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TERMS OF REFERENCE

CIPC BID NUMBER: 03/2015/2016

DISCRIPTION: **TERMS OF REFERENCE FOR ESTABLISHMENT OF A PANEL OF CONSULTANTS TO ASSIST OR CONDUCT COMPLIANCE ENFORCEMENT ACTIVITIES AND FORENSIC SERVICES ON BEHALF OF THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION IN TERMS OF VARIOUS APPROPRIATE SECTIONS OF THE COMPANIES ACT, NO 71 OF 2008, AS AMENDED, AND COMMISSION ACTIVITIES AND PROCEDURES FOR A PERIOD OF (36) THIRTY SIX MONTHS**



1. OBJECTIVE

The Companies and Intellectual Property Commission ("Commission") wishes to establish a panel of consultants who can be contracted to assist the Commission with executing activities relating to the compliance, enforcement and forensic service functions in terms of the Companies Act, Act 71 of 2008, as amended ("the Act") and Commission activities and procedures.

2. BACKGROUND

2.1 The Commission's functions are outlined in Section 187 of the Act. The relevant functions for the purpose of the tender are:

187. Functions of Commission.

- (1) In this section, "this Act" has the meaning set out in section 1, but also includes any legislation listed in Schedule
- (2) Other than with respect to matters within the jurisdiction of the Takeover Regulation Panel, the Commission must enforce this Act, by, among other things,—

- (a)
- (b) monitoring proper compliance with this Act;
- (c) receiving or initiating complaints concerning alleged contraventions of this Act, evaluating those complaints, and initiating investigations into complaints;
- (d) receiving directions from the Minister in terms of section 190, concerning investigations to be conducted into alleged contraventions of this Act, or other circumstances, and conducting any such investigation;
- (e) ensuring that contraventions of this Act are promptly and properly investigated;
- (f) negotiating and concluding undertakings and consent orders contemplated in section 169 (1) (b) and 173;
- (g) issuing and enforcing compliance notices;
- (h) referring alleged offences in terms of this Act to the National Prosecuting Authority; and
- (i) referring matters to a court, and appearing before the court or the Companies Tribunal, as permitted or required by this Act.

- (3) The Commission must promote the reliability of financial statements by, among other things—

- (a) monitoring patterns of compliance with, and contraventions of, financial reporting standards; and
- (b) making recommendations to the Council for amendments to financial reporting standards, to secure better reliability and compliance.

(4)

2.2 LEGISLATIVE FRAMEWORK

Sections that are relevant to the assistance the Commission wishes to obtain from consultant are the attached as Annexure "A"

3. ACTIVITIES RELATING TO THE COMPLIANCE, ENFORCEMENT FUNCTIONS AND FORENSIC SERVICES

3.1 The compliance, enforcement and forensic service activities require a mix of specialized legal and accounting skills and "as and when required" the Commission will contract consultants in order to enhance its capacity to fulfill its functions in terms of Sections 187 of the Act and the Commission procedures.

3.3 As the frequency and number of activities in terms whereof assistance might be required are not always known, it has been decided to establish a panel of consultants to draw from as and when the need arises. The consultants will be categorized in three categories:

- (i) Specialized Attorneys to provide legal and related services;
- (ii) Chartered Accountants to provide accounting services and
- (iii) Investigators to provide forensic services

4. INVITATION

4.1 Specialized Attorneys firms, Chartered Accountants and Forensic Investigation firms are invited to send proposals to the Commission for consideration.

4.2 In preparing the proposals it is emphasized that the profile of the firms of attorneys, accounting and forensic investigation firms must submit demonstrated expertise together with the national / international acceptability of the experts in the respective fields of law, accounting and forensic investigations together with their experience reflected in projects already dealt with. With regard to the profile of the firms, please provide among others the composition of the firm in terms of shareholding; personnel complement; and the financial position of the firms.

4.3 The respective proposals must be limited to a maximum of five pages.

4.4 It is important that the respective firms ensure continuous quality and consistency of advice and assistance.

5. EVALUATION

5.1 Each proposal will be evaluated in terms of the evaluation matrix as set out in paragraph 12 hereof. It must be noticed that the price is not the sole determining factor in appointing the successful firms to the proposed panel.



