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SUMMARY OF CIPC NON-BINDING OPINIONS ISSUED UP TO 7 DECEMBER 2102

1 GUIDANCE ON THE INTERPRETATION OF THE PROVISIONS OF THE COMPANIES ACT, 2008 AND REGULATIONS IN RELATION TO THE RIGHTS OFFERS IN RESPECT OF LISTED SECURITIES

Webber Wentzel attorneys, per Mr. P Bradshaw and Mr. X Hlatshwayo requested the CIPC to provide it with a non-binding option on the interpretation of section 96 (1) of the Act read with regulation 50 of the Companies Regulations 2011, relating to the rights offer of listed securities.

Webber Wentzel state the difficulty they have with these provisions as follows:

"1.4 - In order to fall within the exemption from the requirements for "offers to the public" (including the obligation to issue a full prospectus), a rights offer must be an offer:

1.4.1 with or without the right to renounce in favour of other persons;
1.4.2 made to holders of a company's securities;
1.4.3 for subscription of any securities of that company or other company in the same group of companies; and
1.4.4 which satisfies the "prescribed requirements".

The CIPC agrees with the above interpretation as it's in line with the definition of " rights offer" in section 1 and exemption envisaged in section 96 (1) (d) of the Act.

Webber Wentzel then continues:

a. The prescribed requirements envisaged in paragraph 1.4.4 are contained in Regulation 50 of the Regulations. However, the application of Regulation 50 to rights offer under the Companies Act is not entirely clear.

b. Regulation 50 deals with rights offers in respect of listed securities and provides that:

> "*A rights offer in respect of listed securities, and all documents issued in connection with it, must satisfy the requirements that would apply to a prospectus in terms of sections 100 and 101 and Regulation 51, each read with the changes required by the context."*

c. Regulation 51 sets out the general requirements for prospectuses, requiring them (a) to be prepared using plain language and (b) to be presented in a narrative form, with statistical information in tabular form.

d. Section 100 of the Companies Act is more problematic in that it is not clear in most cases how its provisions can apply to a rights offer. Section 100 sets out detailed requirements for a prospectus. Section 100(1) provides that section 100 does not apply in respect of listed securities, except listed securities that are the subject of an initial public offering. A rights offer which complies with section 96(1) (d) cannot be an initial public offering because it is excluded

from being an offer to the public.

Guidance Requested

Webber Wentzel requested the commission's guidance as to the proper interpretation of Regulation 50 and its application to rights offers. In particular, the Commission is requested to confirm that under that Companies Act:

- A rights offer which complies with the JSE Listing Requirements will fall within the exemption in section 96(1)(d): and
- No obligation to issue a prospectus arises in respect of a rights offer envisaged in paragraph 3.1.

CIPC - The extent of the application of section 100 of the Companies Act should, however, be considered against what is aimed to be achieved by and with regulation 50. Section 95(7) empowers the Minister to make regulations establishing general or specific requirements respecting the form and content of rights offers. This is what is intended with regulation 50 and the interpretation should, therefore, be that section 100 applies only as far as the form and content of the rights offers are concerned. Section 95(7) does not allow the Minister to prescribe anything else than form and content. It should also be noted that secondary legislation such as these regulations cannot amend the primary legislation and an interpretation that a rights offer is subject to all prospectus provisions is simply not reconcilable with the Act.

The intention of the legislature is clearly that rights offers of listed securities should not be regarded as offers to the public and, therefore, specifically not subject to the registration requirements of the prospectuses.

The application of sections 96(1) (d) and 102 and regulation 51 to rights offers is clear and section 100 should only be applied to the extent that it prescribes the form and content of a prospectus.

A rights offer must in addition to complying with the Listing Requirements of the JSE also comply with the provisions of section 100 and 102 of the Act only as far as form and content are concerned and with regulation 51.

No obligation to issue a prospectus arises in respect of a rights offer of listed securities.

