



**REPUBLIC OF SOUTH AFRICA**



**EXPLANATORY MEMORANDUM**

**ON THE**

**THE SECURITIES TRANSFER TAX BILL, 2007**



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## INTRODUCTION

The Stamp Duties Act (“SDA”) caters for unlisted securities and leases whereas the Uncertificated Securities Tax Act (“USTA”) caters for listed securities. The dichotomy in events that give rise to the tax payable, results in anomalies and also complicates the administration of the tax/duties.

In view of the above, it is proposed that the securities aspect of both Acts will be merged into the proposed Bill to provide for the levying of tax on listed and unlisted securities in respect of every change in beneficial ownership of the securities. This merger will ensure that the rules relating to both listed and unlisted securities will be comparable, and the tax will be called the Securities Transfer Tax (“STT”). The basic premise is that Uncertificated Securities Tax will be the starting point. However, the proposal will take into account unlisted securities taxable under the SDA.

Described below are provisions that relate to pre-existing, changed and new provisions included in the proposed Act.

### Clause 1

This clause provides for a number of definitions of words and expressions used in the Bill.

**“change in beneficial ownership” [changed]** in relation to a security includes the cancellation or redemption of that security but does not include—

(a) any issue of that security;

(b) a cancellation or redemption of that security if the company or close corporation which issued the security is being wound up, liquidated or deregistered or its corporate existence is being finally terminated;

This definition of beneficial ownership is the trigger for STT and is linked to the new definition of security. It clarifies that a change in beneficial ownership takes place whenever securities are cancelled or redeemed, and where a security consists of any acquisition of any of the rights or entitlements attaching to a security. The concept of beneficial ownership relates to economic ownership, as opposed to the mere registration of a security as in the case of a share registered in the name of a nominee.

However, there is an exclusion for the issue of securities (and also for companies being wound up, liquidated or deregistered. The exclusion for share issues encourages company formations and equity financing.

**“close corporation” [new]** means a close corporation as referred to in the Close Corporation Act, 1984 (Act No. 69 of 1984);

The proposed Act does not provide incentives for close corporations, which are to be phased out by the Department of Trade and Industry. However, current relief is provided for in the definition of change in beneficial ownership with regard to issues and liquidations. As a practical matter, the issuing of securities and liquidations probably constitute the majority of transactions in which close corporations will be involved.

**“closing price” [pre-existing]** means the closing price, on the date of the transaction or other manner of acquisition of a listed security, at which that security was traded on the exchange on which it is listed, as determined by that exchange on each day on which trade in that security occurs on that exchange: Provided that where the security was not traded on the date of the transaction or other manner of acquisition, the closing price of that security will be deemed to be the closing price on the last business day, preceding the date of the transaction or other manner of acquisition, on which that security was traded on that exchange;

**“Commissioner” [pre-existing]** means the Commissioner for the South African Revenue Service;

**“company” [new]** means any corporation or company incorporated, established or formed under any law;

The purpose of this definition is to cover all South African companies as well as foreign companies listed on an exchange in the Republic. This definition however, excludes cooperatives.

**“exchange” [pre-existing]** means an ‘exchange’ as defined in section 1 of the Securities Services Act, 2004 (Act No. 36 of 2004) and licensed under section 10 of that Act;

**“Income Tax Act” [new]** means the Income Tax Act, 1962 (Act No. 58 of 1962);

This definition is introduced for ease of reference.

**“lending arrangement” [pre-existing]** means any arrangement in terms of which—

(a) a person (hereinafter referred to as the lender) lends a listed security to another person (hereinafter referred to as the borrower) in order to enable that borrower to effect delivery (other than to any lender in relation to that borrower unless the borrower can demonstrate that the arrangement was not entered into for purposes of the avoidance of tax and was not entered into for purposes of keeping any position open for more than 12 months) of that security within 10 business days after the date of transfer of that security from the lender to the borrower in terms of that arrangement;

(b) that borrower in return contractually agrees in writing to deliver a listed security of the same kind and quality to that lender within a period of 12 months from

the date of transfer of that security from the lender to the borrower in terms of that arrangement;

- (c) that borrower is contractually required to compensate that lender for any distributions in respect of the listed security which that lender would have been entitled to receive during that period had that arrangement not been entered into; and
- (d) that arrangement does not affect the lender's benefits or risks arising from fluctuations in the market value of the listed security:

Provided that where—

- (i) that borrower has not on-delivered the listed security within the period referred to in paragraph (a); or
- (ii) that borrower has not returned the listed security as referred to in paragraph (b) to the lender within the period referred to in that paragraph, that arrangement is treated not to be a lending arrangement;

**“listed security” [new]** means any security that is listed on an exchange;

This definition is in line with the intended coverage of this Act, so as to distinguish between listed and unlisted securities.