6. SCOPE OF WORK

6.1 The respective firms will be required to render services to the Commission on a wide range of issues relating to their respective fields of law, accounting and forensic investigations, with regard to the compliance, enforcement and forensic functions and activities in respect of the following legislation and Commission activities and procedures:

- ✓ Companies Act, 2008 (Act No 71 of 2008)
- ✓ Close Corporations Act, 1984 (Act No. 69 of 1984)
- ✓ Share Blocks Control Act, 1980 (Act No. 59 of 1980)
- ✓ Co-operatives Act, 2005 (Act No. 14 of 2005)
- ✓ Copyright Act, 1978 (Act No. 98 of 1978)
- ✓ Part A of Chapter 4 of the Consumer Protection Act, 2008 (Act No. 68 of 2008)

6.2 The compliance, enforcement and forensic functions and activities range from any assistance that might be required as from initiation of the compliance, including compliance with financial reporting standards that must be in accordance with the International Financial Reporting Standards, enforcement and forensic activities up to possible criminal, civil or regulatory outcomes. This will include procuring the services of counsel "as and when required".

7. CONDITIONS OF TENDER

7.1 This panel will be established for a period of thirty Six (36) months from date of appointment. Should it come to light during the course of the aforesaid period that the amount set aside by the Commission will be exceeded, it will become necessary to revert to the Commissioner and the Bid Adjudication Committee for approval in this regard.

7.2 Only legal practices established in accordance with the provisions of the Attorneys Act, 1979 (Act No 53 of 1979 as amended) will be considered for this tender with regard to the rendering of legal services. Confirmation of its establishment in terms of the mentioned Act must be submitted

7.3 Only Chartered Accountants registered with the Independent Regulatory Board for Auditors in accordance with Auditing Profession Act, 2005 (Act No 26 of 2005) will be considered for this tender with regard to the rendering of accounting services. Expertise with regards to International Financial Reporting Standards is critical as there will from time to time be a need to conduct sample reviews of financial statements which will have been reviewed internally by an analyst and relevant internal committees.

7.4 Forensic firms that want to tender will only be considered for this tender if they provide proof of their registration with appropriate and relevant institutions.

7.5 The requirements of the Preferential Procurement Policy Framework Act, 2000 (Act No 5 of 2000) will be applicable to the selection process in respect of this tender proposal is 80/20



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- 7.6 Firms that do not score 60% or more on the technical evaluation will not be appointed to the panel.
- 7.7 A contract will be signed with each member appointed on the panel.
- 7.8 The firms will be required to sign confidentiality and indemnity agreements with the Commission.
- 7.9 The cost of every assignment will be negotiated with the relevant tendering panel members and a letter of appointment will be issued for each assignment awarded.
- 7.10 Panel members are not guaranteed any work under this tender proposal.
- 7.11 Firms / individuals will be placed on approved lists for
 - i. Specialized Attorneys to provide legal and related services;
 - ii. Chartered Accountants to provide accounting services;
 - iii. Forensic Services activities.

Only the successful applicants on the lists will be approached, either by obtaining quotes on a rotation basis or according to the bid procedure when services are required. The bid procedure will not be advertised in the Government Gazette Tender Bulletin.

- 7.12 The Commission may at its own discretion vary an instruction to include more work or to exclude work areas in the case of the latter, the firms will not be entitled to claim for any additional costs.
- 7.13 The firms may not cede or assign any part of its agreement with the Commission nor subcontract any part of the work assigned to them without prior written authorization of the Commission.
- 7.14 Failure to comply with any condition of this request for a proposal will invalidate respective tender proposal.
- 7.15 Firms must declare any interest it has in an assignment as well as declare any possible conflict of interest with the Commission in the pursuance of the proposed assignment.
- 7.16 In the event that any conflict of interest is discovered during the assignment, the Commission reserves the right to summarily cancel the agreement and demand that all information, documentation and property of the Commission be returned forthwith.
- 7.17 Assignments awarded in the last three months of the contract period will be allowed to continue after expiry of this contract period.
- 7.18 Attached herewith find CIPC Supplier Database Annexure "B" to be completed by bidders

8. FUTURE PROPOSAL /RFQ REQUIREMENTS

- 8.1 Each proposal must include the specialist field of law or accounting. If a firm has expertise in more than one field of law or accounting, all relevant fields must be indicated in the proposal together with demonstrated experience in the specialized areas of law, accounting and forensic services.
- 8.2 The persons available to provide the services must be identified and their CV's provided.
- 8.3 The hourly rate of each person must be included in the proposal.
- 8.4 An assignment fee will be negotiated for every assignment issued.
- 8.5 All expenditure claims will have to be accompanied by detail time records indicating the time spend and a brief description of the activity conducted.