Although there are no filing requirements under the Companies Act, the CIPC will accept a copy of the final offer document, as provided by the JSE, filed with the CIPC for disclosure and record purposes.

2 INTERPRETATION OF SECTION 16 (9) OF THE COMPANIES ACT, 2008, IN RELATION TO THE DATE ON WHICH AN AMENDMENT OF A MEMORANDUM OF INCORPORATION OF A COMPANY TAKES EFFECT AND THE MEANING OF "FILING"

Werksmans Attorneys, per Mr. P le Roux, requested CIPC to provide with a non-binding opinion in terms of section 188 (2) (b) of the Companies Act, 2008, on the interpretation of section 16 (9) of the Act.

> "(9) An amendment to a company's Memorandum of Incorporation takes effects –
>
> (a) In the case of an amendment that changes the name of the company, on the date set out in the amended registration certificate issued by the Commission in terms of subsection (8), read with section 14 (1) (b) m(iii); or

(b) In any other case, on the later of –

(i) The date on, and time at, the Notice of Amendment it filed; or
(ii) The date, if any, set out in the Notice of Amendment."

Werksmans express the view, with which the CIPC is in agreement; that in practice it is important for companies to understand when an amendment to their Memorandum of Incorporation becomes effective and questions the CIPC's perceived approach that special resolutions to amend a MoI must be registered by the CIPC.

Werksmans contend –

> "According to our opinion, when a company elects that an amendment to its MoI becomes effective on the date that the Notice Form CoR15.2 is filed, its MoI will be amended from the date it is delivered to the Commission.
>
> The question now arises whether CIPC is of the view that some sort of registration must take place to complete the filing referred to in the Companies Act. Our view is that the Act does not support such an interpretation.
>
> This also raise the question whether the CIPC considers itself responsible to review the content of a MoI or special resolution and to refuse registration or filing if it does not agree with the content thereof.
>
> If our interpretation as set above is correct and an amendment becomes effective on delivery there remains nothing to reject. If the CIPC is of the view that some sort of registration is required and it refuses that registration it will have no effect as filing has already taken place.
>
> In our view CIPC is accordingly not obliged to read or consider the content of a special resolution and cannot refuse to accept filing provided it is done on and in accordance with the prescribed forms."

CIPC - The CIPC acknowledges that "register" might have been an unfortunate choice of word in the notices to customers in relation to the filing of special resolutions for amendment of the MoI and it cannot agree that mere delivery constitutes an effective filing of an amendment to a MoI. The position of the CIPC under the Act is unfortunately not that simple and the CIPC as an office of company records, is in terms of both the Act and the Regulations required to also verify certain information and therefore acceptance of the form CoR15.2 is required in addition to filing to constitute effective filing. In general terms the CIPC is entitiled to reject the filing of a specific document in the following circumstances:

- when the prescribed fee for that document/form has not been paid;
- When the information required to be completed on the document is incomplete;
- When the company could not be properly identified – for instance, the company name and registration number do not match;
- When the document/form is not signed;
- When the CIPC is unable to confirm the identity of the person filing the document/form (reg 168); and

When the CIPC is unable to verify that the person filing the document/form has the right to file that document or is authorised to file it on behalf of another person who has the right to file it (reg 168);

Should the filing be accepted by the CIPC after these additional requirements have been satisfied, the amendment would be effective in accordance with the option elected on form CoR15.2 in terms of section 16 (9) of the Act.

It is submitted that the CIPC further has the right and the duty to also ensure that the amendment filed with it complies with any further requirements that the Act or Regulations may have in relation to a particular amendment. For certain changes of a MoI additional requirements are set, e.g. for the conversion of par value shares into no par value shares regulations 31 (5) requires that a report by the board dealing with certain matters must be filed with the resolution.

