

COMPANIES REGULATIONS  
DRAFT FOR PUBLIC COMMENT 21 DECEMBER 2009

Chapter 4 - Offerings of Company Securities : Part C – Items required to be included in a Prospectus

Regulation 83-r84

- (a) the debtors and creditors do not include any accounts other than trade accounts;
- (b) the provisions for doubtful debts are adequate;
- (c) adequate provision has been made for obsolete, damaged or defective goods, and for supplies purchased at prices in excess of current market prices;
- (d) intercompany profits in the group have been eliminated;
- (e) there have been no material changes in the assets and liabilities of the company and of any subsidiary since the date of the last annual financial statements.

**83. Report by auditor where business undertaking to be acquired**

If the proceeds, or any part of the proceeds, of the issue of the shares or any other funds are to be applied directly or indirectly in the purchase of any business undertaking, a report made by an auditor named in the prospectus on-

- (a) the profits or losses of the business undertaking in respect of each of the 3 financial years preceding the date of the prospectus; and
- (b) the assets and liabilities of the business undertaking at the last date to which the financial statements of the business undertaking were made out.

**84. Report by auditor where company will acquire a subsidiary**

(1) If the proceeds or any part of the proceeds of the issue of the shares are to be applied, directly or indirectly, in any manner resulting in the acquisition by the company or its subsidiary of securities of any other juristic person by reason of which or of anything to be done in consequence thereof or in connection therewith, that juristic person will become a subsidiary of the company, a report made by an auditor named in the prospectus on-

- (a) the profits or losses of the other juristic person in respect of each of the 3 financial years preceding the date of the prospectus; and
- (b) the assets and liabilities of the other juristic person at the last date to which the annual financial statements of the juristic person were made out.

(2) The report must-

- (a) indicate how the profits or losses of the other juristic person dealt with by the report would, in respect of the shares to be acquired, have concerned shareholders of the company and what allowance would have fallen to be made, in respect of assets and liabilities so dealt with, for holders of other shares, if the company had at all material times held the shares to be acquired; and

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## Regulation 85

- (b) where the other juristic person has a subsidiary, or, had it been a company in terms of the Act, would have had a subsidiary, deal with the profits or losses and the assets and liabilities of the juristic person and its subsidiary and such other juristic person as would have been its subsidiary if it had been a company in terms of the Act, in the manner provided by Regulation 84 (3) in relation to the company and its subsidiary.

**85. Requirements for prospectus of mining company**

- (1) In this regulation, “**mining company**” includes a company that carries on or proposes to carry on mining, development or prospecting for or exploitation of any mineral resources, or that acquires or proposes to acquire any mineral rights thereto or options thereon.
- (2) A report by an expert containing information appropriate to the subject matter of the prospectus and including, if applicable-
  - (a) a statement describing briefly the geological characteristics of the occurrence;
  - (b) details of previous operations and production relevant to the workability and pay ability of the proposed mining operations;
  - (c) survey, drilling and borehole results;
  - (d) ore reserves;
  - (e) an interpretation of the information available with reference to the viability of the project.
- (3) Material information not otherwise required by Parts B, C or D of this Chapter relating to the mineral rights, or any other right to mine, mining title, including any Government mining lease, and immovable property available for the mine, including, if applicable-
  - (a) whether the aforesaid is owned by the company, or in process of transfer or is under option or lease;
  - (b) the name of the farm on and district in which each is situated;
  - (c) the area of each;
  - (d) the aggregate price or other consideration for which they were or are to be acquired;
  - (e) relevant details of any option as aforesaid.
- (4) A statement by the directors of the plans for reaching the production stage or for increasing output, including information regarding-
  - (a) shaft sinking and development;

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- (b) capital expenditure for each material stage of development.

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Regulation 86

**Part D – Items required to be included in a Prospectus**

*In terms of Regulation 60 (2)(c)(ii)*

**86. Application of Part C Regulations**

If, as contemplated in Regulation 60 (2)(c)(ii), an intended offer -

- (a) relates to unlisted securities that are in all respects uniform with previously issued securities of the same company; and
- (b) is made only to existing holders of that company securities, with a right to renounce in favour of other persons

the requirements for a prospectus, as set out in Part C, listed in the first column of the following table, apply to the extent and subject to the alterations listed in the second column.

| Regulation | Extent to which the Regulation applies, or alterations to the regulation   |
|------------|--|
| 62         | Only sub-regulations (1), (2) and (4) apply.   |
| 63         | Only sub-regulations (1) and (6)(c) apply.   |
| 64         | Only sub-regulation (2) applies, and it applies only if there has been a material change in the nature of the company's activities since it last issued an annual financial statement. |
| 65         | All of the Regulation applies  |
| 66         | None of the Regulation applies   |
| 67         | All of the Regulation applies  |
| 68         | None of the Regulation applies   |
| 69         | None of the Regulation applies   |
| 70         | None of the Regulation applies   |
| 71         | All of the Regulation applies  |
| 72         | None of the Regulation applies   |
| 73         | All of the Regulation applies  |
| 74         | All of the Regulation applies, but without reference to any promoter.  |

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| 75 | The following provision is substituted for the regulation:<br>“A statement of the purpose of the offer, giving reasons why it is considered necessary to raise the capital offered.” |
| 76 | All of the Regulation applies.   |
| 77 | All of the Regulation applies.   |
| 78 | None of the Regulation applies.  |
| 79 | None of the Regulation applies.  |
| 80 | All of the Regulation applies.   |
| 81 | None of the Regulation applies.  |
| 82 | None of the Regulation applies.  |
| 83 | All of the Regulation applies.   |
| 84 | All of the Regulation applies.   |
| 85 | None of the Regulation applies.  |

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Chapter 5 - Fundamental Transactions and Takeover Regulations : Part A – Interpretation and Application

Regulation 87

**Chapter 5 - Fundamental Transactions and Takeover Regulations****Part A – Interpretation and Application****87. Definitions**

In this Chapter, and in applying Part B and Part C of Chapter 5 of the Act, unless the context indicates otherwise –

- (a) **“circular”** means a document required to be completed in English in accordance with Part B and Part C of Chapter 5 of the Act and this Chapter, and posted to relevant holders;
- (b) **“condition as to acceptance”** means a condition of an offer, announced in the firm intention announcement, determined by an offeror as being, and relating only to, the minimum percentage level of securities required to be tendered by offeree regulated company holders in order for an offeror to be obliged to accept all tendered securities, and for purposes of clarity, shall not include a condition relating to the ability of an offeror to meet its cash consideration commitment;
- (c) **“control”** means a holding of a beneficial interest in a regulated company equal to or exceeding the specified percentage of voting rights in that regulated company;
- (d) **“controlled company”** means a regulated company which is controlled, directly or indirectly, by its pyramid;
- (e) **“dealings”** means acquisitions, disposals, subscriptions, grants and issues of securities, however effected;
- (f) **“fair and reasonable opinion”** means the opinion expressed by an independent expert on the fairness and reasonableness of an offer consideration, taking account of value and price, given to either -
  - (i) an independent board of an offeree regulated company; or
  - (ii) to an independent board of an offeror company, where required;
- (g) **“independent”** or **“acts independently”** means a person who has no conflict of interest and is able to make impartial decisions without fear or favour in relation to an offer;
- (h) **“independent board”** means those directors of an offeree regulated company declared or determined to be independent directors;
- (i) **“independent board of an offeror company”** means those directors of an offeror company declared or determined to be independent directors;