9. INTELLECTUAL PROPERTY RIGHTS

- 9.1** All copyright and intellectual property rights that may result as a consequence of the work to be performed will become the property of the Commission.
- 9.2** Firms must hand over all documents and information in any format, including copies thereof, that it received from the Commission or that it had access to during the assignment immediately after completion of the assignment to the Commission.
- 9.3** Firms shall deliver to the Commission, on completion of an assignment, any security devices, passwords or protective mechanisms to the soft versions of documents that were written and the Commission will have the right to amend and change these without obligation whatsoever to the firms upon completion of the assignment.

10. PROCUREMENT POLICIES AND PROCEDURES

- 10.1** The general conditions of tender, contract and order is applicable to this tender.
- 10.2** The bidders are required to provide CV's of personnel who will be involved in an investigation, and failure to submit such will result in the invalidation of your proposal.
- 10.3** Failure to provide the following might result in a bid not to be considered: (MINIMUM REQUIREMENTS)
- a) Bid offers must be properly received on the tender closing date and time specified on the invitation, fully completed and signed in ink as per Standard Conditions of Tender;
 - b) Submission and completion of the Declaration of Interest;
 - c) Submission of an original and valid Tax Clearance Certificate; and
 - d) Submission of the company's disclosure certificates from the Register of Companies (CIPC).



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11. EVALUATION CRITERIA

11.1 In order to be considered for placement on the panel, a minimum overall score of is this not 60% percent must be obtained to be placed on the panel. Bids will be evaluated in accordance with the 80/20 preference point system contemplated in the Preferential Procurement Policy Framework Act (Act 5 of 2000) as amended 2011.

Evaluation Criteria	Rating					Weight	Total
	1	2	3	4	5		
Functional Requirements (Please address the below mentioned criterion individually to enable proper evaluation)							
Provide proof that bidder is a recognized and established Attorney/CA/Forensic Service e.g. Statutory Registrations and Professional bodies						10	
Demonstrate current and previous projects that your company provided resources. (Please submit at least three contactable i.e. companies of similar size as references).						20	
Demonstrate company experience in the mentioned services. The following ratings will apply: 10 years and above + 3 references = 5 rating 6 years + 3 references = 4 rating 4 years + 3 references = 3 rating 2 years + 3 references = 2 rating 1 year + 3 references = 1 rating						30	
Demonstrate <u>knowledge</u> of relevant legislation and regulations in respect: <ul style="list-style-type: none">Drafting of interpretations or opinions of legislation / regulations /standards;Understanding regulatory functions and requirements						30	
Capacity/ Resources/ of the company include audited financial statements, Attach CV of Key Personnel (Maximum of 3 CVs for Key Personnel) in the company who will be involved on the projects should you be awarded, qualifications and experience etc.						10	
TOTAL						100	

IMPORTANT: The above criterion must be separately addressed and elaborated to allow proper evaluation of the proposal. A company profile might NOT cover all the above.



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12. SUBMISSION OF PROPOSALS

Sealed proposals will be received at the: Tender Box at the Reception,

77 Meintjies Street

Sunnyside

the dti campus, Block F.

Proposals should be addressed to:

Manager (Supply Chain Management)

Companies and Intellectual Property Registration Office

Block F, the dti Campus,

77 Meintjies Street,

Sunnyside

PRETORIA

13. ENQUIRIES

A. TECHNICAL QUERIES TO BE ADDRESSED TO

Ms. Lana van Zyl

Tel: (012) 394 1151

E mail: LvanZyl@cipc.co.za

OR

Mr. Joey Mathekga

Tel: (012) 394 3990

E-mail: JMathekga@cipc.co.za

B. SUPPLY CHAIN QUERIES TO BE ADDRESSED TO

Mr. Solomon Motshweni

Tel: (012) 394 3971

Email: Smotshweni@cipc.co.za

OR

Ms Ntombi Maqhula

Tel: (012) 394 5344

Email: Nmaqhula@cipc.co.za

14 ATTACHEMENTS:

Annexure "A"

Annexure "B"



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ANNEXURE "A"

LEGISLATIVE FRAMEWORK

Sections that are relevant to the assistance the Commission wishes to obtain from consultant are the following:

169. Investigation by Commission or Panel.

- (1) Upon initiating or receiving a complaint, or receiving a direction from the Minister, in terms of this Act, the Commission or Panel, as the case may be, may—
 - (a) except in the case of a direction from the Minister, issue a notice to the complainant in the prescribed form indicating that it will not investigate the complaint, if the complaint appears to be frivolous or vexatious, or does not allege any facts that, if proven, would constitute grounds for remedy under this Act;
 - (b) if they think it expedient as a means of resolving the matter, refer the complainant to the Companies Tribunal, or to an accredited entity, as defined in section 166 (3), with a recommendation that the complainant seek to resolve the matter with the assistance of that agency or person; or
 - (c) direct an inspector or investigator to investigate the complaint as quickly as practicable, in any other case.
- (2) At any time during an investigation, the Commission or Panel, as the case may be, may—
 - (a) designate one or more persons to assist the inspector or investigator conducting the investigation; or
 - (b) if a complaint concerns a dispute that is internal to a particular company, and does not appear to implicate a party other than the company, the holders of its securities, its directors, committees, prescribed officers, company secretary, or auditor—
 - (i) submit a proposal to the company seeking an agreement to jointly appoint an independent investigator—
 - (aa) at the expense of the company, or on a cost-shared basis; and
 - (bb) to report to both the company, and to the Commission or Panel, as the case may be; or
 - (ii) apply to a court for an order appointing an independent investigator—
 - (aa) at the expense of the company; and
 - (bb) to report to both the Commission or Panel, as the case may be, and the company.
- (3) In conducting an investigation contemplated in this section an inspector or investigator may investigate any person—
 - (a) named in the complaint, or related to a person named in the complaint; or
 - (b) whom the inspector reasonably considers may have information relevant to the investigation of the complaint.

170. Outcome of investigation.

- (1) After receiving the report of an inspector or independent investigator, the Commission or Panel, as the case may be, may—



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- (a) excuse any person as a respondent in the complaint, if the Commission or Panel considers it reasonable to do so, having regard to the person's conduct, and the degree to which the person has cooperated with the Commission or Panel in the investigation;
 - (b) refer the complaint to the Companies Tribunal, or to the Commission or the Panel as the case may be, if the matter falls within their respective jurisdictions in terms of this Act;
 - (c) issue a notice of non-referral to the complainant, with a statement advising the complainant of any rights they may have under this Act to seek a remedy in court;
 - (d) in the case of the Commission, propose that the complainant and any affected person meet with the Commission or with the Companies Tribunal, with a view to resolving the matter by consent order;
 - (e) commence proceedings in a court in the name of the complainant, if the complainant—
 - (i) has a right in terms of this Act to apply to a court in respect of that matter; and
 - (ii) has consented to the Commission or Panel, as the case may be, doing so;
 - (f) refer the matter to the National Prosecuting Authority, or other regulatory authority concerned, if the Commission or Panel, as the case may be, alleges that a person has committed an offence in terms of this Act or any other legislation; or
 - (g) in the case of—
 - (i) the Commission, issue a compliance notice in terms of section 171; or
 - (ii) the Panel, refer the matter to the Executive Director, who may, among other things, issue a compliance notice in terms of section 171.
 - (2) The Commission or Panel, as the case may be—
 - (a) in its sole discretion, may publish a report contemplated in subsection (1); and
 - (b) irrespective whether it publishes such a report, must deliver a copy of the report to—
 - (i) the complainant, or a regulatory authority that requested the initiation of the complaint;
 - (ii) any person who was a subject of the investigation;
 - (iii) any court, if requested or ordered to do so by the court; and
 - (iv) any holder of securities, or creditor, of a company that was the subject of the report, or any other person implicated in the report, upon payment of the prescribed fee.
171. Issuance of compliance notices.—(1) Subject to subsection (3), the Commission, or the Executive Director of the Panel, may issue a compliance notice in the prescribed form to any person whom the Commission or Executive Director, as the case may be, on reasonable grounds believes—
- (a) has contravened this Act; or
 - (b) assented to, was implicated in, or directly or indirectly benefited from, a contravention of this Act, unless the alleged contravention could otherwise be addressed in terms of this Act by an application to a court or to the Companies Tribunal.