Should filing be complete upon mere delivery, as Werksmans would like to believe, great uncertainly would be created as valid and invalid amendments of a MoI (and other company documents) would be placed on file as official documentation pertaining to the company concerned and interested persons would have to approach the court in many cases for a determination of validity.

In the light of the above observations the CIPC does not regard any document as effectively filed unless it has been accepted as complying with the criteria set out in paragraph 5 above and it also complies with any additional requirements of the Act or Regulations referred to in paragraph 6.

It is important to note that the filing of a document might also be undone when a company challenges such filing in terms of regulation 168 (6) and (7).

3 GUIDANCE ON THE INTERPRETATION OF THE PROVISIONS OF THE COMPANIES ACT, 2008, ON THE LIMITATION OF LISTING DEBT INTRUMENTS ON THE JSE BY PRIVATE COMPANIES AND THE CONSEQUENTIAL EFFECT OF SUCH LISTING

A number of large private companies have listed certain debt instruments on the JSE under the provisions of the repealed Companies Act, 1973, and these instruments continue to trade. This could have been done as the definition of “share” under the repealed Act excluded such debt instruments and the requirement for a private company to restrict the transfer of its shares did not find application. Under the Companies Act, 2008 (the Act), “securities” have been more widely defined and would, according to the definition now include the debt instruments concerned.

There are alternative interpretations based on the heading of section 43 of the Act which suggest that loans and promissory notes are excluded from the definition of “debt instrument” and consequently from the definition of “securities”, which would render the listing referred to above in order. Due to interpretational uncertainty the JSE has now requested the CIPC to provide them with guidance on the correct interpretation of the Act in this matter.

The CIPC and the Special Committee on Company Law established under section 191 of the Act have considered but do not subscribe to the latter interpretation and hold the view that the exclusion to in section 43 is clearly limited to the provisions of that section only and not to the greater Act. Consequently the listing of the debt instruments concerned is contrary to the requirement of section 8 (2) (b) (ii) (bb) in so far as private companies are required to limit the transferability of their securities.

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The consequential effect of the new requirement is that the private companies which have so listed their debt instruments could no longer be regarded as private companies under the Act and that they must convert to public companies. This could be done by either filing an appropriate new Memorandum of Incorporated for the company or by amending the company’s current Memorandum of Incorporation to remove the articles relating to private

companies and to insert those relating to public companies.

The same principle would also apply to unlisted debt instruments such as loans and promissory notes of private companies that may be trading through brokers. The Companies Act, 2008, requires all private companies to restrict the transferability of their securities and according to the wider definition of securities in the said Act it would include debt instruments which were not considered to be shares under the repealed Companies Act. Such private companies would likewise be required to convert into public companies.

4 GUIDANCE ON THE INTERPRETATION AND APPICATION OF SECTION 72 (4) TO (10) OF THE COMPANIES ACT, 2008, AND REGULATION 43 OF THE COMPANIES REGULATIONS, 2011.

The firm, Christopher Lee Attorney, requested the CIPC to provide a non-binding opinion on the interpretation of section 72 of the Act and regulation 43 of the Companies Regulations, 2011.

Section 72 (4) requires certain categories of companies to appoint a social and ethics committee to perform certain prescribed functions. Section 72 (5) (b) provides that any company falling within such category of companies may apply to the Tribunal for an exemption from that requirement.

Regulation 43 provides that the following companies must appoint a social and ethics committee:

- Every state owned company;
- Every listed public company;
- Any other company that has in any two of the previous five years, scored above 500 points in calculating its public interest score in terms of regulation 26 (2).

Regulation 43 further exempts from this requirement any company if –

- It is a subsidiary of another company that has a social and ethics committee, and the social and ethics committee of that other company will perform the functions required by regulation 43 on behalf of that subsidiary company; or
- It has been exempted by the Tribunal in accordance with section 72 (5) and (6).