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## Chapter 5 - Fundamental Transactions and Takeover Regulations : Part A – Interpretation and Application

## Regulation 87

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- (j) **“independent director”** means a director who acts independently;
- (k) **“independent expert”** means an independent expert as described in Section 114(2) of the Act;
- (l) **“material”** means for purposes of Part B and Part C of Chapter 5 of the Act and the Takeover Regulations, an amount equal to or greater than 10% of any subject matter in relation to an offer;
- (m) **“offeree regulated company”** means a regulated company which is itself the subject of an offer, or a regulated company, the securities of which or any part thereof are the subject of an offer;
- (n) **“offeror”** means any person, including its concert parties, who enters into or proposes any affected transaction, including without limitation -
- (i) a person offering to acquire the assets or undertaking in terms of Section 117(1)(c)(i) of the Act;
  - (ii) the surviving amalgamated or merged company that owns all securities, assets or liabilities of amalgamating or merging companies in terms of Section 117(1)(c)(ii) of the Act;
  - (iii) a person, excluding the offeree regulated company concerned, proposing to acquire securities in terms of Section 117(1)(c)(iii) of the Act;
  - (iv) a person offering to acquire securities in accordance with Sections 117(1)(c)(v),(vi) or (vii) of the Act;
- (o) **“options”** mean all options granted or similar rights given, by a regulated company, whether vested or not, including those granted, or given, in terms of any formalised -
- (i) share incentive scheme;
  - (ii) phantom scheme, which has rights which could be equity settled; or
  - (iii) share participation rights scheme, which has rights which could be equity settled; or
  - (iv) agreement with any person, which has rights which could be equity settled;
- (p) **“other conditions”** means any condition of an offer, but does not include a condition as to acceptance, or a condition relating to the ability of an offeror to meet its cash consideration commitment;
- (q) **“publish”** or **“announce”** means:

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## Regulation 88

- (i) in the case of a person listed on an exchange as defined in and regulated by the Securities Services Act, 2004, as amended, disclosure in the manner required by such stock exchange for immediate public release after receiving Panel approval; and
- (ii) in the case of any other person not listed on an exchange as defined in and regulated by the Securities Services Act, 2004, as amended, disclosure in the manner determined by the Panel after receiving Panel approval;
- (r) **"pyramid"** means the ultimate controlling juristic person, or any intermediate juristic person that, directly or indirectly, holds at least the specified percentage of a controlled company and after applying consolidation accounting principles (irrespective of whether consolidation principles should be applied or not) either:
  - (i) derives more than 75% of its total attributable income from such controlled company; or
  - (ii) the attributable net assets in such controlled company represent more than 75% of the total attributable net group assets of the pyramid;
- (s) **"Ruling"** means a written decision issued by the Executive Director with respect to a possible affected transaction, proposed affected transaction or affected transaction which is binding on the Panel, subject to review or appeal in accordance with the Act; and
- (t) **"SAMVAL code"** means the South African Code for Reporting of Mineral Asset Valuation.

**88. Interpretation**

- (1) The word **"includes"** in the definition of **"acquisition"** in Section 117(1)(a) embraces acquiring securities by any means whatsoever.
- (2) The widened definition of **"acquisition"** embraces the principle of a person advantaging himself by way of increased voting power without acquiring any securities. For example, a conversion of a minority's holding of voting securities into non voting securities by exercising special resolution majority voting power by a majority holder in terms of Section 114(1) of the Act read with Section 115(4) of the Act.
- (3) The words **"the greater part of the assets or undertaking"** in Section 117(1)(c)(i) of the Act mean either more than 50% of the gross assets measured at fair value (being total assets ignoring all liabilities) or more than 50% of the business measured as a going concern (being net assets supporting the business as a going concern).
- (4) The definition of **"offer"** in Section 117(1)(f) of the Act requires that any offer, possible offer or proposed offer is subject to the Takeover Regulations unless exempt by the Panel or the Act.

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- (5) The meaning of “control” in Section 2 of the Act is interpreted by the words “ability to materially influence” in Section 2(2)(d) of the Act as varying the meaning of the word “majority” in both Section 2(2)(a) and Section 2(2)(b) of the Act to mean “prescribed percentage”, and to ascribe the level of “50%” to the word “majority” in Section 2(2)(c) of the Act, thereafter ignoring any other meaning arising from Section 2(2)(d) of the Act.
- (6) Reference to -
- (a) a “**compliance order**” in section 119(5) must be regarded as referring to a compliance notice contemplated in section 171 (1);
- (b) a “**clearance notice**” in section 119 (4)(b) or 121(b)(i), or to a “**compliance notice**” in section 115(1)(b)(iii), must be regarded as referring to a compliance certificate contemplated in section 171 (6).
- (7) The definition of “**securities**” in Section 117(1)(j) of the Act includes securities with voting rights, convertible securities where possible future conversion would result in a beneficial interest in securities with voting rights and options where the possible future exercise would result in a beneficial interest in securities with voting rights.
- (8) Section 123(2)(a)(i) of the Act includes an affected transaction arising as a result of a reacquisition of voting securities effected by way of Section 114 of the Act.
- (9) The reference to subsection (4)(b) in Section 119(5) of the Act must be regarded as a reference to section 119 (4)(c).
- (10) A series of transactions is determined by applying the principles in Section 41(4)(b) of the Act.
- (11) The acquisition of a beneficial interest as contemplated in the definition of “affected transaction” in section 117(1)(c)(iv) will only give rise to a mandatory offer as contemplated in the definition of “affected transaction” in section 117(1)(c)(vi) if the acquisition complies with section 123(2) of the Act.
- (12) The definition of “**mandatory offer**” in section 117(1)(c)(vi) of the Act will not require compliance with section 117(1)(c)(vi) of the Act if any person, including concert parties, becomes entitled at any point in time (“the point in time”), to exercise voting rights which, at the point in time, exceed the prescribed percentage because of voting rights which accrue to such person as a result of a beneficial interest in preference shares, which preference shares had been acquired before the point in time, and such preference shares, at the point in time, give such person voting rights in accordance with the rights of the preference shares (e.g. arrear dividends); for so long as the person, including concert parties, does not acquire any further securities as defined in section 117(1)(j) of the Act.
- (13) The expression “**acted in concert**” in section 118(5) of the Act, which is not rebutted in terms of section 118(6) of the Act, will not require compliance with Section 117(1)(c)(vi) of the Act (“mandatory offer”) -

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Regulation 89-r90

- (a) for the duration of the option, if at the time of coming into concert (the date of grant of the option), each individual concert party person (the grantor and grantee) was entitled to exercise voting rights which were less than the prescribed percentage, and as a result of coming into concert the concert party persons are entitled, in aggregate, to exercise voting rights equal to or exceeding the prescribed percentage, for so long as no individual concert party person acquires any further securities as defined in section 117(1)(j) of the Act;
  - (b) for the duration of the option, where at the time of coming into concert (the date of grant of the option), the grantee was already entitled to exercise voting rights which were equal to or exceeded the prescribed percentage; or
  - (c) if, at the time of coming into concert (the date of grant of the option), the grantee was not entitled to exercise voting rights which were equal to or exceeded the prescribed percentage, but the grantor was entitled to exercise voting rights which were equal to or exceeded the prescribed percentage, until the grantee exercises the option and/or acquires securities entitling the grantee to exercise voting rights equal to or exceeding the prescribed percentage.
- (14) To the extent that an amalgamation or merger employs the either or both types of mechanics of the fundamental transactions described in sections 112 or 114 (included as affected transactions in section 117 of the Act), the same Takeover Regulations applicable to section 117(1)(c)(i) of the Act or to section 117(1)(c)(iii) of the Act will apply to section 117(1)(c)(ii) of the Act.

