**Consultation process on proposed changes to Schedule 10 of the JSE Listings Requirements: Requirements for the MOI**

**13 June 2012**

**DIVIDENDS**

The Companies Act No 71 of 2008 (the “**New Act**”) has adopted the solvency and liquidity regime as it relates to distributions (including dividends) and such distributions must be must be authorised by the board.

Pursuant to the New Act, distributions, including dividends must be authorised by the board of directors. We have extracted section 46 of the New Act for ease of reference dealing with distributions.

“***Section 46 of the New Act***

*Distributions must be authorised by board.*

*(1) A company must not make any proposed distribution unless—*

*(a) the distribution—*

*(i) is pursuant to an existing legal obligation of the company, or a court order; or*

*(ii) the board of the company, by resolution, has authorised the distribution;*

*(b) it reasonably appears that the company will satisfy the solvency and liquidity test immediately after completing the proposed distribution; and*

*(c) the board of the company, by resolution, has acknowledged that it has applied the solvency and liquidity test, as set out in section 4, and reasonably concluded that the company will satisfy the solvency and liquidity test immediately after completing the proposed distribution.*”

**Schedule 10**

As a result certain provisions in Schedule 10 do not reflect the solvency and liquidity regime to be applied by directors pursuant to the New Act.

* Paragraph 10.11(g) of Schedule 10 of the Requirements stipulates the following:

*“The business of a general meeting must include the power to sanction or declare dividends”*

* Further, paragraph 10.17(a) of Schedule 10 of the Requirements stipulates the following:

*“The company in general meeting or the directors may declare dividends. However, the company in general meeting must not be able to declare a larger dividend than that declared by the directors.”*

**Amendments to Schedule 10**

In order to incorporate the principle of distributions (including dividends) being authorised by the board and not the shareholders, the following amendments to Schedule 10 of the Listings Requirements are suggested:

* The deletion of paragraph 10.11(g) in its entirety:

*“The business of a general meeting must include the power to sanction or declare dividends”*

* The deletion and substitution of paragraph 10.17(a) in its entirety:

*“The company in general meeting or the directors may declare dividends. However, the company in general meeting must not be able to declare a larger dividend than that declared by the directors.”*

* The newly proposed paragraph 10.17(a):

*“Dividends are declared by the directors in accordance with the Act[[1]](#footnote-2).”*

**NOMINATION OF DIRECTORS**

Certain practical issues have been identified as regards the nomination of directors.

**Paragraph 10.16(h): Nomination and Appointment of Directors**

*“The notice period to be allowed before the date of a general meeting/ annual general meeting convened for the nomination of a new director must be such as to give sufficient time, after the receipt of the notice, for nominations to reach the company’s office from any part of the Republic of South Africa (Part 1). Directors may be elected at a general meeting, provided the meeting is not conducted in terms of Section 60 of the Act (Part 2).”*

**Amendments to Schedule 10**

It is proposed to delete the provisions of paragraph 10.16(h) in its entirety, on the following basis:

* Part 1: the nomination of directors does not require the convening of a general meeting; and
* Part 2: the fact that shareholders must approve the appointment of directors is adequately dealt with in paragraph 10.16(b).

It is further proposed to entrench a shareholder’s right to nominate directors. It is therefore suggested to amend paragraph 10.16(b) of Schedule 10 as follows:

*The MOI may provide for the nomination of one or more directors by any person who is named in the MOI or determined in terms of the MOI, provided that shareholders have the right to nominate directors. Such a person must not be entitled to appoint or remove any director/s. The appointment of all directors shall be subject to shareholder approval at any general/annual general meeting (provided the meeting is not conducted in terms of Section 60 of the Act). The MOI may provide for the appointment of alternate directors in terms of the Act.*

**Paragraph 4.25(d) - Public Shareholders**

In considering the above matter a further interpretational issue has arisen in respect of the definition of a public shareholder:

Paragraph 4.25(d) stipulates that the manner of securities held, for purposes of the Requirements, will not be regarded to be held by the public, if:

*“any person who, by virtue of any agreement, has a right to nominate a person to the board of directors of the applicant:”*

**Interpretation**

Taking into account the above provisions of nomination of directors (paragraph 10.16(b)) stipulating that the MOI may provide for the nomination of one or more directors by any person who is named in the MOI or determined in terms of the MOI), this requirement does not support the spirit in which directors may be nominated. It was never the intention of the Requirements to exclude a party having the right to nominate a director as a public shareholder.

It is therefore proposed to delete paragraph 4.25(d) as a whole.

1. Defined in the Requirements as Companies Act No 71 of 2008 [↑](#footnote-ref-2)