- (2) A compliance notice may require the person to whom it is addressed to—
 - (a) cease, correct or reverse any action in contravention of this Act;
 - (b) take any action required by this Act;
 - (c) restore assets or their value to a company or any other person;
 - (d) provide a community service, in the case of a notice issued by the Commission; or
 - (e) take any other steps reasonably related to the contravention and designed to rectify its effect.
- (3) When issuing a notice in terms of subsection (1) to a regulated person or entity, the Commission or Executive Director, as the case may be, must send a copy of the notice to the regulatory authority that granted a licence or similar authority to that regulated person or entity, and in terms of which that person is authorised to conduct business.
- (4) A compliance notice contemplated in subsection (1) must set out—
 - (a) the person or association to whom the notice applies;
 - (b) the provision of this Act that has been contravened;
 - (c) details of the nature and extent of the non-compliance;
 - (d) any steps that are required to be taken and the period within which those steps must be taken; and
 - (e) any penalty that may be imposed in terms of this Act if those steps are not taken.
- (5) A compliance notice issued in terms of this section, or any part of it, remains in force until—
 - (a) it is set aside by—
 - (i) the Companies Tribunal, or a court upon a review of the notice, in the case of a notice issued by the Commission; or
 - (ii) the Takeover Special Committee, or a court upon a review of the notice, in the case of a notice issued by the Executive Director; or
 - (b) the Commission, or Executive Director, as the case may be, issues a compliance certificate contemplated in subsection (6).
- (6) If the requirements of a compliance notice issued in terms of subsection (1) have been satisfied, the Commission or the Executive Director, as the case may be, must issue a compliance certificate.
- (7) If a person to whom a compliance notice has been issued fails to comply with the notice, the Commission or the Executive Director, as the case may be, may either—
 - (a) apply to a court for the imposition of an administrative fine; or
 - (b) refer the matter to the National Prosecuting Authority for prosecution as an offence in terms of section 214 (3), but may not do both in respect of any particular compliance notice.



173. Consent orders.—(1) If a matter has been investigated in terms of this Part, and the Commission and the respondent have agreed a resolution of the complaint, the Commission may—
- (a) record the resolution in the form of an order; and
 - (b) if the person who is the subject of the complaint consents to that order, apply to the High Court to have it confirmed as a consent order, in terms of its rules.
- (2) Section 167 (2) to (4), read with the changes required by the context, applies to an application contemplated in subsection (1).
167. Dispute resolution may result in consent order.—(1) If the Companies Tribunal, or an entity accredited in terms of section 166, has resolved, or assisted parties in resolving, a dispute in terms of this Part the Tribunal or accredited entity may—
- (a) record the resolution of that dispute in the form of an order; and
 - (b) if the parties to the dispute consent to that order, submit it to a court to be confirmed as a consent order, in terms of its rules.
- (2) After hearing an application for a consent order, the court may—
- (a) make the order as agreed and proposed in the application;
 - (b) indicate any changes that must be made to the draft order before it will be made an order of the court; or
 - (c) refuse to make the order.
- (3) A consent order confirmed in terms of subsection (2)—
- (a) may include an award of damages; and
 - (b) does not preclude a person applying for an award of civil damages, unless the consent order includes an award of damages to that person.
- (4) A court hearing any proceedings concerning a dispute arising out of a consent order may order the proceedings closed to the public if it is the interest of the confidentiality of the parties to the consent order to do so.
84. Application of Chapter.—(1) This Chapter applies to—
- (a) every public company, subject to sections 5 (6) and 94 (1);
 - (b) every company that is a state-owned company—
 - (i) except to the extent that the company has been exempted from the application of this Chapter, in terms of section 9; and
 - (ii) subject to subsection (3); and
 - (c) a private company, a personal liability company or a non-profit company—
 - (i) if the company is required by this Act or the regulations to have its annual financial statements audited every year: Provided that the provisions of Parts B and D of this Chapter will not apply to any such company; or



- (ii) otherwise, only to the extent that the company's Memorandum of Incorporation so requires, as contemplated in section 34 (2).
- (2)
- (3) In the case of a state-owned company—
 - (a) if there is a conflict between a provision of this Chapter and a provision of the Public Audit Act, 2004 (Act No. 25 of 2004), the provisions of that Act prevail;
 - (b) despite the provisions of this Chapter to the contrary, the state-owned company is not required to appoint an auditor for any financial year in respect of which the Auditor-General has elected, in terms of the Public Audit Act, 2004 (Act No. 25 of 2004), to conduct an audit of that enterprise; and
 - (c) in any year in which the state-owned company is required by this Chapter to appoint an auditor, any requirement in terms of the Public Audit Act, 2004 (Act No. 25 of 2004), to have the appointment of the company's auditor approved by the Auditor-General applies to that company, in addition to the relevant provisions of this Chapter.
- (4) Every company contemplated in subsection (1) (a) or (b) must appoint—
 - (a) a person to serve as company secretary, in the manner and for the purposes set out in Part B;
 - (b) a person to serve as auditor, in the manner and for the purposes set out in Part C; and
 - (c) an audit committee, in the manner and for the purposes set out in Part D.
- (5) A person who is disqualified in terms of section 69 (8) to serve as a director of any particular company may not be appointed or continue to serve that company in any capacity mentioned in subsection (4), irrespective of whether that appointment is made—
 - (a) as required by this Chapter; or
 - (b) voluntarily, as contemplated in section 34 (2).
- (6) If the board of a company fails to make an appointment as required by this Part—
 - (a) the Commission may issue a notice to that company to show cause why the Commission should not proceed to convene a shareholders meeting for the purpose of making that appointment; and
 - (b) if the company fails to respond to a notice contemplated in paragraph (a) or, in responding, fails to satisfy the Commission that the board will make the appointment, or convene a shareholders meeting to make the appointment, within an acceptable period, the Commission may—
 - (i) give notice to the holders of the company's securities of a general meeting, and convene such a meeting, to make that appointment; and
 - (ii) assess a pro-rata share of the cost of convening the general meeting to each director of the company who knowingly permitted the company to fail to make the appointment in accordance with this Part.



