



Companies and Intellectual
Property Commission
a member of the dti group

**NON-BINDING OPINION
IN TERMS OF
SECTION 188 (2) (b) OF THE COMPANIES ACT, 2008**

SUBJECT: 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

1. Webber Wentzel attorneys, per Mr. P Bradshaw and Mr. X Hlatshwayo requested the CIPC to provide it with a non-binding opinion in terms of section 188 (2) (b) of the Companies Act, 2008, on the interpretation of section 96 (1) (d) of the Act read with regulation 50 of the Companies Regulations, 2011, relating to rights offers of listed securities. The wording of the relevant provisions is contained in the problem statement hereunder.

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

"1.4 Our interpretation of the relevant provisions of the Companies Act is that 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;

1.4.4 which satisfies the "prescribed requirements"; and

1.4.4.1 in respect of which an exchange (as defined in the Securities Services Act No. 36 of 2004) has granted, or has agreed to grant, a listing for the securities that are the subject of the offer; and

1.4.4.2 which complies with the relevant requirements of that exchange at the time the offer is made."

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

3. Webber Wentzel then continues:

"1.5 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 offers under the Companies Act is not entirely clear.

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- 1.6 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.'

- 1.7 Regulation 51 sets out the general requirements for prospectuses, requiring them, *inter alia*:

1.7.1 to be prepared using plain language; and

1.7.2 to be presented in narrative form, with statistical information in tabular form.

- 1.8 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.

- 1.9 In terms of Regulation 50, however, section 100 of the Companies Act must be applied to rights offers of securities. This results in the bizarre outcome that in order to fit within exemption from the public offer requirements in terms of section 96(1)(d), one is required to comply with the prospectus requirements in section 100. This outcome does not appear to us to accord with the apparent intention of the drafters of the Companies Act that public offers of listed securities should be governed by the rules of the relevant exchange.

2. Guidance requested

We hereby request the Commissions 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 the Companies Act:

- 2.1 a rights offer which complies with the JSE Listings Requirements will fall within the exemption in section 96(1)(d); and


- 2.2 no obligation to issue a prospectus arises in respect of a rights offer envisaged in paragraph 2.1."

2. The content of Webber Wentzel's request has been noted and the CIPC is in agreement that the interpretation should be somewhat difficult. 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. Any interpretation that would require more than this or that a prospectus must be registered is not reconcilable with the Minister's power to make relevant regulations. 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 prospectuses.

3. The application of sections 96(1)(d) and 102 and regulation 51 to rights offers is clear and section 100 should any be applied to the extent that it prescribes the form and content of a prospectus.
4. In conclusion the answers to the specific questions posed by Webber Wentzel are as follows:
 - 4.1 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.
 - 4.2 No obligation to issue a prospectus arises in respect of a rights offer of listed securities.
5. Although there is no filing requirement under the Companies Act the CIPC will accept a copy of the final offer document, as approved by the JSE, filed with the CIPC for disclosure and record purposes.


Adv Rory Voller
Deputy Commissioner
22 December 2011