**89. Beneficial interests**

- (1) For purposes of Part B and Part C of Chapter 5 of the Act and this Chapter, the acquisition of a beneficial interest in the remaining voting securities as contemplated in the definition of "affected transaction" in section 117(1)(c)(v) of the Act will only give rise to compliance with Part B and Part C of Chapter 5 of the Act and the Takeover Regulations where an offer is made for all of the securities of a particular class of voting security not already beneficially held, irrespective of how many securities of the particular class are beneficially held before the offer.
- (2) The definition of "holder" in section 117(1)(e) of the Act read with the definition of "beneficial interest" in section 1 of the Act includes nominee entities, asset managers and similar persons who have authority, by any means, to exercise rights of disposal or rights of voting with respect to securities.

**90. Acting in concert**

- (1) For purposes of Part B and Part C of Chapter 5 of the Act and this Chapter, the definition of "act in concert" in section 117(1)(b) of the Act will not require compliance with section 117(1)(c)(vi) of the Act ("mandatory offer") where, at the time of coming into concert, each individual concert party person was entitled to exercise voting rights which were less than the prescribed percentage, and as a result of coming into concert the concert party persons are entitled, in aggregate, to

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## Regulation 91

exercise voting rights exceeding the prescribed percentage, for so long as no individual concert party person acquires any further securities as defined in section 117(1)(j) of the Act.

- (2) The definition of “act in concert” in section 117(1)(b) of the Act requires persons coming into concert to each make such declaration, on the prescribed form, to the regulated company concerned and to the Executive Director within five business days of coming into concert.
- (3) When persons acting in concert come out of concert, such persons must each make such declaration, on the prescribed form, to the regulated company concerned and to the Executive Director within five business days of coming out of concert.
- (4) If the Panel is aware of persons coming into concert or coming out of concert, and those persons have not declared themselves as having come into concert or coming out of concert in the prescribed manner in terms of sub-regulation (2) or (3), respectively, the Panel may presume those persons came into concert or came out of concert from a date determined by the Panel as being the date of coming into concert or coming out of concert (“determined date”) and the Takeover Regulations shall be enforceable from such determined date.
- (5) A presumption of coming into concert or coming out of concert in terms of sub-regulation (4) is rebuttable in a hearing before the Executive Director. The Executive Director shall issue a Ruling, which will be binding on all persons concerned. If any person concerned does not comply with such Ruling it may be re-issued immediately as a compliance notice.
- (6) The following persons are presumed to be acting in concert with one another unless the contrary is established by any such person, namely:
  - (a) a company, with:
  - (b) any of its directors;
  - (c) any company controlled by one or more of its directors;
  - (d) any trust of which any one or more of its directors is a beneficiary or a trustee; and
  - (e) any of the company’s pension, provident or benefit funds and share incentive schemes.

**91. Application of Parts B and C of Chapter 5 of the Act, and the Takeover Regulations, to private companies**

For the purposes of the Part B and Part C of Chapter 5 of the Act and the Takeover Regulations:

- (a) the measurement of transfers for purposes of the inclusion of private companies as regulated companies in terms of section 118(1)(c)(i) of the Act,

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Regulation 91

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is determined by calculating the percentage at the time of each qualifying transfer (being all transfers excluding transfers between or among related or inter-related persons) in the prior 24 months, taking account of the number of securities transferred compared to the number of securities in issue (excluding treasury securities held by subsidiaries) at that time, and aggregating all such transfers just prior to effecting an affected transaction;

- (b) a buy back of securities by a company that are cancelled is not a transfer. A buy back of holding company securities by a subsidiary company is considered to be a transfer among related parties.

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Regulation 92-r93

**Part B – Fundamental transactions****92. Fundamental transactions**

- (1) A special resolution contemplated in section 112 (3) or 113 (5) must be -
  - (a) published in accordance with regulation 6 (b) and (c); and
  - (b) delivered to shareholders of the company concerned.
- (2) A notice to creditors contemplated in section 116 (1)(a) must be -
  - (a) published in accordance with regulation 6 (b) and (c); and
  - (b) delivered to known creditors of the company concerned.
- (3) A Notice of Amalgamation or Merger contemplated in section 116(3) must be in Form CoR 92.

**93. Independent Experts***Authority s. 117(1)(c)(i)(c)*

- (1) In terms of section 117(1)(c)(i) of the Act, for purposes of Part B and Part C of Chapter 5 of the Act and the Takeover Regulations, an offeree regulated company must retain an independent expert who must -
  - (a) be qualified, and have the competence and experience necessary to:
  - (b) understand the type of disposal proposed;
  - (c) evaluate the consequences of the disposal; and
  - (d) assess the effect of the disposal on the value of securities and on the rights and interests of a holder of relevant securities, or a creditor of the company;
  - (e) be able to express opinions, exercise judgment and make decisions impartially;
  - (f) not have any other relationship with the offeree regulated company or with the offeror, such as would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of such independent expert is compromised by that relationship;
  - (g) not have had any relationship contemplated in subparagraph (iii) within the immediately preceding two years; and
  - (h) not be related to a person who has or has had a relationship contemplated in subparagraphs (iii) or (iv).
- (2) The independent expert retained in accordance with sub-regulation (1) must prepare a report to the independent board, and cause it to be distributed to all holders of the

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Regulation 93

offeree regulated company's securities, concerning the proposed disposal, which must:

- (a) state all prescribed information relevant to the value of the securities affected, on an attributable basis (being the attributable fair value per offeree regulated company security calculated from a valuation of the underlying assets/undertaking disposed of divided by the offeree regulated company's relevant securities in issue compared to the disposal consideration receivable for the assets/undertaking to be disposed of per offeree regulated company security), in accordance with Regulation 107;
  - (b) identify every type and class of holders of the offeree regulated company's securities affected by the proposed disposal;
  - (c) describe the material effects that the proposed disposal will have on the rights and interests of the persons mentioned in paragraph (ii);
  - (d) evaluate the effects of the proposed disposal on the business and prospects of the offeree regulated company;
  - (e) state any material interest of any director of the offeree regulated company or trustee for security holders, and state the effect of the disposal on those interests and persons.
- (3) In terms of section 117(1)(c)(v) of the Act, for purposes of Part B and Part C of Chapter 5 of the Act and this Chapter, an offeree regulated company must retain an independent expert who must:
- (a) be qualified, and have the competence and experience necessary to:
  - (b) understand the type of offer proposed;
  - (c) evaluate the consequences of the offer;
  - (d) assess the effect of the offer on the value of securities and on the rights and interests of a holder of relevant securities;
  - (e) be able to express opinions, exercise judgment and make decisions impartially;
  - (f) not have any other relationship with the offeree regulated company or with a proponent of the offer, such as would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of such independent expert is compromised by that relationship;
  - (g) not have had any relationship contemplated in subparagraph (iii) within the immediately preceding two years; or
  - (h) not be related to a person who has or has had a relationship contemplated in subparagraphs (iii) or (iv).

