



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, ON THE LIMITATION OF LISTING DEBT INSTRUMENTS ON THE JSE BY PRIVATE COMPANIES AND THE CONSEQUENTIAL EFFECT OF SUCH LISTING

1. A number of large private companies have listed certain debt instruments on the JSE under the provisions of the repealed Companies Act, 1973, and these instruments continue to trade. This could have been done as the definition of "share" under the repealed Act excluded such debt instruments and the requirement for a private company to restrict the transfer of its shares did not find application.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. Section 8 of the Act further requires that a private company must restrict the transferability of its securities. The debt instruments contemplated above, however, became freely transferable after being listed.
2. 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 listings 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.
3. 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 referred 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 requirements of section 8 (2) (b) (ii) (bb) in so far as private companies are required to limit the transferability of their securities.
4. 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 Incorporation for the company or by amending the company's current

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Memorandum of Incorporation to remove the articles relating to private companies and to insert those relating to public companies.

5. 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.



Adv Rory Voller
Deputy Commissioner
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