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Regulatory agencies in terms of the Companies Act 71 of 2008

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Introduction

Set out below is a brief overview of the main functions of regulatory agencies to be established by the new Companies Act 71 of 2008 ("Companies Act"), and of the remedies and enforcement procedures which these entities will make available to any person entitled to apply for relief. The Companies Act intends to establish one new institution, namely the Companies Tribunal, and to transform the three existing entities, namely the Companies and Intellectual Property Registration Office ("CIPRO"), the Securities Regulation Panel ("SRP"), and the Financial Reporting Standards Council ("FRSC"), into new bodies to be established as discussed below.

Item 12 of Schedule 5 to the Companies Act provides for transitional arrangements in respect of the existing entities. Note that the effective date of the Companies Act will not be earlier than one year following the date on which the President assented to the Companies Act (i.e. 9 April 2009).

The Companies and Intellectual Property Commission

The Companies Act establishes the Companies and Intellectual Property Commission ("the Commission") as a juristic person with functions similar to that of CIPRO, but with significantly expanded functions and powers.

The Commission will thus similarly to CIPRO, be tasked with registration and deregistration of companies and external companies, other juristic persons and intellectual property rights in terms of any applicable legislation. The Commission will also be

required to maintain such information in relevant registers in the prescribed manner and form and provide the information to the public and to other organs of state.

Other than with respect to matters within the jurisdiction of the Takeover Regulation Panel, the Commission must also enforce the Companies Act, by, among other things, promoting voluntary resolution of disputes between a company on the one hand and a shareholder or director on the other, as contemplated in Part C of Chapter 7, without intervening in, or adjudicating any such dispute. Part C of Chapter 7 allows for voluntary resolution of disputes by, amongst others, the Companies Tribunal or an entity accredited by the Commission.

The Commission is empowered to accredit a juristic person or an association of persons, with or without conditions, that functions predominantly to provide conciliation, mediation or arbitration services; has the demonstrated capacity to perform such services within the context of company law; and satisfies the requirements for accreditation, as prescribed by the Minister, after consulting the Commission. The Commission is obligated to monitor the effectiveness of any accredited person or an association relative to the purposes and policies of the Companies Act.

The enforcement of the Companies Act by the Commission also entails receiving or initiating complaints concerning alleged contraventions, evaluating those complaints, and initiating investigations into complaints. The Minister, by notice in the *Gazette*, may issue policy directives to the Commission with respect to the application, administration and enforcement of the

Companies Act, and may at any time direct the Commission to investigate alleged contraventions, or any circumstances relating to the administration of one or more companies, whether or not those circumstances appear at the time of the direction to amount to a possible contravention.

If a matter has been investigated and the Commission and the respondent have agreed a resolution of the complaint, the Commission may record the resolution in the form of an order; and if the person who is the subject of the complaint consents to that order, applies to the High Court to have it confirmed as a consent order, in terms of its rules.

The Commission must also promote the reliability of financial statements by, among other things, monitoring patterns of compliance with, and contraventions of, financial reporting standards; and making recommendations to the FRSC for amendments to financial reporting standards, to secure better reliability and compliance.

The Takeover Regulation Panel

The Companies Act further establishes the Takeover Regulation Panel ("the Panel") as a juristic person with powers similar to the existing SRP.

The Panel will be responsible to regulate "affected transactions" and "offers" as defined, to the extent provided for and in accordance with Parts B and C of Chapter 5 and the Takeover Regulations (Part B of Chapter 5 deals with the authority of the Panel and with the Takeover Regulations. Part C deals with the regulation of affected transactions and offers). Note that the definition of affected transaction quoted below refers to a "regulated company". A regulated company is a company to which Parts B and C of Chapter 5 and the Takeover Regulations apply as determined in accordance with section 118(1) and (2). Briefly, regulated companies will include public companies, state-owned companies except to the extent exempted, as well as private companies, subject to certain requirements set out in section 118(1) and (2).

The Minister, in consultation with the Panel, is responsible for prescribing the Takeover Regulations, which will provide, among other things, for compliance with and enforcement of the provisions of Parts B and C of Chapter 5, the administration, operation and procedures of the Panel; prescribed fees and levies imposed in terms of an Act of Parliament on certain companies; and any other matters relating to the powers and functions of the Panel. The detailed provisions will thus be contained in the Takeover Regulations which have not yet been published.