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- (4) The independent expert retained in accordance with sub-regulation (1) must prepare a report to the independent board, and cause it to be distributed to all holders of the offeree regulated company's securities, concerning the proposed offer, which must:
- (a) state all prescribed information relevant to the value of the securities affected by the offer;
  - (b) identify every type and class of holders of the offeree regulated company's securities affected by the offer;
  - (c) describe the material effects that the offer will have on the rights and interests of the persons mentioned in paragraph (ii);
  - (d) evaluate any material adverse effects of the offer against:
  - (e) the compensation that any of those persons will receive in terms of that offer; and
  - (f) any reasonably probable beneficial and significant effect of that offer on the business and prospects of the offeree regulated company; and
  - (g) state any material interest of any director of the offeree regulated company or trustee for security holders, and state the effect of the offer on those interests and persons.

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Regulation 94-r96

**Part C – Affected Transactions****94. Confidentiality***Authority s. 119(1)(a)(ii)*

- (1) Confidentiality shall be observed before a firm intention announcement or cautionary announcement containing “price sensitive information” is made. Price sensitive information is as defined in the JSE Listings Requirements and also satisfies the definition of inside information in the Securities Services Act, 2004.
- (2) All negotiations between an independent board and an offeror must be kept confidential. An independent board should be cognisant of the fact that confidentiality may only be able to be maintained for a short period of time, and sometimes not at all.
- (3) If there is reasonable suspicion of a leak of price sensitive information, that information must immediately be disclosed in a cautionary announcement.

**95. The approach***Authority s. 119(1)(a)(i)*

- (1) An approach with a view to an offer being made, or an offer when made, shall be put forward to the board of the offeree regulated company.
- (2) An offer shall not be subject to conditions which depend solely on subjective judgments by the directors (or equivalent) of the offeror or the fulfilment of which is in their hands.
- (3) If the offer, or an approach with a view to an offer being made, is not made by the ultimate offeror or potential offeror, the identity of that person shall be disclosed when the offer is put forward to the board of the offeree regulated company.
- (4) A board of an offeree regulated company approached, with a view to an offer being made, is entitled to be satisfied on reasonable grounds that the offeror is, or will be, in a position to implement the offer in full.
- (5) A board of an offeree regulated company that has received an offer shall be provided with evidence acceptable to the board that the offeror is in a position to implement the offer in full.

**96. Partial Offers***Authority s. 117(1)(h)(i)*

- (1) A partial offer is an offer made to all holders of a particular class of securities for the acquisition of the same pro rata percentage of such class of securities, which is a lesser percentage than 100 percent of such securities (“partial offer percentage”), provided that any holder who tenders a number of securities:

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Regulation 97-r98

- (a) equal to or less than the partial offer percentage, must have its tender accepted in full; or
  - (b) greater than the partial offer percentage, must have that number of securities equal to the partial offer percentage accepted in full, and part or all of the excess tendered balance accepted on an equitable basis, provided that the aggregate of the acceptances shall not exceed the partial offer percentage.
- (2) The definition of “**partial offer**” in Section 117(1)(h) of the Act will not give rise to compliance with Part B and Part C of Chapter 5 of the Act and this Chapter -
- (a) if an offeror beneficially holding securities of a class entitling the offeror to exercise less than the prescribed percentage of voting rights makes a partial offer to acquire that number of relevant securities which will, if such partial offer is successfully completed, result in such offeror still only holding a beneficial interest in securities entitling the offeror to still only be able to exercise less than the prescribed percentage of voting rights; or
  - (b) if an offeror already holds securities entitling the offeror to exercise voting rights which exceed the prescribed percentage and a partial offer is made for less than all the remaining securities of a class, which if successful, would result in the offeror increasing its voting rights entitlement to a level less than 100% of the voting rights.
- (3) Regulation 93 (3) and (4) apply to Section 117(1)(h) of the Act.

**97. Mandatory offers**

The percentage to be prescribed in terms of section 123 is 35% of the issued voting securities of the company.

**98. Cautionary and other announcements***Authority s. 119(1)(a)(iii)*

- (1) A cautionary announcement is as defined in the JSE Listings Requirements, except that the concept of “material price sensitive information” is replaced with price sensitive information, notwithstanding that an offeree regulated company may not be listed. The price sensitive information would concern a possible or proposed offer which is the subject of negotiations.
- (2) The responsibility to publish a cautionary announcement rests with the offeree regulated company or offeror, as applicable.
- (3) An independent board should disclose as much detailed information as soon as possible concerning an offer.
- (4) An independent board must do all things necessary to satisfy itself that an offeror is able to perform in terms of an offer.

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- (5) Information provided to select offeree regulated company securities holders must be disclosed equally and immediately to all other securities holders, and in the case of a public company to the general public, in the appropriate manner.
  - (6) An independent board must ensure that all material changes to previously announced specific information concerning an offer is immediately announced.
  - (7) In order for any incorrect statement made in relation to an offer to not become enforceable or binding, such statement must immediately be repudiated by all reasonable means by the person(s) who made such statement.

**99. Firm intention announcement***Authority s. 119(1)(a)(iv)*

- (1) A firm intention announcement is an announcement which must be made when a mandatory offer is required or when an offeror has a firm intention to make an offer and is ready, able and willing to proceed with such offer. When a firm intention announcement has been made, the offeror shall proceed with the offer.
- (2) A firm intention announcement shall immediately be made when -
  - (a) the board of the offeree regulated company has received a formal written offer; or
  - (b) a mandatory offer is required to be made in terms of Section 117(1)(c)(vi) of the Act read with Section 123 of the Act.
- (3) The responsibility for making a firm intention announcement under -
  - (a) sub-regulation (2)(a) rests with the independent board, failing which, with Panel approval, shall rest with the offeror; or
  - (b) sub-regulation (2)(b) rests with the offeror.
- (4) Each firm intention announcement must state that the offeror, and where appropriate, the independent board, accepts responsibility for the information contained in the firm intention announcement and that to the best of their knowledge and belief, the information is in accordance with the facts and, where appropriate, that it does not omit anything likely to affect the importance of such information. If it is proposed that any director shall be excluded from such a statement, the omission and the reasons for it shall be stated in the firm intention announcement.
- (5) A firm intention announcement must contain the following information:
  - (a) the terms of the offer, including but not limited to:
    - (i) the type of offer proposed and mechanics of implementation;
    - (ii) the class or classes of securities affected;

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- (iii) the consideration offered per security, for each class;
  - (iv) pro forma earnings and asset value per offeree regulated company security if the offer consideration consists wholly or partly in offeror securities;
  - (v) any conditions as to acceptance, or other conditions of the offer;
  - (vi) details of the cash guarantee or cash confirmation provided to the Panel in conformity with Regulation 101 (3);
  - (vii) confirmation that the offeror has sufficient securities available to settle any consideration payable in securities or has a condition as to acceptance regarding an increase of authorised share capital;
  - (viii) estimated offeror offer circular or combined circular posting date, and where known, other pertinent dates relating to the offer;
- (b) the identity of the offeror and any concert parties;
- (c) if known, details of any beneficial interest in the offeree regulated company -
- (i) held or controlled, directly or indirectly, by the offeror;
  - (ii) held or controlled, directly or indirectly, by any person(s) acting in concert with the offeror;
  - (iii) held or controlled, directly or indirectly, by any other person in respect of which the offeror has received an irrevocable commitment to accept or vote in favour of the offer;
  - (iv) in respect of which the offeror holds an option to purchase; or
  - (v) in respect of which any person acting in concert with the offeror holds an option to purchase.