**“lowest price” [pre-existing]** means the lowest price, on the date of the transaction or other manner of acquisition of a listed security, at which that security was traded on the exchange on which it is listed, as determined by that exchange on each day on which trade in that security occurs on that exchange: Provided that where that security was not traded on the date of the transaction or other manner of acquisition, the lowest price of that security will be deemed to be the lowest price on the last business day, preceding the date of the transaction or other manner of acquisition, on which that security was traded on that exchange;

**“member” [pre-existing]** means any person who is an ‘authorised user’ as defined in section 1 of the Securities Services Act, 2004 (Act No. 36 of 2004), providing such securities services as the exchange rules permit including services in respect of the buying and selling of a listed security;

**“Minister” [new]** means the Minister of Finance;

This definition is introduced for ease of reference.

**“participant” [pre-existing]** means a person that holds in custody and administers a listed security or an interest in a listed security and that has been accepted in terms of section 34 of the Securities Services Act, 2004 (Act No. 36 of 2004), by a central securities depository as a participant in that central securities depository;

**“person” [changed]** includes-

- (a) any sphere of the Government of the Republic;
- (b) any body of persons (corporate or unincorporated);

- (c) the estate of any deceased or insolvent person;
- (d) any trust fund; and
- (e) any portfolio comprised in any collective investment scheme in securities contemplated in Part IV of the Collective Investment Schemes Control Act, 2002 (Act No. 45 of 2002);

This definition is in line with the VAT Act definition. However, collective investment schemes have also been added to the definition (which is in line with the Income Tax Act treatment of portfolios of CISs).

**“prescribed rate” [pre-existing]**, in relation to any interest payable in terms of this Act, means the rate as the Minister may from time to time fix by notice in the *Gazette* in terms of section 80(1)b) of the Public Finance Management Act, 1999 (Act No. 1 of 1999): Provided that where the Minister fixes a new rate in terms of that Act, that new rate applies for purposes of this Act from the first day of the second month following the date on which that new rate came into operation;

**“Republic” [new]** means the ‘Republic’ as defined in section 1 of the Income Tax Act;

This definition is collateral to the clarification of the source rules for establishing whether a security is subject to tax on shares i.e. listed on an exchange in the Republic ( i.e. the JSE)

**“security” means [changed]—**

- (a) any share in a company;
- (b) any depository receipt in a company; or
- (c) any right or entitlement —
  - (i) to receive any dividend payable in respect of a share or a member’s interest; or
  - (ii) to exercise or cause to be exercised in the ordinary course of events, any or all of the conversion, redemption or other rights attaching to a share or a member’s interest,

excluding—

- (aa) the right to vote; and
- (bb) the debt portion in respect of a share linked to a debenture;

The STTA contains a holistic version of the security definition in one location. The references to “share” and “beneficial ownership” in the USTA will fall away. The security definition essentially acts as the base for the new STT.

The securities definition (i.e. the tax base consists of a change in beneficial ownership in securities) will cover all shares in a company (not just equity share capital), all members' interests in a close corporation and depository receipts. These items will essentially form the majority of items subject to the STT. Debts will generally remain outside the net (as under the SDA and USTA). Interests in collective investment schemes in the form of unit trusts also fall outside the scope of the STT because a unit trust interest in a trust is not a share.

Partial rights in shares will additionally fall within the STT to the extent those rights represent a right to receive dividends or the right to cause a conversion and a redemption or other rights attaching to a share (or a member's interest). However, the right to vote is fully excluded because separate taxation of this item is impractical and not readily quantifiable. In terms of dividend rights, a cession of dividend rights would fall under the STT because the holder has a right to dividends. On the other hand, a right to manufactured dividends would fall outside the regime because no actual right to dividends exists (i.e. the taxpayer has a right only to an amount equal to a dividend).