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- (7) A company that has been given notice contemplated in subsection (6) (a), or a director who has been assessed any portion of the costs of a meeting, as contemplated in subsection (6) (b), may apply to the Companies Tribunal to set aside the notice, or the assessment, in whole or in part. R 44. Appointment of auditor or company secretary
- (1) A notice of appointment of auditor, or company secretary, or of person ceasing to act in such capacity, as contemplated in section 85 (3), must be in Form CoR 44.
- (2) A notice issued by the Commission to a company that has failed to appoint an auditor, company secretary, audit committee or social and ethics committee, as required by the Act must be in the form of a compliance notice.
157. Extended standing to apply for remedies.—(1) When, in terms of this Act, an application can be made to, or a matter can be brought before, a court, the Companies Tribunal, the Panel or the Commission, the right to make the application or bring the matter may be exercised by a person—
- (a) directly contemplated in the particular provision of this Act;
- (b) acting on behalf of a person contemplated in paragraph (a), who cannot act in their own name;
- (c) acting as a member of, or in the interest of, a group or class of affected persons, or an association acting in the interest of its members; or
- (d) acting in the public interest, with leave of the court.
- (2) The Commission or the Panel, acting in either case on its own motion and in its absolute discretion, may—
- (a) commence any proceedings in a court in the name of a person who, when filing a complaint with the Commission or Panel, as the case may be, in respect of the matter giving rise to those proceedings, also made a written request that the Commission or Panel do so; or
- (b) apply for leave to intervene in any court proceedings arising in terms of this Act, in order to represent any interest that would not otherwise be adequately represented in those proceedings.
- (3) For greater certainty, nothing in this section creates a right of any person to commence any legal proceedings contemplated in section 165 (1), other than—
- (a) on behalf of a person entitled to make a demand in terms of section 165 (2); and
- (b) in the manner set out in section 165.

Section 162. Application to declare director delinquent or under probation.

- (1) In this section, “legislation” means any national or provincial legislation—
- (a) relating to the promotion, formation or management of a juristic person;
- (b) regulating an industry or sector of an industry; or
- (c) imposing obligations on, prohibiting any conduct by, or otherwise regulating the activities of, a juristic person.



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- (2) A company, a shareholder, director, company secretary or prescribed officer of a company, a registered trade union that represents employees of the company or another representative of the employees of a company may apply to a court for an order declaring a person delinquent or under probation if—
 - (a) the person is a director of that company or, within the 24 months immediately preceding the application, was a director of that company; and
 - (b) any of the circumstances contemplated in—
 - (i) subsection (5) (a) to (c) apply, in the case of an application for a declaration of delinquency; or
 - (ii) subsections (7) (a) and (8) apply, in the case of an application for probation.
- (3) The Commission or the Panel may apply to a court for an order declaring a person delinquent or under probation if—
 - (a) the person is a director of a company or, within the 24 months immediately preceding the application, was a director of a company; and
 - (b) any of the circumstances contemplated in—
 - (i) subsection (5) apply, in the case of an application for a declaration of delinquency; or
 - (ii) subsections (7) and (8) apply, in the case of an application for probation.
- (4) Any organ of state responsible for the administration of any legislation may apply to a court for an order declaring a person delinquent if—
 - (a) the person is a director of a company or, within the 24 months immediately preceding the application, was a director of a company; and
 - (b) any of the circumstances contemplated in subsection (5) (d) to (f) apply with respect to any legislation administered by that organ of state.
- (5) A court must make an order declaring a person to be a delinquent director if the person—
 - (a) consented to serve as a director, or acted in the capacity of a director or prescribed officer, while ineligible or disqualified in terms of section 69, unless the person was acting—
 - (i) under the protection of a court order contemplated in section 69 (11); or
 - (ii) as a director as contemplated in section 69 (12);
 - (b) while under an order of probation in terms of this section or section 47 of the Close Corporations Act, 1984 (Act No. 69 of 1984), acted as a director in a manner that contravened that order;
 - (c) while a director—
 - (i) grossly abused the position of director;
 - (ii) took personal advantage of information or an opportunity, contrary to section 76 (2) (a);
 - (iii) intentionally, or by gross negligence, inflicted harm upon the company or a subsidiary of the company, contrary to section 76 (2) (a);
 - (iv) acted in a manner—