**100. Dealings disclosure and announcement***Authority s. 119(1)(a)(v)*

- (1) During an offer period allowable dealings (being dealings, inter alia, in securities not in contravention of Section 127(2) of the Act) in securities of the offeror or the offeree regulated company by an offeror or the offeree regulated company, and/or by their respective concert party/ies shall be both disclosed to the Panel on form TRF 2 and announced (detailing the TRF 2 information) when effected -
- (a) by a person with a beneficial interest (i.e. beneficial interest dealt for own account or dealt for another person in terms of any form of mandate); or
  - (b) on an agency basis (i.e. beneficial interest of a client, dealt for a client on client instruction).

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**101. Securities acquisition during offer**

- (1) Except for prohibited acquisitions in terms of Section 127(2)(b) of the Act, acquisitions of securities in an offeree regulated company, which is or may be the subject of an offer, may be made prior to or during an offer period without Panel consent.
- (2) If an offer is made and the offeror or any person acting in concert with it has acquired relevant securities in the offeree regulated company within the six month period before the commencement of the offer period, the offer consideration, per security, to the offeree regulated company's holders of securities of the same class must be -
  - (a) identical to, or where appropriate, and with Panel consent, similar to, the highest consideration paid (excluding commission, tax and duty) for such acquisitions;
  - (b) accompanied by a cash consideration, at not less than the highest cash consideration paid per security (excluding commission, tax and duty) where securities were acquired for cash which carry 5% or more of the voting rights currently exercisable at a class meeting of that class.
- (3) If the offeror considers that the highest consideration per relevant security paid ought not to apply in a particular case, the offeror may consult the Panel, which in its discretion may agree to an adjusted offer consideration.
- (4) When an offer consideration is wholly or partly in cash, the offeror offer circular shall include a statement that the Panel has been provided with -
  - (a) an irrevocable unconditional guarantee issued by a South African registered bank; or
  - (b) an irrevocable unconditional confirmation from a third party that sufficient cash is held in escrow;in favour of the holders of relevant securities for the sole purpose of fully satisfying the cash offer commitments.
- (5) A guarantee or confirmation contemplated in sub-regulation (4) shall be written in such form that the Panel is empowered to exercise the guarantee or confirmation, in whatever manner is required, on behalf of all holders of relevant securities once all conditions have been satisfied and the offeror and its concert parties have failed to pay the cash consideration owing to holders of relevant securities entitled thereto by the due date.
- (6) If, after the firm intention announcement and before the offer closes, an offeror or any person acting in concert with it acquires relevant securities in the offeree regulated company at above the offer consideration per relevant security, the offeror shall increase the offer consideration per security to not less than the highest consideration paid for the securities so acquired. Immediately thereafter, an

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announcement shall be made detailing the revised offer consideration per relevant security and relevant dates, which announcement shall be posted to the offeree regulated company's relevant securities holders.

- (7) An offeror may require a holder of relevant securities of an offeree regulated company that is the subject of an offer, as a stated term of acceptance, until acceptance is withdrawn in terms of Regulation 103 to give the offeror a proxy to vote in respect of those securities -
- (a) if the offer is conditional, on all matters in order to satisfy any announced conditions of the offer; or
  - (b) if the offer is unconditional, on all matters.
- (8) Parties to an offer must take care not to issue statements which, while not factually inaccurate, may mislead holders of relevant securities and the market or may create uncertainty.
- (9) If a profit forecast or estimate ("forecast(s)", as defined in the Revised Guide on Forecasts issued by the South African Institute of Chartered Accountants ("SAICA"), as amended from time to time ("the Forecast Guide")), including for the avoidance of doubt, trading statements, general forecasts and specific forecasts as defined in the JSE Listings Requirements, as amended from time to time, is made on or after the date of publication of a firm intention announcement -
- (a) by an offeree regulated company, involved in an offer, on itself or on the offeror; or
  - (b) by an offeror, involved in an offer, on itself or on the offeree regulated company;

any such forecast must be prepared in accordance with the Forecast Guide and reported upon by an auditor, or a similar professional registered with regulatory or professional body for auditors in another jurisdiction.

**102. Circulars**

- (1) An offeror offer circular shall contain the following disclosures and information -
- (a) the same disclosure contents as required in Regulation 99 (5)(a), excluding pro forma per security disclosure, and Regulation 99 (5)(b);
  - (b) a statement that the offeror accepts responsibility for the information contained in the offeror offer circular and that to the best of its knowledge and belief, the information contained in the offeror offer circular is in accordance with the facts and, where appropriate, that it does not omit anything likely to affect the importance of such information. If any director (or equivalent) of the offeror is excluded from such a statement, the omission and the reasons for such exclusion shall be stated in the offeror offer circular;

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- (c) where the offer consideration consists wholly or partly of offeror securities -
- (i) the annual financial statements of the offeror for the last three financial periods in IFRS interim reporting format;
  - (ii) an audit reviewed pro forma balance sheet and pro forma income statement (and pro forma earnings and assets per security) assuming a 100% successful offer result as at the last completed financial year/period.
- (d) the reasons for the offer and the offeror's intentions regarding the continuation of the business of the offeree regulated company and the continuation in office of the directors of the offeree regulated company;
- (e) in a highly-leveraged offer (that is where, as a result of the offer, the offeror will incur a high level of debt and the payment of interest, repayments or security for the debt will substantially depend on the business of the offeree regulated company) a description of the financing arrangements entered into by the offeror, including capital amount, interest rate, security given, period and repayment terms;
- (f) statements of direct and indirect beneficial interests in or holdings of securities, or actions to be effected, or a negative statement if there are no such interests or holdings -
- (i) by the offeror, including separate disclosure of concert party holdings, in the offeree regulated company;
  - (ii) by directors (or equivalent) of the offeror in the offeror's securities and in any of the offeree regulated company's securities;
- in the offeror and in the offeree regulated company by any person who, prior to the posting of the offeror offer circular, has irrevocably committed himself to accept or to reject the offer or to vote in favour of or against the offer, together with the name of such person;
- (g) if any party whose holdings of securities are required to be disclosed by this Regulation has dealt for value in the securities in question during the period beginning six months prior to the offer period and ending with the latest practicable date prior to the posting of the offeror offer circular, the details, including volumes, dates and prices, shall be stated. If no such dealings have taken place this fact shall be stated;
- (h) whether and in what manner the remuneration of the offeree regulated company's directors will be affected by the offer or by any other associated transaction. If there will be no effect, this shall be stated;
- (i) a statement on whether or not any agreement exists between the offeror, or any person acting in concert with the offeror, and -