Lastly, in the case of linked units, only the share portion (i.e. the non-debt portion) is subject to the STT.

**“tax” [pre-existing]** means the tax payable in terms of this Act;

**“unlisted security” [new]** means any security other than a listed security;

This definition is in line with the intended coverage of this Act, which covers both listed and unlisted securities.

### **Imposition of tax: Clause 2 [changed]**

Subclause 1:

This clause provides that a tax, to be known as the securities transfer tax, shall be levied and paid for the benefit of the National Revenue Fund, in respect of - every change in beneficial ownership in, any security issued by a company-

(a) incorporated, established or formed inside the Republic; or

(b) incorporated, established or formed outside the Republic and listed on an exchange,

at the rate of 0,25 per cent of the taxable amount of the securities.

This clause provides the scope for the taxation of listed and unlisted securities. It covers all South African companies as well as foreign companies listed on an exchange in the Republic (i.e. JSE).

Subclause 2 [pre-existing]

This clause provides that the Minister may announce the reduction of the rate mentioned in subclause (1) as well as a change in the provisions of the STTA that will have the effect that the change in beneficial ownership in any security will no longer be subject to securities transfer tax.

Subclause 3 [pre-existing]

This clause provides that if the Minister makes the announcement referred to in subclause (2), that reduction or change comes into effect on the date announced and continues to apply for a period of six months from that date, unless Parliament passes legislation giving effect to that announcement within the six months.

**Purchase of listed securities through or from a member:**

**Clause 3 [pre-existing]**

Subclause 1

This clause provides that the taxable amount in respect of the change in beneficial ownership as a result of every purchase of a listed security through the agency of or from a member is the consideration for which that security is so purchased.

Subclause 2

This clause provides that the member is to be liable for the tax payable in respect of the change in beneficial ownership of a listed security contemplated in this clause.

**Change in beneficial ownership in listed securities effected by a participant:**

**Clause 4 [pre-existing]**

Subclause 1

This clause provides that the taxable amount in respect of any change in beneficial ownership in a listed security effected by a participant, other than pursuant to a purchase from or through a member, is –

- (a) where all the rights and entitlements in that security are acquired-
  - (i) the amount of the consideration for that security declared by the person who acquires beneficial ownership of that security; or
  - (ii) if no amount is declared or the amount so declared is less than the lowest price of that security, the closing price of that security; or
- (b) where not all the rights or entitlements in that security are acquired, the greater of-
  - (i) the amount of the consideration declared by the person who acquires beneficial ownership of those rights or entitlements; or
  - (ii) the fair market value of those rights or entitlements on the date of acquisition.

Subclause 2

The participant who effects the transfer on behalf of the beneficial owner is liable for the tax payable in respect of the change in beneficial ownership of the listed security in terms of this clause.

**Other transactions in listed securities:**  
**Clause 5 [changed slightly]**

Subclause 1

This clause provides that the taxable amount in respect of other transactions, other than pursuant to a purchase from or through a member of the JSE or change in beneficial ownership effected by a participant, is –

- (a) where all the rights or entitlements in that security are acquired-
  - (i) the amount declared by the person who acquires beneficial ownership as consideration paid for the security; or
  - (ii) if no amount is declared or the amount so declared is less than the fair market value of the listed security, the ruling price of the security one day prior to the date on which the transfer of the security is effected by the participant.
- (b) where not all the rights or entitlements in that security are acquired, the greater of-
  - (i) the amount of the consideration declared by the person who acquires beneficial ownership of those rights or entitlements; or
  - (ii) the fair market value of those rights or entitlements on the date of acquisition.

This clause provides for other transactions not covered in clauses 3 and 4, and is in respect of any change in beneficial ownership in a listed security (or part thereof). As is currently the case in the USTA, it protects the tax base against changes in beneficial ownership that take place outside the ambit of brokers and participants.

Subclause 2

The person who acquires the beneficial ownership of the listed security is liable for the tax payable as referred to in this clause. (Note that this includes acquisitions in whatever form, and as such includes changes in sub-accounts of foreign nominee companies.)

Subclause 3

The tax payable must be paid through a member or participant holding the listed security in custody, in respect of which a person has acquired a security or where the security has been cancelled or redeemed.

