in accordance with this Act.

(5) Despite anything to the contrary in a company's Memorandum of Incorporation, the provisions of this Act respecting—

(a) the duties, conduct and liability of directors apply to every director of a pre-existing company as from the effective date;

(b) rights in terms of this Act of shareholders to receive any notice or have access to any information apply as from the effective date to every pre-existing company;

(c) meetings of shareholders or directors, and adoption of resolutions apply as from the effective date to every pre-existing company; and

(d) Chapter 5 applies as from the effective date to every pre-existing company, except to the extent it is exempted by or in terms of that Chapter.

(6) Approval of any distribution, financial assistance, insider share issues, or options, are subject to this Act, even if any such action had been approved by a company's shareholders before the effective date, despite anything to the contrary in the company's Memorandum of Incorporation.

(7) A right of any person to seek a remedy in terms of this Act applies with respect to conduct pertaining to a pre-existing company and occurring before the effective date, unless the person had commenced proceedings in a court in respect of the same conduct before the effective date.

(8) A pre-existing company is not in contravention of this Act by reason only of a failure to—

(a) maintain any record for the duration required by section 24(1), if—

(i) the company disposed of that record before the effective date; and

(ii) at the time the company disposed of the record it was not required, by or **in terms of any public regulation, to continue to maintain that record; or**

(b) include in its notice of incorporation in terms of the previous Act a prominent statement comparable to that required by section 13(3) of this Act.

(9) A provision of the Memorandum of Incorporation of a pre-existing company comparable to a provision contemplated in section 15(2) has the same validity after the effective date that it had immediately before that date, despite any failure of the company to have drawn attention to that provision in the manner required by section 13(3).

(10) Section 19(4) applies to any provision of the Memorandum of Incorporation of a pre-existing company that is comparable to a provision contemplated in section 15(2), from the time that the company files a notice of that provision.

Company names and name reservations

8. (1) Any reservation by the Registrar of a name in terms of section 42 of the previous Act that was in effect immediately before the effective date, is regarded as having been a reservation in terms of section 12 of this Act, as from the effective date, subject to subitem (2).

(2) If the Commission believes that a reserved name contemplated in subitem (1) does not satisfy the requirements of section 11—

(a) the Commission must notify the person for whose use the name was reserved,

inviting the person to request the reservation of a substitute name that does satisfy the requirements of this Act; and

(b) the person concerned may file a request contemplated in paragraph (a), at no charge, any time within 120 business days after the date of the Commission's notice.

(3) Any registration by the Registrar of—

(a) a translation or shortened form of a name, in terms of section 43 of the previous Act that was in effect immediately before the effective date, is deemed to be a registration of that name, as if it had been registered as a name of the company concerned in terms of this Act; or

(b) a defensive name, in terms of section 43 of the previous Act that was in effect immediately before the effective date must be regarded as if it had been reserved in terms of section 12 of this Act, as from the effective date, but any such reservation of a name expires on the earlier of—

(i) the date the name is used by a company incorporated by the person for who the name has been reserved; or

(ii) the second anniversary of the general effective date.

Continued application of previous Act to winding-up and liquidation

9. (1) Despite the repeal of the previous Act, until the date determined in terms of subitem (4), Chapter 14 of that Act continues to apply with respect to the winding-up and liquidation of companies under this Act, as if that Act had not been repealed subject to subitems (2) and (3).

(2) Despite subitem (1), sections 343, 344, 346, and 348 to 353 do not apply to the winding-up of a solvent company, except to the extent necessary to give full effect to the provisions of Part G of Chapter 2.

(3) If there is a conflict between a provision of the previous Act that continues to apply in terms of subitem (1), and a provision of Part G of Chapter 2 of this Act with respect to a solvent company, the provision of this Act prevails.

(4) The Minister, by notice in the *Gazette*, may—

(a) determine a date on which this item ceases to have effect, but no such notice may be given until the Minister is satisfied that alternative legislation has been brought into force adequately providing for the winding-up and liquidation of insolvent companies; and

(b) prescribe ancillary rules as may be necessary to provide for the efficient transition from the provisions of the repealed Act, to the provisions of the alternative legislation contemplated in paragraph (a).

Preservation and continuation of court proceedings and orders

- 10.** (1) Any proceedings in any court in terms of the previous Act immediately before the effective date are continued in terms of that Act, as if it had not been repealed.
- (2) Any order of a court in terms of the previous Act, and in force immediately before the effective date, continues to have the same force and effect as if that Act had not been repealed, subject to any further order of the court.

General preservation of regulations, rights, duties, notices and other instruments

- 11.** (1) Any right or entitlement enjoyed by, or obligation imposed on, any person in terms of any provision of the previous Act, that had not been spent or fulfilled immediately before the effective date is a valid right or entitlement of, or obligation imposed on, that person in terms of any comparable provision of this Act, as from the date that the right, entitlement or obligation first arose, subject to the provisions of this Act.
- (2) A notice given by any person to another person in terms of any provision of the previous Act must be considered as notice given in terms of any comparable provision of this Act, as from the date that the notice was given under the previous Act.
- (3) A document that, before the effective date, had been served in accordance with the previous Act must be regarded as having been satisfactorily served for any comparable purpose of this Act.
- (4) An order given by an inspector, in terms of any provision of the previous Act, and in effect immediately before the effective date, continues in effect, subject to the provisions of this Act.