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- (i) the offeree regulated company;
  - (ii) any of the directors of the offeree regulated company, or persons who were directors within the preceding 12 months of the offeree regulated company; or
  - (iii) holders of offeree regulated company securities, or persons who were holders thereof within the preceding 12 months;
- and full particulars of any such agreement;
- (j) all pertinent dates and times having relevance to a full understanding of the offer;
  - (k) the fair and reasonable opinion provided, in conformity with the applicable disclosure requirements in Regulation 107 and the offeror board opinion after taking account thereof where the offer consideration comprises wholly or partly offeror securities in compliance with Regulation 106 (8) and
  - (l) a statement to the effect that settlement of the offer consideration to which any holder is entitled under the offer will be implemented in full in accordance with the terms of the offer without regard to any lien, right of set-off, counterclaim or other analogous right to which the offeror may otherwise be, or claim to be, entitled against such holder.
- (2) An offeree response circular shall contain the following disclosures and information by the independent board -
- (a) its views on the offer and offer consideration, including any other offers received during the offer period and six months prior to the offer period;
  - (b) insofar as is relevant, comment upon the statements contained in the offeror offer circular;
  - (c) a statement that it accepts responsibility for the information contained in the offeree response circular and that to the best of its knowledge and belief, the information contained in the offeree response circular is in accordance with the facts and, where appropriate, that it does not omit anything likely to affect the importance of such information. If any director of the independent board is excluded from such a statement, the omission and the reasons for such exclusion shall be stated in the offeree response circular;
  - (d) financial information as follows -
    - (i) the annual financial statements of the offeree regulated company for the last three financial years/periods, and if completed, the latest interim results, in IFRS interim reporting format, without audit review;
    - (ii) in respect of an offer where offeree regulated company holders continue to hold some form of security post the offer, an audit reviewed pro

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forma income statement and balance sheet must be produced as at the last financial year/period ended of the offeree regulated company (and the pro forma effects per offeree regulated company security) must be disclosed;

- (e) statements of direct and indirect beneficial interests in or holdings of securities, and/or actions to be effected, or a negative statement if there are no such holdings:
  - (i) by the offeree regulated company in the offeror;
  - (ii) by directors of the offeree regulated company in the offeror and in any of the offeree regulated company's securities;

in the offeror and in the offeree regulated company by any person who, prior to the posting of the offeree response circular, has irrevocably committed himself to accept or to reject the offer or to vote in favour of or against the offer, together with the name of such person;

- (f) if any party whose holdings of securities are required to be disclosed by this Takeover Regulation has dealt for value in the securities in question during the period beginning six months prior to the offer period and ending with the latest practicable date prior to the posting of the offeree response circular, the details, including volumes, dates and prices, shall be stated. If no such dealings have taken place this fact shall be stated;
- (g) whether the directors of the offeree regulated company intend, in respect of their own beneficial holdings of relevant securities, to accept or to reject the offer, or to vote in favour of or against the offer;
- (h) material particulars of all service contracts of any director or proposed director of the offeree regulated company with such offeree regulated company or with any of its subsidiaries. If there are no such service contracts, this should be stated. If any service contract has been entered into or amended within six months of the date of the offer period, particulars shall be given in respect of such contracts or amendments. If there have been no such service contracts entered into or amended, this should be stated.
- (i) a statement on whether or not any agreement exists between the offeree regulated company and:
  - (i) the offeror or any of its concert parties;
  - (ii) any of the directors (or equivalent) of the offeror, or persons who were directors (or equivalent) within the preceding 12 months; or
  - (iii) holders of offeror securities or a beneficial interest in the offeror, or persons who were holders thereof or interested therein within the preceding 12 months;

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and full particulars of any such agreement;

- (j) the fair and reasonable opinion provided, in conformity with the applicable disclosure requirements in Regulation 107 and the independent board opinion after taking account thereof in compliance with Regulation 106.
- (3) A combined offer circular shall contain the information contained in Regulation 102.
  - (4) Circulars subsequently sent to holders by an offeror or offeree regulated company shall contain details of any material changes to prior published information or a statement that there has been no material change.
  - (5) The following documents must lie for inspection at the offeror and/or offeree regulated company's registered office, as applicable, from the date of posting of a circular until the end of the offer period -
    - (a) where a forecast has been made, the reporting accountant's report and consent letter;
    - (b) where pro forma information has been disclosed, the audit review opinion and consent letter;
    - (c) any document evidencing an irrevocable commitment to accept or to reject or vote in favour of or against an offer;
    - (d) the respective memorandum of incorporation of the offeree regulated company and of the offeror if the offer consideration includes offeror securities;
    - (e) the issued annual financial statements of the offeree regulated company, and, where the offer consideration includes offeror securities, also the offeror company, for the last three completed financial years.

**103. Timelines of offers***Authority s. 119(1)(b)(ii)*

- (1) An offeror offer circular or combined offer circular shall be posted within 20 business days after the date of publication of a firm intention announcement.
- (2) The opening date of an offer relating to a general offer, mandatory offer or partial offer shall be the day after the date of posting of an offeror offer circular or combined offer circular.
- (3) An offer relating to a general offer, mandatory offer or partial offer shall be open for at least 30 business days.
- (4) An offer relating to a general offer, mandatory offer or partial offer shall state a closing date or an initial closing date (which reserves the right to extend) or an objective method of determination of a closing date where no closing date or initial closing date is stated. With respect to an offeree regulated company that is listed on an exchange, the closing date shall be on a Friday.

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- (5) An offeror shall not be entitled to extend a general offer after the 45th day after the opening of such general offer (whether the offer consideration is revised or not), and such offer shall therefore terminate, unless such general offer has been declared unconditional as to acceptance at midnight on the 45th business day after the opening of such offer unless -
- (a) a firm intention of a competing offer has been announced (in which case the original offeror will be entitled from time to time to extend the time periods of its offer to coincide with the time periods applicable to the competing offeror's offer); or
  - (b) the independent board has consented to an extension.
- (6) On the 45th business day after the day upon which a conditional general offer opened an announcement shall be made by no later than 18:00 as to whether the offer is unconditional as to acceptances or has terminated.
- (7) When an offer becomes unconditional as to acceptances the offeror shall announce that fact within one business day and the announcement shall include the total number and percentage of securities -
- (a) for which acceptances have been received; and
  - (b) which are held by the offeror at that time.
- (8) Where a general offer has been accepted by a holder and such general offer has been declared unconditional as to acceptances but such general offer still remains subject to other conditions, such holder may, by notice in writing delivered to the offeror, withdraw its acceptance if such general offer is not declared wholly unconditional by midnight on the 65th business day after it opened.
- (9) After withdrawal of an acceptance as provided in sub-regulation (8) and prior to the closing date of such general offer, a holder may again accept the general offer in the manner provided in terms of the general offer. Such withdrawal and reacceptance may only occur once.
- (10) After an offer relating to a general offer, mandatory offer or partial offer has become unconditional it shall be announced as being unconditional within one business day. The then unconditional offer shall remain open for not less than 10 business days after such announcement.
- (11) An offer relating to a section 117(1)(c)(i) disposal, section 117(1)(c)(ii) amalgamation or merger or section 117(1)(c)(iii) scheme of arrangement shall state an expected effective or operative date or an objective method of determination of the effective/operative date where no expected effective or operative date is stated.
- (12) An offer relating to a general offer, mandatory offer or partial offer may be extended prior to the initial closing date (and time) of the offer, and if so, shall be announced prior to the initial closing date (and time) occurring. An offeror shall only be allowed to extend an offer relating to a general offer, mandatory offer or partial offer where

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the right to do so has been specifically reserved in the offeror offer circular or combined circular, and such right has not subsequently been withdrawn by the offeror, If “no extension statements” in relation to the offer are included in announcements, circulars or any statement by or on behalf of an offeror, its directors (or equivalent) or advisers, and not withdrawn immediately if incorrect, then the offer may not subsequently be extended.

