**Consultation process on proposed changes to JSE Listings Requirements in relation to the review and approval of the Memorandum of Incorporation for subsidiary companies**

**20 September 2012**

**Background**

Currently each and every subsidiary MOI of an issuer must be reviewed and approved by the JSE pursuant to the JSE Listings Requirements (the “**Requirements**”). The relevant provisions are contained in paragraph 10.21 of Schedule 10 along with accompanying footnotes.

The following provisions of Schedule 10 currently do not apply to subsidiary companies:

* Par 10.2(a) – Shares need to be free transferable;
* Par 10.11(c) – General meetings to be held in person;
* Par 10.11(d) – No restriction from calling a meeting for the purposes of adhering to the Requirements;
* Par 10.11(f) – Delivery of notices of meeting to the JSE and an announcement through SENS;
* Par 10.11(h) – Public company quorum requirement;
* Par 10.16(a) – Minimum directors of four;
* Par 10.16(g) – Retirement of directors by rotation;
* Par 10.16(h) – To be repealed.

**Proposal for consideration**

In considering our memorandum, the following should be considered in respect of subsidiary companies of an Issuer. Subsidiary companies in many instances are:

* Wholly owned and as such controlled by the issuer;
* Controlled by the issuer by holdings exceeding 50%;
* The subsidiary companies undertakes little or no trading activities;
* The subsidiary companies are dormant companies holding no assets or not undertaking any commercial activities;
* Joint ventures or greenfield projects are undertaken in subsidiary companies and as such the contracting parties would like to have the commercial freedom to have certain powers and flexibilities as it relates to the general governance of the company, such as appointments to the board and the issue of shares (not on a *pro rata* basis);
* Subsidiaries are foreign entities holding immaterial assets of the issuer. Costs are increased by having these foreign MOIs translated into English for review. Also, the company may not be in a position to fully adhere to the provisions of Schedule 10 as it may be in conflict with the laws of the foreign jurisdiction.

We fully appreciate the fact that many issuers have subsidiaries that at times drive and own the majority or even all of the assets of the issuer. However, we are of the view that the Requirements, including the requirement of control over the majority of its assets, apply to an issuer irrespective of the provisions contained in the subsidiary’s MOI.

We are only considering removing the requirements to remove the review of MOIs in accordance with Schedule 10 as it pertains to subsidiary companies as we believe that:

* The review and approval of subsidiary MOIs is a secondary measure of regulation as it pertains to the Issuer; and
* The enforcements powers of the JSE exist despite any provision in the MOI at subsidiary level.

The proposed amendments have been attached as **Annexure 1**.

Please submit all comments to alwynf@jse.co.za by close of business, Monday 22 October 2012.

**Annexure 1**

**Schedule 10**

**Requirements for the MOI**

No application for listing will be considered until the MOI of the applicant issuer has been approved by the JSE.

All amendments to the MOI of the applicant issuer must be submitted to the JSE for approval before such amendments are submitted to shareholders for approval.

The MOI must be in English and must comply with the requirements in this Schedule 10 in respect of the applicant issuer and the applicant issuer’s subsidiary companies.

The requirements set out in this Schedule 10 are not exhaustive. The JSE will not allow the MOI to contain any provisions that are unlawful, will in any way restrict free dealings in securities (unless otherwise required by statute) or may, in the JSE’s opinion, be unreasonable.

There must be no provision in the applicant issuer’s and/or its subsidiary company/ies’ MOI that is in conflict with any provision in the Listings Requirements or that prevents the enforcement of any provision in the Listings Requirements. In the event that the MOI contains such a provision, the applicant issuer must amend the MOI of the applicant issuer and/or its subsidiary company/ies accordingly.

This does not prevent the JSE from taking action against the relevant parties in terms of Section 1 of the Listings Requirements.

The Act provides that a company must harmonise its MOI within two years from 1 May 2011. An applicant issuer must, within the same period, harmonise its MOI with the Listings Requirements.

Prior to harmonisation of the MOI and as of 1 May 2011, where the Listings Requirements prescribes a requirement which is not provided for in the unharmonised MOI and the Listings Requirement states that it must be provided for in the MOI then, until the MOI is harmonised, that requirement shall apply to the applicant issuer and to its directors, notwithstanding the fact that it has not yet been provided for in the unharmonised MOI.

**MOI for subsidiary companies of applicant issuers**

The following provisions apply to the MOI of subsidiary companies of applicant issuers:

10.21 (a)The applicant issuer must ensure that the provisions of the MOIs of its subsidiaries do not frustrate the applicant issuer in any way from compliance with its obligations in terms of the Listings Requirements.

(b)Nothing contained in the MOI of a subsidiary of an applicant issuer shall relieve the applicant issuer from compliance with the Listings Requirements.

The footnotes to Schedule 10 in respect of subsidiary MOIs will be deleted.