An affected transaction is defined in section 117(c) as:

"(i) a transaction or series of transactions amounting to the disposal of all or the greater part of the assets or undertaking of a regulated company, as contemplated in section 112, subject to section 118(3);

(ii) an amalgamation or merger, as contemplated in section 113, if it involves at least one regulated company, subject to section 118(3);

(iii) a scheme of arrangement between a regulated company and its shareholders, as contemplated in section 114, subject to section 118(3);

(iv) the acquisition of, or announced intention to acquire, a beneficial interest in any voting securities of a regulated company to the extent and in the circumstances contemplated in section 122(1);

(v) the announced intention to acquire a beneficial interest in the remaining voting securities of a regulated company not already held by a person or persons acting in concert;

(vi) a mandatory offer contemplated in section 123; or

(vii) compulsory acquisition contemplated in section 124".

An offer is defined as "a proposal of any sort, including a partial offer, which, if accepted, would result in an affected transaction other than such a transaction that is exempted in terms of section 118(3)". (Section 118(3) provides for exemption of certain affected transactions pursuant to or contemplated in an approved business rescue plan.)

The Panel is required to regulate any affected transaction or offer without regard to the commercial advantages or disadvantages of any transaction or proposed transaction, in order to:

- ▶ ensure the integrity of the marketplace and fairness to the holders of the securities of regulated companies;
- ▶ ensure the provision of necessary information to holders of securities of regulated companies, to the extent required to facilitate the making of fair and informed decisions with adequate time for regulated companies and holders of their securities to obtain and provide advice with respect to offers; and
- ▶ prevent actions by a regulated company designed to impede, frustrate, or defeat an offer, or the making of fair and informed decisions by the holders of that company's securities.

The Panel is further obligated to regulate any affected transaction or offer, and the conduct of the parties in respect of any such transaction or offer, in a manner that promotes the objectives set out above and which ensures that:

- ▶ no person may enter into an affected transaction unless that person is ready, able and willing to implement that transaction;
- ▶ all holders of any particular class of voting securities of an offeree regulated company are afforded equivalent treatment, and voting securities of an offeree regulated company are afforded equitable treatment, having regard to the circumstances;
- ▶ no relevant information is withheld from the holders of relevant securities; and
- ▶ all holders of relevant securities receive the same information from an offeror, potential offeror, or offeree regulated company during the course of an affected transaction, or when an affected transaction is contemplated and are provided sufficient information, and permitted sufficient time, to enable them to reach a properly informed decision.

In carrying out its mandate, the Panel may:

- ▶ require the filing, for approval or otherwise, of any document with respect to an affected transaction or offer;
- ▶ issue clearance notices, if the Panel is satisfied that the offer or transaction satisfies the requirements set; and
- ▶ initiate or receive complaints, conduct investigations, and issue compliance notices, with respect to any affected transaction or offer, in accordance with Chapter 7, and the Takeover Regulations. The Minister may also direct the Panel to investigate alleged contraventions or other specified circumstances.

A compliance order issued by the Panel may, among other things, prohibit or require any action by a person, or order a person to divest of an acquired asset, or account for profits. Other functions of the Panel include applying for a court order to wind up a company, in the manner contemplated in section 81(1)(f) and consulting with the Minister in respect of additions, deletions or amendments to the Takeover Regulations.

The Panel may also wholly or partially, and with or without conditions, exempt an offeror to an affected transaction or an offer from the application of any provision if there is no reasonable potential of the affected transaction prejudicing the interests of any existing holder of a regulated company's securities, the cost of compliance is disproportionate relative to the value of the affected transaction, or doing so is otherwise reasonable and justifiable in the circumstances having regard to the principles and purposes of Parts B and C of Chapter 5 and the Takeover Regulations.

In exercising its powers and performing its functions the Panel must not express any view or opinion on the commercial advantages or disadvantages of any transaction or proposed transaction. As is the case with the current Companies Act 61 of 1973, the intention here is that the ultimate responsibility in respect of the commercial advantages or disadvantages of any transaction or proposed transaction will lie with the holder of the securities.

The Companies Act also establishes a committee of the Panel, to be known as the Takeover Special Committee. The Takeover Special Committee may hear and decide any matter referred to it by the Panel and review compliance notices.

The Financial Reporting Standards Council

The functions of the FRSC include receiving and considering any relevant information relating to the reliability of, and compliance with, financial reporting standards; adapting international reporting standards for local circumstances; considering recommendations from the Commission for amendments to financial reporting standards and advising the Minister on matters relating to financial reporting standards.

The FRSC is also tasked with consulting with the Minister on the making of regulations establishing financial reporting standards. Note that regulations in this regard must promote sound and

consistent accounting practices, in the case of financial reporting standards, must be consistent with the International Financial Reporting Standards of the International Accounting Standards Board or its successor body and may establish different standards applicable to profit and non-profit companies and different categories of profit companies.