In the case under consideration the group is made up of two companies, viz. a shell holding company and an operating company. The holding company has no employees and only two shareholders but in terms of its turnover-dividend and liabilities its public interest score exceeds 500. The subsidiary company is 100% owned by the holding company and due to its number of employees of approximately 3000, and its turnover and liability scores, its public interest score is also above 500.

Due to this group structure and the fact that the only infrastructure within the group to facilitate a social and ethics committee lies within the subsidiary company, the question is asked whether the said committee could be established within the subsidiary company to serve both companies in performing the functions of the social and ethics committee for both the holding and subsidiary company.

CIPC - The exemption provided for in regulation 43 is for a subsidiary of a company that already has a social and ethics committee and that committee will perform the required functions also for this subsidiary. As this is an automatic statutory exemption it must be strictly interpreted and the exemption would, therefore, not apply. Regulation 43 also refers

to an exemption that could be applied for under section 72(5) and as exemption will be based on the exercise of a wide discretion by the Companies Tribunal, The Company would be able to obtain the required relief through this route.

There is also a practical approach that could be followed in a small group such as this and that is that both companies appoint the same social and ethics committee so that there is no reliance on any exemption.

5 GUIDANCE ON THE INTERPRETATION OF THE TRANSITIONAL PROVISIONS OF THE COMPANIES ACT, 2008 (THE ACT), IN RELATION TO COMPANIES INCORPORATED, UNDER SECTION 21A OF THE REPEALED COMPANIES ACT, 1973 (THE REPEALED ACT)

KPMG requested CIPC to provide clarity on the position under the Act of companies incorporated under section 21A of the repealed Act as neither item 2 nor item 4 of Schedule 5 of the Act refers specifically to this type of company.

Section 21A of the repealed Act provided for a branch established in the RSA of a company or other association of persons incorporated outside the RSA, or an unincorporated association of persons which had its head office in a foreign country, to be incorporated as a company under section 21 if the entity fulfilled certain further conditions.

The said section 21A in subsection (3) further expressly provided that the provisions of the repealed Act with regard to external companies do not apply to companies which have been incorporated by virtue of section 21A.

CIPC - A company incorporated by virtue of section 21A was in fact, therefore, incorporated under section 21 of the repealed Act and would in terms of item 4 (1)(a) of Schedule 5 of the Act be a non-profit company.

All companies concerned should, therefore, ascertain from their incorporation documents whether a memorandum and articles of association complying with section 21 of the repealed Act was registered or whether a certified copy of their constitution in the foreign jurisdiction was registered. If the latter was the case the company would be regarded as an external company in terms of item 2 (6) of Schedule 5 of the Act and the company could apply for an amended registration certificate.

6 INTERPRETATION OF SECTION 11(3) (b) READ WITH SECTION 65 (12) AND 15(2) (a) (3) OF THE COMPANIES ACT, 2008, IN RELATION TO THE USE OF "(RF)" IN THE NAME OF A COMPANY

Graeme Fraser & Veldra Morris of Companies Act Online requested that clarity be provided on the following statement and question flowing from the statement:

"Section 65(11) (a) to (m) set out the various instances in which the Act requires that a special resolution is required from the shareholders of a company but –

(a) Section 65(12) allows the Memorandum of Incorporation of a company to require a special resolution to approve any other matter not contemplated in subsection (11); and

(b) Section 15(2)(a)(iii) states that the Memorandum of Incorporation of a company may impose on the company a higher standard, greater restriction, longer period of time or any similarly more onerous requirement, than would apply to the company in terms of an unalterable provision of the Act.

If a company's Memorandum of Incorporation contains a clause which would fall within (a) or

(b) above would that company's MoI be regarded as falling within the provisions of section 15(2) (b) or (c) resulting in that company being required to include letters "(RF)" at the end of the company's name and reference to such clause in the company's Notice of Incorporation.