- (13) An offeror offer circular relating to a general offer, mandatory offer or partial offer is the responsibility of the offeror.
- (14) A combined offer circular relating to a general offer, mandatory offer or partial offer is the responsibility of both the offeror and the independent board.
- (15) An offer circular relating to a section 117(1)(c)(i) of the Act disposal, Section 117(1)(c)(ii) of the Act amalgamation or merger or section 117(1)(c)(iii) of the Act scheme of arrangement is the -
  - (a) responsibility of the independent board if the proposed affected transaction is for a 100% beneficial interest or a 100% assets/undertaking acquisition by an offeror payable in cash or cash equivalents;
  - (b) responsibility of the independent board and the offeror if the proposed affected transaction is for a 100% beneficial interest or a 100% asset/undertaking acquisition by an offeror payable in offeror securities;
  - (c) responsibility of the independent board and the offeror if the proposed affected transaction is an acquisition for less than 100% of a beneficial interest or less than 100% of the assets/undertaking by an offeror payable in offeror securities.
- (16) Within 20 business days after an offeror offer circular has been posted, the independent board shall post the offeree response circular.
- (17) The consideration shall be settled within six business days of an offer being declared wholly unconditional and acceptance thereof by a holder, whichever is the later.
- (18) With respect to an exchange timetable regarding offers, the closing date of an offer is also the last day to trade and holders shall accordingly -
  - (a) be entitled to acquire securities up to and including the closing date of an offer; and
  - (b) be able to accept an offer in respect of all securities beneficially held, or acquired, up to and including the closing date of an offer.
- (19) An offer consideration may only be revised by announcing -
  - (a) an increase in the original announced offer consideration(s); or
  - (b) an alternate consideration to the original announced offer consideration (i.e. adding a share or cash consideration);

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collectively defined as the “revised offer consideration”.

- (20) The revised offer consideration announcement content shall comply with the requirements of a firm intention announcement.
- (21) If an offer consideration is revised, the offer shall be kept open for at least 15 business days following the date on which the revised offer consideration is announced, which announcement shall be posted to the offeree regulated company’s relevant holders.
- (22) If an offer consideration is revised, all holders of relevant securities who have accepted the initial offer consideration shall be entitled to revise their initial acceptance and elect to receive the revised offer consideration.
- (23) No announcement revising an offer consideration(s) shall be posted on or after the 45th business day after an offer has opened unless such offer is unconditional as to acceptances.
- (24) If “no increase statements” in relation to the offer consideration such as “the offer consideration will not be further increased” or “our offer consideration remains at x cents per security and it will not be raised” are included in announcements, circulars or any statement by or on behalf of an offeror, its directors (or equivalent) or advisers, and not withdrawn immediately if incorrect, then the offer consideration may not subsequently be increased.
- (25) An independent board shall announce a response to a revised offer consideration announcement within five business days detailing its opinion and the opinion of its independent expert concerning the revised offer consideration(s) and any other details considered pertinent by such board.
- (26) Before an offer may be implemented or given effect to, the Panel must issue a compliance certificate against request.

**104. Duties of directors of offeree regulated companies***Authority s. 119(2) and 119(1)(c)(i)*

- (1) Offers require the expansion of a director’s duty of good faith in terms of the “Standards of directors’ conduct” in section 76 of the Act to include the general body of the offeree regulated company’s securities holders concerned.
- (2) The directors of an offeree regulated company that is the subject of an offer shall not resign from the board of the offeree regulated company from the date of the firm intention announcement until the offer is declared unconditional or lapses or is withdrawn.
- (3) In an offer, and during the entire course of such offer, a director of an offeree regulated company, whether executive or non-executive, must fully disclose to the offeree regulated company board, any conflict of interest or potential conflict of interest, including its nature, in relation to such transaction. Such disclosure must be made immediately when the director becomes aware of any such conflict. In such a

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case, where the director considers that such conflict or potential conflict may affect his independence, the director concerned must declare himself non-independent.

- (4) If a director does not declare himself non-independent and the board of the offeree regulated company considers such director to be non-independent, the board must declare the director to be non-independent.
- (5) A non-independent director may not tender an opinion or vote on any matters at a meeting of the independent board, and must recuse himself from its deliberations. However, the independent board may determine the extent of his attendance at any of its meetings for a defined purpose, such as furnishing factual information.
- (6) The determination of independence affects primarily offeree regulated company directors but may also be relevant to offerors.
- (7) If an offeror is not a company, references to offeror directors apply equally to trustees of trusts, partners of partnerships, members of a consortium and similar personae.
- (8) The following situations are relevant in determining independence but are not considered to be exhaustive:
  - (a) A director who is a member of the boards of both an offeror and an offeree regulated company is presumed to be conflicted and non-independent, but such presumption is rebuttable at the instance of the independent board. If a director is declared independent by the independent board, the director is conflicted at the offeror board/management level, and vice versa.
  - (b) A director of an offeree regulated company who holds vested shares and/or options ("vested securities") in the offeree regulated company, which vested securities -
    - (i) have an intrinsic value (as defined by International Financial Reporting Statements) which represents a material amount of the director's net worth; and/or
    - (ii) represents a material holding in the offeree regulated company;is presumed to be conflicted and non-independent, but the presumption is rebuttable at the instance of the independent board.
  - (c) A director of an offeree regulated company is non-independent if the director -
    - (i) holds unvested securities or options, and who is offered any substitute share/option scheme, separate offer or acceleration of vesting periods which would give rise to a benefit in terms of an offer; or
    - (ii) is partial to the outcome of an offer because of an increased or decreased future benefit or loss of office or employment is non-independent.

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- (d) A director of an offeree regulated company who is related or inter-related to any person who is, or would be considered, non-independent in relation to an offeree regulated company concerned, in terms of an offer, is rebuttably presumed to be non-independent.
  - (9) An independent board should comprise a minimum of three independent directors, and if there are less than three independent directors, other persons must be appointed to the independent board.

**105. Requisite knowledge of independent board members**

Each member of an independent board, and where applicable, an independent board of an offeror, must ensure that he has received all necessary information in order to provide a fully informed opinion to relevant securities holders concerning an offer and for that purpose must -

- (a) meet with all appointed advisers to be briefed on all details of the offer, including the offer mechanism, terms, conditions and other relevant information;
- (b) whilst respecting regulatory timetables, ensure that he has sufficient time to discharge all duties and responsibilities and resist haste and pressured time deadlines; and
- (c) ensure he is properly informed of the offeree regulated company's value per security or, where applicable, the offeror company's value per relevant security.

**106. Independent board opinion**

- (1) The independent board of an offeree regulated company that is the subject of an offer must obtain appropriate external advice from an independent expert in the form of a fair and reasonable opinion.
- (2) The independent board must take cognisance of the fair and reasonable opinion received in forming its own opinion on an offer consideration(s), which opinion must be communicated to the relevant offeree regulated company's holders.
- (3) In order to enable the independent board to express an opinion on an offer and on the offer consideration, it must either -
  - (a) perform a valuation of the offeree regulated company's securities that are the subject of an offer, including an attributable value per security where the offer is a disposal of assets or undertaking in terms of section 112 of the Act; or
  - (b) place reliance upon a valuation performed by the appointed independent expert on the offeree regulated company's securities that are the subject of an offer, including an attributable value per security where the offer is a disposal of assets or undertaking in terms of section 112 of the Act, after performing the

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requisite amount of work that satisfies the independent board that it is justified in placing reliance upon such valuation.