Transition of regulatory agencies

- 12.** (1) The person who occupied the post of chief executive officer of the Companies and Intellectual Property Registration Office immediately before the general effective date, must be regarded as having been appointed on the general effective date as the Commissioner in terms of section 189, for a term to be determined by the Minister.
- (2) A person in the employ of the Companies and Intellectual Property Registration Office or the Office of Companies and Intellectual Property Enforcement in the Department of Trade and Industry becomes an employee of the Commission on the effective date.
- (3) The transfer of departmental employees to the Commission must be effected in accordance with—
- (a) section 197 of the Labour Relations Act, 1995 (Act No. 66 of 1995); and

(b) any collective agreement reached between the State and the trade union parties of the Departmental Chamber of the Public Service Bargaining Council before the effective date.

(4) A person referred to in subitem (2) remains subject to any decisions, proceedings, rulings and directions applicable to that person immediately before the effective date, and any proceedings against such a person, that were pending immediately before the effective date, must be disposed of as if this Act had not been enacted.

(5) Any person transferred in terms of subitems (2) and (3)—

(a) remains a member of the Government Employees' Pension Fund mentioned in section 2 of the Government Employees' Pension Law, 1996 (Act No. 21 of 1996); and

(b) is entitled to pension and retirement benefits as if that person were in service in a post classified in a division of the public service mentioned in section 8(1)(a)(i) of the Public Service Act, 1994 (Proclamation No. 103 of 1994).

(6) As of the general effective date—

(a) all movable assets of the state which were used by or which were at the disposal of the Companies and Intellectual Property Registration Office and the Office of Company and Intellectual Property Enforcement in the Department immediately before the effective date, except those assets excluded by the Minister, become the property of the Commission;

(b) all contractual rights, obligations and liabilities of the Company and Intellectual Property Registration Office are vested in the Commission;

(c) all financial, administrative and other records of the Company and Intellectual Property Registration Office, including all relevant documents in the possession of that office immediately before the effective date, are transferred to the Commission; and

(d) the assets and liabilities of the Securities Regulation Panel established by section 440B of the Companies Act, 1973, are transferred to and are assets and liabilities, respectively, of the Panel.

(7) Subject to subitem (8), on the general effective date—

(a) the person, if any, holding office immediately before that date, as a member, chairperson, deputy chairperson or Executive Director of the Securities Regulation Panel appointed in terms of the Companies Act, 1973, is regarded to have been appointed as a member, chairperson, deputy chairperson or Executive Director, respectively of the Panel in terms of this Act;

(b) any person in the employ of the Securities Regulation Panel becomes an employee of the Panel;

(c) the terms and conditions of office or employment of a person contemplated in this subitem are identical to the terms and conditions of office or employment subsisting between that person and the Securities Regulation Panel immediately before the general effective date, subject to any further determination by the Panel in the exercise of its authority set out in sections 200(1), 200(2)(b) and 210(3); and

(d) any person contemplated in this subitem who, as an employee or office holder of the Securities Regulation Panel immediately before the general effective date, had any rights to participate in, or vested rights in terms of, any pension scheme or medical scheme, retains those rights, subject to any further determination by the Panel in the exercise of its authority set out in sections 200(1), 200(2)(b) and 210(3).

(8) If, after the general effective date, a person referred to in subitem (7)(c) or (d)—
(a) resigns from an office in, or terminates that person's employment by, the Panel; and

(b) is subsequently appointed to an office within, or re-employed by, the Panel, sections 200(1), 200(2)(b) and 210(3) apply with respect to that person as if the person were being so appointed or employed by the Panel for the first time.

(9) The registers of companies, external companies, reserved names, and delinquent directors, respectively, as maintained by the Companies and Intellectual Property Registration Office in terms of the previous Act are each continued as the register of companies, external companies, reserved names, and directors, respectively, required to be established by the Commission in terms of this Act.

Continued investigation and enforcement of previous Act

13. (1) Despite the repeal of the previous Act—

(a) any investigation by the Minister or the Registrar in terms of the previous Act and pending immediately before the effective date, may be continued by the Commission;

(b) any investigation or other matter being considered by the Securities Regulation Panel in terms of the previous Act and pending immediately before the effective date, may be continued by the Panel; and

(c) for a period of three years after the effective date—

(i) the Commission may exercise any power of the Registrar, or the Panel may exercise any power of the Securities Regulation Panel, in terms of the previous Act to investigate and prosecute any breach of that Act that occurred during the period of three years immediately before the

effective date, subject to subitem (2); and

(ii) a court may make any order that could have been made in the circumstances by a court under that Act.

(2) In exercising authority under subsection (1), the Commission or Panel, respectively, must conduct the investigation or other matter in accordance with the previous Act.

Regulations

14. On the effective date, and for a period of 60 business days after the effective date, the Minister may make any regulation contemplated in this Act without meeting the procedural requirements set out in section 223 or elsewhere in this Act, provided the Minister has published those proposed regulations in the *Gazette* for comment for at least 30 business days.