- (aa) that amounted to gross negligence, wilful misconduct or breach of trust in relation to the performance of the director's functions within, and duties to, the company; or
- (bb) contemplated in section 77 (3) (a), (b) or (c);
- (d) has repeatedly been personally subject to a compliance notice or similar enforcement mechanism, for substantially similar conduct, in terms of any legislation;
- (e) has at least twice been personally convicted of an offence, or subjected to an administrative fine or similar penalty, in terms of any legislation; or
- (f) within a period of five years, was a director of one or more companies or a managing member of one or more close corporations, or controlled or participated in the control of a juristic person, irrespective of whether concurrently, sequentially or at unrelated times, that were convicted of an offence, or subjected to an administrative fine or similar penalty, in terms of any legislation, and—
 - (i) the person was a director of each such company, or a managing member of each such close corporation or was responsible for the management of each such juristic person, at the time of the contravention that resulted in the conviction, administrative fine or other penalty; and
 - (ii) the court is satisfied that the declaration of delinquency is justified, having regard to the nature of the contraventions, and the person's conduct in relation to the management, business or property of any company, close corporation or juristic person at the time.
- (6) A declaration of delinquency in terms of—
 - (a) subsection (5) (a) or (b) is unconditional, and subsists for the lifetime of the person declared delinquent; or
 - (b) subsection (5) (c) to (f)—
 - (i) may be made subject to any conditions the court considers appropriate, including conditions limiting the application of the declaration to one or more particular categories of companies; and
 - (ii) subsists for seven years from the date of the order, or such longer period as determined by the court at the time of making the declaration, subject to subsections (11) and (12);
- (7) A court may make an order placing a person under probation, if—
 - (a) while serving as a director, the person—
 - (i) was present at a meeting and failed to vote against a resolution despite the inability of the company to satisfy the solvency and liquidity test, contrary to this Act;
 - (ii) otherwise acted in a manner materially inconsistent with the duties of a director; or
 - (iii) acted in, or supported a decision of the company to act in, a manner contemplated in section 163 (1); or
 - (b) within any period of 10 years after the effective date—
 - (i) the person has been a director of more than one company, or a managing member of more than one close corporation, irrespective of whether concurrently, sequentially or at unrelated times; and



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- (ii) during the time that the person was a director of each such company or managing member of each such close corporation, two or more of those companies or close corporations each failed to fully pay all of its creditors or meet all of its obligations, except in terms of—
 - (aa) a business rescue plan resulting from a resolution of the board in terms of section 129; or
 - (bb) a compromise with creditors in terms of section 155.
- (8) The court may declare a person under probation in the circumstances contemplated in—
 - (a) subsection (7) (a) (iii), only if the court is satisfied that the declaration is justified having regard to the circumstances of the company's or close corporation's conduct, if applicable, and the person's conduct in relation to the management, business or property of the company or close corporation at the time; or
 - (b) subsection (7) (b), only if the court is satisfied that—
 - (i) the manner in which the company or close corporation was managed was wholly or partly responsible for it failing to meet its obligations; and
 - (ii) the declaration is justified, having regard to the circumstances of the company's or close corporation's failure, and the person's conduct in relation to the management, business or property of the company or close corporation at the time.
- (9) A declaration placing a person under probation—
 - (a) may be made subject to any conditions the court considers appropriate, including conditions limiting the application of the declaration to one or more particular categories of companies; and
 - (b) subsists for a period not exceeding five years, as determined by the court at the time it makes the declaration, subject to subsections (11) and (12).
- (10) Without limiting the powers of the court, a court may order, as conditions applicable or ancillary to a declaration of delinquency or probation, that the person concerned—
 - (a) undertake a designated programme of remedial education relevant to the nature of the person's conduct as director;
 - (b) carry out a designated programme of community service;
 - (c) pay compensation to any person adversely affected by the person's conduct as a director, to the extent that such a victim does not otherwise have a legal basis to claim compensation; or
 - (d) in the case of an order of probation—
 - (i) be supervised by a mentor in any future participation as a director while the order remains in force; or
 - (ii) be limited to serving as a director of a private company, or of a company of which that person is the sole shareholder.
- (11) A person who has been declared delinquent, other than as contemplated in subsection (6) (a), or is subject to an order of probation, may apply to a court—