RF is the abbreviation for "Ring Fenced" and section 11(3)(b) requires every company to use "(RF)" as part of its name if the company's MoI includes any provision contemplated in sections 15(2)(b) or (c) restricting or prohibiting the amendment of a particular provision of the MoI. Section 15(2)(b) refers to provisions that "contain any restrictive conditions applicable to the company" (and any requirement for the amendment of any such condition in addition to the requirements set out in section 16) and 15(2)(c) refers to provisions that "prohibit the amendment of any particular provision" of the MoI of the company.

Under the repealed Act a company had the powers and capacity determined by its main object as stated in the specific company's memorandum of association and the complex "**doctrine of constructive notice"** applied to all outsiders. In terms of this doctrine the public is, therefore, presumed to have knowledge of any limitations on the powers and capacity of the company.

Under the Companies Act, 2008, a company has, in terms of section 19(1) (b), the powers and capacity of a natural person or individual of full capacity except to the extent that a juristic person is incapable of exercising any such power or having such capacity. Section 19(4) specifically excludes the operation of the doctrine of that interacts with a company can accept that the company has the necessary power and capacity to participate in that activity and to bind the company.

The doctrine of constructive notice would, therefore, only apply under the Companies Act, 2008, in very limited circumstances.

In principle, if a limitation could have any effect on third parties, it would be advisable to use (RF) in the name. The wording of section 15(2) (b) or (c) is, however, not sufficiently clear to limit the use of (RF) to those instances only.

The answer to the questions posed in paragraph 1 would, therefore, be that it is conceivable that in both cases the conditions as set out in section 15(2) (b) or (c) could be met although in many cases it might be irrelevant to third parties.

In the circumstances the CIPC would recommend that expression (RF) be used in all cases where:

- The purpose or objectives of the company is restricted or limited in the MoI of the company;
- The powers of the company is restricted or limited in any way in its MoI;
- Any other limiting or restricting condition is contained in the MoI of the company;
- Any requirement in addition to those set out in section 16, for the amendment of any of the abovementioned restrictions or limitations is contained in the MoI;
- A special resolution to approve any matter not contemplated in section 65(11) is prescribed in the MoI of a company;
- The MoI of a company imposes on the company a higher standard, greater restriction, longer period of time or any similarly more onerous requirement, than would apply to the company in terms of an unalterable provision of the Act; and
- The MoI of a company contains a prohibition on the amendment of any particular provision of the MoI.

7 INTERPRETATION OF SECTION 30 (2) AND 30 (4) OF THE COMPANIES ACT, 2008, IN RELATION TO THE DISCLOSURE OF DIRECTORS' REMUNERATION IN PRIVATE COMPANIES.

Webber Wentzel, requested CIPC to provide it with a non-binding opinion on the interpretation of section 30(4) of the Act. The relevant parts read as follows:

> 30 (4) The annual financial statements of each company that is required in terms of this Act to have its annual financial statements audited, must include particulars showing-
>
> a) The remuneration received by each director….
> b) The amount of-
> i) Any pensions paid by the company to directors
> ii) An amount paid by the company to a pension scheme with respect to directors;
> c) The amount of compensation paid in respect of loss of office to directors;
> d) The number of any securities issued to a director and
> e) Details of service contract of directors.

Webber Wentzel contend as follows:

"It follows from the language of the preamble to section 30(4) that if a company is not "required in terms of the Act" to have its annual financial statements ("AFSs") audited, then it is not required in terms of section 30(4) to include in its AFSs the particulars with respect to directors' remuneration and benefits set out in section 30(4), (5) and (6).