**Change in beneficial ownership in unlisted securities:**  
**Clause 6 [new]**

Subclause 1

This clause provides that the taxable amount in respect of the change in beneficial ownership of an unlisted security is:-

(a) the market value of the consideration given or, where no consideration is given or the consideration is less than the value of that security, the value of that security; or

(b) in the case of the cancellation or redemption of an unlisted security, the greater of the market value of that security immediately prior to the cancellation or redemption and the amount payable in respect of the cancellation or redemption of that security, the market value of that security immediately prior to the cancellation or redemption: Provided that the market value must be determined as if that security was never cancelled or redeemed.

Subclause 2

The company which issued the unlisted security is liable for the tax payable in respect of a change in beneficial ownership of that security referred to in this clause.

This clause provides for the taxation of changes in beneficial ownership that relate to unlisted securities, currently not provided for in the USTA. Reliance on market value is consistent with the rules for listed shares.

**Tax recoverable from persons who acquire the security or the rights or entitlements in a security:**  
**Clause 7 [changed slightly]**

Subclause 1

This clause provides that on respect of a listed security, a member or participant may recover the amount of the tax payable by that member or participant from the person who-

- (a) acquires beneficial ownership in a listed security or
- (b) cancels or redeems a listed security.

Subclause 2

This clause provides that in respect of an unlisted security, the company which issued that security and paid the tax to the Commissioner may recover that tax from the person who has acquired beneficial ownership in that security.

This clause provides for the recovery of tax from the person who acquires the security (including any of the rights or entitlements in a share or member's interest).

**Exemptions:**  
**Clause 8 [changed]**

With the partial merger of the SDA and USTA, the exemptions contained in those Acts were reviewed and since the definition of beneficial ownership included economic change in rights, the relevant exemptions were retained, and the obsolete

were deleted. This clause contains the exemptions applicable to changes in beneficial ownership in listed and unlisted securities.

#### Subclause 1

Includes the following exemptions in respect of a change in beneficial ownership in a security –

#### **Corporate reorganisation exemptions [changed]:**

- (a) if the beneficial ownership is acquired by a person in terms of the following transactions referred to in the Income Tax Act—
  - (i) in terms of an asset for share transaction referred to in section 42 of that Act;
  - (ii) in terms of an amalgamation transaction referred to in section 44 of that Act;
  - (iii) in terms of an intra-group transfer referred to in section 45 of that Act;
  - (iv) in terms of an unbundling transaction referred to in section 46 of that Act;
  - (v) in terms of a liquidation distribution referred to in section 47 of that Act; or
  - (vi) in terms of any transaction which would have constituted a transaction or distribution referred to—
- (A) in subparagraphs (i) to (v) regardless of whether or not an election has been made for the provisions of that section to apply;
- (B) in subparagraph (i) or (iii) regardless of the market value of the asset disposed of in exchange for that security; or
- (C) in subparagraphs (i) to (v) regardless of whether or not that person acquired that security as capital assets or as trading stock,

where the public officer of the relevant company has made a sworn affidavit or solemn declaration that the acquisition of that security complies with the provisions of this paragraph;

There are minor changes made to these exemptions which are in line with recent changes to the Income Tax Act.

#### **Securities lending transactions [pre-existing]:**

- (b) if the change in beneficial ownership is from a lender to a borrower, or *vice versa*, in terms of a lending arrangement and the person who has acquired such beneficial ownership has certified to the participant that the change is in terms of such lending arrangement;

#### **Transfer between pension funds [pre-existing]:**

- (c) if the change in beneficial ownership is from a pension fund to another pension fund both of which are registered under the Pension Funds Act, 1956 (Act No. 24 of 1956), and that change is made in pursuance of a scheme referred to in section 14(1) of that Act;

**Acquisition by a PBO [pre-existing]:**

- (d) if the beneficial ownership is acquired by a public benefit organisation which is exempt from tax in terms of section 10(1)(cN) of the Income Tax Act, if the duty thereon would be legally payable and borne by that public benefit organisation;

**Acquisition by an institution, board or body [pre-existing]:**

- (e) if the beneficial ownership is acquired by an institution, board or body, which is exempt from tax in terms of the provisions of section 10(1)(cA)(i) of the Income Tax Act, which has as its sole or principal object the carrying on of any public benefit activity referred to in section 30, if the tax thereon would be legally payable and borne by such institution, board or body.