- (4) An independent board must form a clear basis for the expression of an opinion to relevant holders dealing with value and price compared to the consideration offered.
- (5) If the consideration offered per security exceeds either the estimated fair value per security or current traded price per security, but not both, a split opinion clearly detailing the independent board's view is required e.g. fair but not reasonable or reasonable but not fair.
- (6) An independent board must form a view of a range of fair value, based upon an accepted valuation approach, of the offeree regulated company securities. An offer with a consideration per offeree regulated company security within the fair value range is generally considered to be fair.
- (7) The independent board must consider factors that are difficult to quantify, or are unquantifiable, and must disclose any such factors (or state that there are none of which it is aware) and take them into account in forming its opinion in respect of fairness.
- (8) An offer with an offer consideration per offeree regulated company security above the offeree regulated company's traded security price at the time the offer consideration(s) per security was announced, or at some other more appropriate identifiable time, is generally considered to be reasonable.
- (9) An offer with an offer consideration comprising or including offeror company securities requires the independent board to carefully consider the price and value per security of the offeror's securities relative to the offeree regulated company securities. In such an offer, the offeror company must either -
  - (a) appoint an independent expert to provide a fair and reasonable opinion concerning the offeror company's relevant securities value and price to the independent board of the offeror company, the offeree regulated company's independent board and to the offeree regulated company's independent expert, in which case the independent board of the offeror company must express its opinion on the offeror company's securities value and price after considering the fair and reasonable opinion; or
  - (b) provide relevant information, as agreed between the parties, concerning the offeror company, directly to the independent board and to the offeree regulated company's independent expert, to enable the independent board and the offeree regulated company's independent expert to consider and opine on that information.
- (10) If the independent board is not unanimous in its opinion, all differing opinions of members, including reasons, must be provided to holders.

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**107. Independent expert**

- (1) The Act and the Takeover Regulations collectively require the appointment of an independent expert by an offeree regulated company and, where applicable, an offeror company (when offeror securities are offered as whole or part offer consideration), in regard to offers (being qualifying disposals, amalgamations or mergers, schemes of arrangement, general offers, mandatory offers, partial offers and comparable offers) and to provide a report in the form of a fair and reasonable opinion to the relevant board.
- (2) The independent expert's fair and reasonable opinion must address the same concepts of fairness and reasonableness described in Regulation 106.
- (3) The independence of the independent expert requires that the independent expert must not only be able to show that it is independent but must also take into account whether it will be perceived to be independent taking into account any other existing relationships and appointments.
- (4) The independent expert must satisfy the Panel that it is competent to act in respect of the offer, which the Panel may challenge if it is not satisfied.
- (5) Notwithstanding any prior approval given by the Panel, the Panel may at any time, either itself or in response to written representations by holders of relevant securities, require the appointment by either or both of the offeror and the offeree regulated company of a further independent expert approved by the Panel.
- (6) The independent expert's valuation of the offeree regulated company shall be performed in accordance with generally accepted valuation approaches and methods in use in the market from time to time including in order of preference -
  - (a) capitalisation, income or cash flow approach which relies on the 'value-in-use' principle and requires determination of the present value of future cash flows over the useful life of the asset or business;
  - (b) comparative or market approach which relies on the principle of 'willing buyer, willing seller' and requires that the amount obtainable from the sale of an asset or business is determined as if in an arm's-length transaction; and
  - (c) cost approach which relies on historical amounts spent on the asset or business.
- (7) In respect of mineral companies the valuation approach and methodology must comply with the SAMVAL code.
- (8) The content of the independent expert's fair and reasonable opinion in relation to an offer must, inter alia, include the following -
  - (a) the date of the fair and reasonable opinion and confirmation that the fair and reasonable opinion has been given to the relevant board concerned for the sole

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purpose of assisting the relevant board in forming and expressing an opinion for the benefit of holders, excluding the offeror;

- (b) a statement that the fair and reasonable opinion may be included, in whole or in part, in any required regulatory announcement or documentation;
- (c) a clear expression of opinion dealing with the fairness and reasonableness of the offer consideration(s) in regard to holders, excluding the offeror;
- (d) a detailed list of all source documentation used and reviewed and work done in accordance with the scope of the appointment;
- (e) the valuation approach adopted and method employed and all material assumptions underlying the valuation approach and methodology e.g. without being exhaustive, in the case of the capitalisation / income approach, the number of explicit forecast growth years, the in perpetuity formula employed post the growth years, the economic assumptions used such as revenue pricing and growth, expense pricing and growth, taxation, exchange rates, interest rates, the method of calculating free cash flows or future benefits, the forecast capital structure showing costs of equity and debt and weighted average cost of capital used to calculate discount rates, whether nominal or real discount rates and interest rates have been used;
- (f) a range of final valuation values attributable to the relevant securities and a most likely value used as the core number for purposes of the expression of the opinion;
- (g) any other valuation or pricing approaches and methodologies used in corroborating the expression of the opinion e.g. the comparative approach or cost approach;
- (h) the fee payable or paid to the independent expert for the fair and reasonable opinion and confirmation that the fee is not contingent on or related to the outcome of the offer; and
- (i) a declaration of the independence and competence of the independent expert, which may require evidential justification if the Panel is not satisfied with such declaration.

**108. Variation in offers**

- (1) If an offer (including a partial offer in terms of section 125(3) of the Act) is subject to any other condition(s), which offer, if successfully implemented, would result in a beneficial interest entitling an offeror and its concert parties to either -
  - (a) exercise voting rights exceeding the prescribed percentage for the first time; or
  - (b) exercise all voting rights of a particular class of security or all voting rights of all securities issued not already held, where voting rights exceeding the prescribed percentage were held pre the offer;

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- (2) After an offer opening contemplated in sub-regulation (1), the offer is amended through any other conditions being varied by a regulatory authority, which variation requires or permits the acquisition of a lesser beneficial interest than originally included in the offer, the offeror and its concert parties must obtain the approval of the independent holders of more than 50% of the general voting rights of all issued securities of the offeree regulated company to approve such amended offer as a partial offer.
- (3) Failing such approval being obtained, within three months thereafter, the offeror and its concert parties shall dispose of that number of relevant securities which will either
  - (a) reduce the beneficial interest voting rights to –
    - (i) a level less than the prescribed percentage; or
    - (ii) the beneficial interest level which existed prior to the original offer being made; and
  - (b) during such period of disposal, the offeror and its concert parties shall only be entitled to exercise voting power as does not exceed the levels in Regulation 108.

**109. Solicitation campaigns**

Persons conducting any solicitation campaign(s) in which holders of an offeree regulated company are contacted regarding an offer and their acceptance or voting in respect of such offer, shall only be provided with previously published information which remains accurate.

**110. Information to offerors**

- (1) Any information, including particulars of holders of relevant securities, given to a preferred offeror or potential offeror shall on request be furnished equally and as promptly to a less welcome but *bona fide* offeror or potential offeror (“the less welcome potential offeror”).
- (2) The directors of an offeree regulated company are entitled to test the *bona fide* nature of a less welcome potential offeror by requiring that at the same time the information is to be furnished by the offeree regulated company, equivalent information concerning the less welcome potential offeror be given to the offeree regulated company.
- (3) The directors of the offeree regulated company are also entitled to determine whether any approach is on a nominee basis for an undisclosed ultimate offeror or undisclosed ultimate indirect beneficial owner (“ultimate person”), in which case the less welcome potential offeror is the undisclosed ultimate person.