In our view, on a proper reading of section 30(4) read with section 30(2) of the Act, and for among others the reasons stated below and policy considerations, a private company and a personal liability company are not companies that are required in terms of the Act to have their AFSs audited; and consequently (even when they are required in terms of the regulations to have their AFSs audited) do not need to include in their AFSs the private and confidential details of directors' remuneration and other benefits in terms of section 30(4). Policy considerations for this private treatment of private companies (and personal liability companies) would be that, having regard to the nature of these type of companies and the prohibition against their offering securities to the public, members of the public are not potential investors in these type of companies and consequently have no need of knowledge or access to the private and confidential remuneration packages of directors of private companies. In the result, the inclusion in the AFSs of details of the remuneration and benefits payable to directors of private companies and the making of that information available to the public at large is neither necessary nor desirable and serves no purpose

Therefore, the consequence of being a private company, in terms of the Act, are that its AFSs need not be audited and need not be filed with its annual return, and need not contain details of private remuneration packages of its directors. The consequences of a private company being required to have its AFSs audited in terms of the regulations because of its social and economic impact, are that its AFSs must be audited and must be filed with its annual returns, but still do not need to contain details of the private remuneration packages of its directors.

The source for the requirement to have annual financial statements of companies other than public and state owned companies audited is, therefore, the regulations. Webber Wentzel continues by identifying other relevant provisions of the Act where referenced is made to the source of the audit requirement and finds it in sections 84(1) (c) and 33(1) (a). In these sections the reference is specifically made both sources of this requirement, being the Act on the one hand and the regulations on the other.

The CIPC agrees with the view of Webber Wentzel that section 30(4), by not referring to the requirement of the regulations to have annual financial statements audited, in fact places that requirement on public and state owned companies only and that private companies and personal liability companies whether they are required in terms of the regulations to have the annual financial statements audited or not, are not required to disclose particulars of directors' remuneration and other benefits envisaged in section 30(4), (5) and (6).

The CIPC also agrees with the incidental conclusions of Webber Wentzel that a private or personal liability company that is not required in terms of the regulations to have its annual financial statements audited:

- Is not required to comply with Chapter 3 of the Act in terms of section 84 (1)(c); and
- Is not required to file its annual financial statements with its annual return in terms of section 33 (1) (a).

When the Bill was introduced in Parliament it was the stated intention to exempt all private companies from preparing financial statements. The requirement in section 30(4) that directors' remuneration and benefits should be disclosed was from the outset meant to apply to public companies only and if the legislature intended for this disclosure to extend to all companies that have to be audited this intention would have been clearly stated.

8 INTERPRETATION OF SECTION 45 OF THE COMPANIES ACT, 2008, IN RELATION TO THE PROVISION OF FINANCIAL ASSISTANCE BY A COMPANY TO ANOTHER COMPANY THAT IS RELATED OR INTER-RELATED.

The purpose of section 45 is to protect a company and its shareholders from directors of the company abusing their position and diverting or placing at risk the company's assets and cash flows (in the form of loans or financial assistance) directly or indirectly to or for the benefit of directors or prescribed officers (and not for legitimate business and commercial purposes).

The purpose (and language) of section 45(2) is therefore aimed at addressing the provision of financial assistance by the company to:

(a) Directors/prescribed officers of the company;
(b) Directors/prescribed officers of a company related or inter-related to the company;
(c) A company or corporation that is related or inter-related to any such directors/prescribed officers;
(d) A member of a corporation that is related or inter-related to any such directors/prescribed officers;

Any person who is related to any director or prescribed officer or company or corporation or member contemplated under (a) – (e) above.

The purpose of section 45 is therefore not to hamper the board (acting in the best interest of the company) exercising the company's power to provide financial assistance to any other company or corporation or person unrelated to a director or prescribed officer.

"It follows from this logically that the purpose of section 45(2) is not to hamper the provision of financial assistance by the company to another company that is related or inter-related to the company e.g. a subsidiary or group company or holding company etc. (but is not related or inter-related to any director or prescribed officer or company or corporation or member contemplated under (a) – (e) above). If this is correct, then a company has the power (and the board has the power in terms of section 66(1) to exercise this power of the company) to efficiently allocate and re-allocate surplus cash among group companies so that they can

achieve optimum use of cash and value creation; and to provide security. Requiring shareholder approval for these normal type of business decisions would fly in the face of the rationale for the division of powers between shareholders and directors now embedded in section 66(1) of the Companies Act. Forcing companies to first secure a general authority by special resolution so that the board(s) may continue with intra group financial assistance for the benefit of the group also does not appear to solve or prevent any other possible mischief and probably won't affect intra group cash flows from going where they need to go for commercial reasons."