**Interest in a collective investment scheme [pre-existing]:**

- (f) to the extent that the security is a participatory interest in a collective investment scheme regulated in terms of the Collective Investment Schemes Control Act, 2002 (Act No. 45 of 2002);

Generally interests in collective investment schemes are outside the net because they operate in the form of trusts (i.e. they are not shares). This exemption ensures that STT does not apply even if collective investment schemes operate in a company form.

**Transfer by will [pre-existing]:**

- (g) if the beneficial ownership is acquired by a beneficiary entitled thereto under a trust created in accordance with a will;

**Redistribution of assets in a deceased estate [pre-existing]:**

- (h) if the person who acquires beneficial ownership is an heir or a legatee who has acquired the security *ab intestatio* or by way of testamentary succession or as a result of a redistribution of the assets of a deceased estate in the process of liquidation;

**Acquisition by a spouse in community of property [new]:**

- (i) if the person who acquires beneficial ownership is a spouse in a marriage in community of property who acquires an undivided half-share in that security by

operation of law by virtue of the contraction of such marriage, if that security was acquired by the other spouse prior to the date of that marriage;

This definition is in line with the Transfer Duty Act exemption.

**Acquisition by surviving or divorced spouse [New]:**

- (j) if the person who acquires beneficial ownership is a surviving or divorced spouse who acquires a security from his or her deceased or divorced spouse where that security is transferred to that surviving or divorced spouse as a result of the death of his or her spouse or dissolution of their marriage or union;

This definition is in line with the Transfer Duty Act exemption.

**Acquisition by any sphere of Government [pre-existing]:**

- (k) acquired by any sphere of the Government of the Republic or by any sphere of the government of any other country;

**Water services provider [pre-existing]:**

- (l) acquired by any “water services provider” as defined in section 1 of the Income Tax Act;

**Regional electricity distributor [pre-existing]:**

- (m) acquired by any “regional electricity distributor” as defined in section 1 of the Income Tax Act, until 1 January 2014 or a later date that may be determined by the Minister by Notice in the *Gazette*;

**Unlisted security [pre-existing]:**

- (n) if that security is an unlisted security which in terms of the Transfer Duty Act, 1949 (Act No. 40 of 1949), constitutes a transaction for the acquisition of property that is subject to transfer duty;

This exemption prevents any double taxation of securities (i.e. from STT and Transfer duty).

**Share in a share block company [pre-existing]:**

- (o) if that security is a share in a share block company as defined in section 1 of the Share Block Control Act, 1980 (Act No. 59 of 1980), which confers a right to or an interest in the use of immovable property.

This exemption prevents any double taxation of securities (i.e. from STT and Transfer duty).

**Acquisition by traditional councils [pre-existing]:**

(p) acquired by any traditional council as referred to in the Communal Land Rights Act, 2004 (Act No. 11 of 2004), until a date that may be determined by the Minister by Notice in the *Gazette*;

**Acquisition by a member [pre-existing]:**

(q) if the person who acquires beneficial ownership is a member who has purchased the security for his, her or its own account and benefit.

Subclause 2 [pre-existing]

Provides that the Commissioner may prescribe any declaration to be submitted by any person to the participant in respect of any security referred to in subclause (1)

Subclause 3 [pre-existing]

Provides that no exemption applies in respect of any change in beneficial ownership in any in security referred to in this section unless a declaration in respect of that security is lodged with a participant.

**Schemes for obtaining undue tax benefits:**

**Clause 9 [changed]**

Provides that the Commissioner must determine the liability for tax, penalties and interest imposed by this Act and the amount thereof is satisfied that any transaction, operation, scheme or understanding has been entered into or carried out in the manner listed in this clause.

This clause provides for the Commissioner to determine liability for tax, as well as penalties and interest.
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**Effect of certain exemptions from taxes:**

**Clause 10 [new]**

Provides that no exemption will be allowed for by any other law will apply to the tax levied under this Act.

There are many Acts with miscellaneous exemptions, this clause provides that this Act is the sole Act that governs this tax.
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**Clause 11**

Provides for the repeal of the USTA, This clause further provides that the provisions of the USTA, must apply in respect of any change in beneficial ownership in any security before the date of the repeal of that Act, as if that Act had not been so repealed.

## **Clause 12**

Provides the short title of the Bill and also provides that the Bill will come into operation on 1 July 2008.