The Companies Tribunal

Finally, the Companies Act provides for one new body, a Companies Tribunal which is established as a juristic person with jurisdiction throughout the Republic.

The Companies Tribunal may adjudicate in relation to any application that may be made to it, and make any order as provided for in the Companies Act in respect of such an application, and in addition also serve as a forum for voluntary alternative dispute resolution. If the Companies Tribunal, or an accredited entity has resolved, or assisted parties in resolving the resolution of that dispute, the document recording the resolution of the dispute may be recorded in the form of an order, and if the parties to the dispute consent to that order, the order may be submitted to a court to be confirmed as a consent order, in terms of its rules.

Orders by the Companies Tribunal include for example, orders relating to disputes concerning reservation or registration of company names; administrative orders exempting an agreement, transaction, arrangement, resolution or provision of a company's Memorandum of Incorporation or rules from any prohibition or requirement established by or in terms of an unalterable provision of the Companies Act, other than a provision that falls within the jurisdiction of the Panel. Note that a decision by the Companies Tribunal with respect to a decision, notice or order by the Commission is binding on the Commission, subject to any review by the court. An order of the Companies Tribunal may also be filed in the High Court as an order of the court, in accordance with its rules.

Alternative procedures for addressing complaints or securing rights

From that set out above, it is clear that the Companies Act provides for various alternative procedures to address complaints, deal with disputes, contraventions of the Companies Act and enforcing provisions of a company's Memorandum of Incorporation and rules, other than applying for appropriate relief to the High Court. Disputes can thus be resolved through alternative dispute resolution by the Companies Tribunal or an accredited entity. Application can also be made to the Companies Tribunal for adjudication in respect of any matter for which such an application is permitted in terms of the Companies Act.

As explained, the Companies Act empowers the Commission and the Panel to receive and investigate complaints and to issue compliance notices. Note that in the case of the Panel, compliance notices will be issued by the Executive Director appointed by the Panel. Upon initiating or receiving a complaint, or receiving a direction from the Minister, the Commission or the Panel may,

if it thinks it expedient as a means of resolving the matter, refer the complainant to the Companies Tribunal or to an accredited entity, with a recommendation that the complainant seek to resolve the matter with the assistance of that agency, or direct an inspector or investigator to investigate the complaint as quickly as practicable, in any other case.

A compliance notice issued by the Commission remains in force until it is set aside by the Companies Tribunal or a court upon a review of the notice. A compliance notice issued by the Executive Director remains in force until set aside by the Takeover Special Committee, or a court upon a review of the notice. The Commission, or Executive Director, as the case may be, must issue a compliance certificate if the requirements of a compliance notice issued have been satisfied.

If a person to whom a compliance notice has been issued fails to comply with the notice, the Commission or the Executive Director, as the case may be, may either apply to a court for the imposition of an administrative fine; or refer the matter to the National Prosecuting Authority for prosecution as an offence in terms of section 21 of the Companies Act.



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Ina is a specialist in banking and regulatory law. Prior to joining the firm in October 2007, Ina held the position of Group Legal Counsel at Absa. She actively participated in various banking industry forums and still serves as a member of the Standing Committee for Review of the National Payment System Act. Ina graduated from RAU with a BA (Law) LLB. She later went on to complete her LLM at the same university and following this obtained an LLD from UNISA. She was a highly esteemed lecturer at both the RAU and UNISA law faculties for some 22 years. Ina has delivered many papers and contributed to various publications throughout her career.

About Werksmans Incorporating Jan S. de Villiers

Werksmans Incorporating Jan S. de Villiers is a leading South African corporate and commercial law firm focused on achieving the best legal outcome for our clients, which include multinationals, listed companies, financial institutions, entrepreneurs and government. Our firm is built on the over 100-year track record of Werksmans and Jan S. de Villiers, which merged at the beginning of 2009 to create South Africa's most powerful law firm specialising in mergers and acquisitions (M&A). For the past three consecutive years, Werksmans has been ranked by DealMakers and Ernst & Young as the law firm responsible for the highest volume of M&A transactions in South Africa.

Our firm also has a formidable reputation in commercial litigation and dispute resolution, as well as banking and finance. We are distinguished by the people, clients and work that we attract and retain - our more than 160 lawyers are a powerful team of independent-minded individuals who share a common service ethos.

Our firm is built on a solid foundation of insightful and innovative deal structuring and legal advice, as well as a keen ability to understand the greater economic forces of the marketplace.

In addition to being well established in Gauteng and the Western Cape, we offer a gateway into 26 other African countries through our African legal network, Lex Africa.



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