The provisions of section 45 (financial assistance to directors) therefore amount to an improved and refined version of section 226 of the now repealed Companies Act, 1973; and no more.

The purpose of section 45 as described above is evident from the language used for example in the heading of section 45 (financial assistance to directors); and in section 45(1)(b)(iii); 45(3)(a)(i); 45(7) red with 77(3)(e)(v) – each of which expressly refer to and make sense only in relation to the provision of financial assistance to a director or prescribed officer.

To the extent that the language used in section 45(2) can be reasonably construed to have more than one meaning, then in terms of section 158(b)(ii), preference must be given to the meaning that best promoted the spirit and purpose of the Act. I suggest that the spirit and purpose of section 45 is as described above.

CIPC - Having considered section 45 and Webber Wentzel's contentions and submissions it appears in essence that they are of the opinion that the prohibition on financial assistance to directors and prescribed officers, and to companies and other persons related to them, without being authorised by a special resolution of shareholders to do so, does not extend to the provision of financial assistance to a related or interrelated company or corporation of the company itself (companies within the same group).

Webber Wentzel is correct in suggesting that section 45 is rooted in section 226 of the repealed Companies Act, 1973. In several important respects, it is similar to the old section 226, but in other respects it is dissimilar. Section 226 (1) was originally silent on the question whether a company could make a loan or grant other assistance to its own subsidiary or holding company, but an amendment in 1977 introducing section 226 (1B) made it clear that such loans were entirely exempt from the application of section 226. In other words, section 226 dealt only with assistance to directors and managers, either directly, or by way of assistance to companies controlled by those directors/managers. Section 226 did not target assistance from a company to another company within the same group, even if the various companies had common directors/managers.

Section 45 is totally different in this regard. Unlike the repealed 1973 Act, section 45 (2) does not exempt assistance to the company's own subsidiary or holding company from the application of the section. It does exactly the opposite, expressly referring to such assistance in subsection (2), which permits such assistance "subject to subsections (3) and (4) spell out the requirements that must be satisfied before a company may extend financial assistance to any recipient who falls within the class of persons enumerated in 45(2). In the result, irrespective whether the assistance is to be granted to a director, manager, or to another company within the same group of companies, the applicable requirements of subsections (3) and (4) must still be satisfied and more specifically, such assistance may only be given if sanctioned by a special resolution of shareholders.

Policy: During 2007, the then Minister of Finance, Mr. Trevor Manuel, specifically mentioned intra-group company loans without shareholder knowledge or approval as a matter of concern. This led to the shift in the drafting policy as reflected in the difference between section 226 of the 1973 Act, and section 45 of the 2008 Act. This wording was thus intended and is accurately reflected in the wording of the Act. Parliament supported this policy in the face of several commentators who argued that this would be an additional burden on

companies and would lead to inefficiencies.

9 SECTION 24 (1) OF THE COMPANIES ACT IN RELATION TO THE INCOME TAX ACT

Section 24 of the Companies Act must be read in conjunction with Section 5 (4) (a), in that, the section states as follows:-

"If there is any inconsistency between any provisions of this Act, and a provision of any other national legislation –

The provisions of both Acts apply concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second"

If a company therefore, in terms of the Companies Act retains documents, accounts etc. as per the section for a period of seven years, which is longer that the Income Tax Act provisions containing a shorter five year period, there will be consistency in terms of application and without a contravention.

