



GUIDELINE 3/2011

GUIDELINE ON SECTION 118(1) (c) (i) OF THE COMPANIES ACT NO.71 OF 2008 (“the Act”) AS IT APPLIES TO “SHELF” PRIVATE COMPANIES

1. INTRODUCTION

1.1 In terms of section 201(2)(b) of the Act, the Panel may issue, amend or withdraw information on current policy to serve as Guidelines for the benefit of persons concerned with those transactions regulated by the Panel. Regulation 4 of the Companies Regulation 2011 (the Regulations) provides that a senior officer of a regulatory agency (as defined in the Regulation) may issue a Guideline at any time by publishing a notice of the Guideline to the general public in the Gazette, any generally circulated newspaper on the regulatory agency’s website, or by any similar means of providing information to the public generally.

1.2 It is common practice for advisers in the corporate finance arena (“incorporator”) to register “shelf” private companies for the purpose of on-selling such private companies to persons (“user”) wishing to conduct business using a private company. Section 118(1) (c) (i) of the Act introduces additional levels of compliance which did not previously exist in terms of the previous Companies Act.

1.3 Section 118(1) of the Act provides:

(1) Subject to subsections (2) to (4), this Part, Part C and the Takeover Regulations apply with respect to an affected transaction or offer involving a profit company or its securities if the company is—

- (a).....;*
- (b).....; or*
- (c) a private company, but only if—*

(i) the percentage of the issued securities of that company that have been transferred, other than by transfer between or among related or inter-related persons, within the period of 24 months immediately before the date of a particular affected transaction or offer exceeds the percentage prescribed in terms of subsection (2); or



[Sub-para. (i) substituted by s. 73 of Act No. 3 of 2011.]

(ii) the Memorandum of Incorporation of that company expressly provides that the company and its securities are subject to this Part, Part C and the Takeover Regulations, irrespective of whether the company falls within the criteria set out in subparagraph (i).

(2) The Minister, after consulting the Panel, may prescribe a minimum percentage, being not less than 10%, of the issued securities of a private company which, if transferred within a 24-month period as contemplated in subsection (1) (c) (i), would bring that company and its securities within the application of this Part, Part C, and the Takeover Regulations in terms of that subsection.

(3).....

2 The Panel hereby publishes a Guideline that:

- 2.1 Notwithstanding that a percentage exceeding 10% of the issued securities is being disposed of by the incorporator and is transferred to the user in an initial transaction, the Panel does not regard such initial transaction as categorizing such private company, for purposes of that initial transaction alone, as a regulated company in terms of section 118.1 of the Act, on the basis that no shares had been transferred within the period of 24 months immediately before the date of such initial transaction. Accordingly, the Panel will not insist on compliance with the Takeover Regulations in respect of the initial transactions taking into consideration the purpose and objects of the Takeover Regulations.
- 2.2 However, thereafter for at least 24 months following such initial transaction such private company will, in terms of section 118.1(c) (i) of the Act, be categorized as a regulated company.
- 2.3 The Panel recognises that in the initial start-up phase of a private company the burden of compliance with Part B, Part C and the Takeover Regulations may, in many instances be unduly harsh on a private company. Accordingly, the Executive Director may, against submission of an application setting out all relevant facts, in terms of Section 119.6, exempt parties to an affected transaction from the application of Part B, Part C and the Takeover Regulations if he considers an exemption to be



reasonable and justifiable in the circumstances having regard to the objects and purposes of Part B, Part C and the Takeover Regulations.

DATED 19 MAY 2011

NA Matlala

Chairperson.