10 REGISTRATION OF A COMPANY BY USING A REGISTRATION NUMBER BEING IN CONFLICT WITH THE CONSUMER PROTECTION ACT

The area of conflict between the acts is not highlighted in the submission but the CIPC in any event sees no conflict accordingly.

Similarly the use of a registration number as a name in a company will also provide or point to the identity of the incorporators and/or directors and therefore be in sync with what the Consumer Protection Act hopes to achieve.

The registration requirement of the Consumer Protection Act is furthermore only applicable where no registration under any other Act or public regulation is required.

11 ARE OWNER MANAGED ENTITIES EXPECTED TO CALCULATE PUBLIC INTEREST SCORES

Yes they are.

Section 30(2A) of the Companies Act as amended states that "owner-managed" companies even though exempted from an audit and an independent review, that exemption falls away if it meets the Public Interest Score for an audit only as determined by Regulation 28(c) of the Companies Act.

Regulation 26(2) specifically states that every company regardless of any exemption to have its Annual Financial Statements audited or independently reviewed as per S30 (2A) of the Companies Act must calculate its Public Interest Score.

12 SHOULD OWNER-MANAGED COMPANIES ALSO APPOINT AN INDEPENDENT REVIEWER?

No, they are exempt from an independent review. Their Public Interest Score only determines if they should be audited, not independently reviewed. They may do so voluntarily.

13 INTERNAL COMPILATIONS DEFINITION AND WHETHER A COMPILER AND INDEPENDENT REVIEWER CAN BE FROM THE SAME FIRM

Internals compilation is not defined in the Companies Act Regulations but independently

compiled financial statements is defined in Regulation 26(1) (e) as follows:

1) Being prepared by an independent accounting professional,
2) On the basis of financial records provided by the company
3) In accordance with any relevant financial reporting standards.

The independence aspect is spelt out in Regulation 26(1) (d) and its subsections.

As regards whether a compiler and an independent reviewer can be two qualifying professionals from the same accounting firm the answer is yes.

The requirements is only as per Regulation 29(5) in that an independent review of a company's financial statements must not be carried out by an independent accounting professional who was involved in the preparation of the financial statements.

14 SHOULD INDEPENDENT REVIEWERS BE ROTATED SIMILAR TO AUDITORS?

The Companies Act and Regulations contain no such requirements for independent reviewer rotation.

15 HOW IS A TRUST CALCULATED IN TERMS OF A PUBLIC INTEREST SCORE?

Regulation 26(2) (d) (i) requires every individual with direct or indirect beneficial interest in the company's shares to be counted. In the case of a trust, the beneficiaries should therefore be counted as one point per beneficiary and not the trust as a single unit. Trustees are not counted unless they are beneficiaries as well.

16 HOW IS A COMPANY HOLDING SHARES IN ANOTHER COMPANY, PUBLIC INTERST SCORE CALCULATED?

The answer to item 15 above also applies herein.

17 WHEN A BENEFICIAL OWNER IS ALSO AN EMPLOYEE OF THE COMPANY, ARE THEY COUNTED TWICE FOR THE PUBLIC INTEREST SCORE?

The answer is no. Counting the same person twice will not contribute to the protection envisaged through the Public Interest Score.

18 WHEN AVERAGING THE EMPLOYEES, DO YOU ANNUALIZE THE CONTRACT WORKERS?

Annualization must be in terms of the financial year concerned.

19 IN TERMS OF S129 (3) OF THE COMPANIES ACT, WHEN DOES THE CALCULATION OF THE FIVE WORKING DAYS COMMENCE, THE DAY THAT THE FILED NOTICE IS SENT OR WHEN IT IS RECEIVED BY THE COMMISSION

The calculation starts from the first day after the company has adopted the resolution and must therefore be filed on or before the fifth day so calculated.

20 ARE THERE ANY GUIDELINES FOR S138 (2) OF THE COMPANIES ACT

Guidelines are currently being developed by the Commission and an interim practice note will soon be published