- (a) to suspend the order of delinquency, and substitute an order of probation, with or without conditions, at any time more than three years after the order of delinquency was made; or
 - (b) to set aside an order of—
 - (i) delinquency at any time more than two years after it was suspended as contemplated in paragraph (a); or
 - (ii) of probation, at any time more than two years after it was made.
 - (12) On considering an application contemplated in subsection (11), the court may—
 - (a) not grant the order applied for unless the applicant has satisfied any conditions that were attached to the original order, or imposed in terms of subsection (11) (a); and
 - (b) grant an order if, having regard to the circumstances leading to the original order, and the conduct of the applicant in the ensuing period, the court is satisfied that—
 - (i) the applicant has demonstrated satisfactory progress towards rehabilitation, and
 - (ii) there is a reasonable prospect that the applicant would be able to serve successfully as a director of a company in the future.
 - (13) An applicant in terms of subsection (4) must serve the Commission with a copy of the application.
29. Financial statements.—(1) If a company provides any financial statements, including any annual financial statements, to any person for any reason, those statements must—
- (a) satisfy the financial reporting standards as to form and content, if any such standards are prescribed;
 - (b) present fairly the state of affairs and business of the company, and explain the transactions and financial position of the business of the company;
 - (c) show the company's assets, liabilities and equity, as well as its income and expenses, and any other prescribed information;
 - (d) set out the date on which the statements were published, and the accounting period to which the statements apply; and
 - (e) bear, on the first page of the statements, a prominent notice indicating—
 - (i) whether the statements—
 - (aa) have been audited in compliance with any applicable requirements of this Act;
 - (bb) if not audited, have been independently reviewed in compliance with any applicable requirements of this Act;
 - or
 - (cc) have not been audited or independently reviewed; and
 - (ii) the name, and professional designation, if any, of the individual who prepared, or supervised the preparation of, those statements.
- (2) Any financial statements prepared by a company, including any annual financial statements of a company as contemplated in section 30, must not be—



- (a) false or misleading in any material respect; or
- (b) incomplete in any material particular, subject only to subsection (3).
- (3) A company may provide any person with a summary of any particular financial statements, but—
 - (a) any such summary must comply with any prescribed requirements; and
 - (b) the first page of the summary must bear a prominent notice—
 - (i) stating that it is a summary of particular financial statements prepared by the company, and setting out the date of those statements;
 - (ii) stating whether the financial statements that it summarises have been audited, independently reviewed, or are unaudited, as contemplated in subsection (1) (e);
 - (iii) stating the name, and professional designation, if any, of the individual who prepared, or supervised the preparation of, the financial statements that it summarises; and
 - (iv) setting out the steps required to obtain a copy of the financial statements that it summarises.
- (4) Subject to subsection (5), the Minister, after consulting the Council, may make regulations prescribing—
 - (a) financial reporting standards contemplated in this Part; or
 - (b) form and content requirements for summaries contemplated in subsection (3).
- (5) Any regulations contemplated in subsection (4)—
 - (a) must promote sound and consistent accounting practices;
 - (b) in the case of financial reporting standards for public companies, must be in accordance with the International Financial Reporting Standards of the International Accounting Standards Board or its successor body; and
 - (c) may establish different standards applicable to—
 - (i) profit and non-profit companies; and
 - (ii) different categories of profit companies.
- (6) Subject to section 214 (2), a person is guilty of an offence if the person is a party to the preparation, approval, dissemination or publication of—
 - (a) any financial statements, including any annual financial statements contemplated in section 30, knowing that those statements—
 - (i) fail in a material way to comply with the requirements of subsection (1); or
 - (ii) are materially false or misleading, as contemplated in subsection (2); or
 - (b) a summary of any financial statements, knowing that—
 - (i) the statements that it summarises do not comply with the requirements of subsection (1),
 - (1), or are materially false or misleading, as contemplated in subsection (2); or



- (ii) the summary does not comply with the requirements of subsection (3), or is materially false or misleading.
188. Reporting, research, public information and relations with other regulators.
- (1) In addition to any other advice or reporting requirements set out in this Part, the Commission is responsible to —
 - (a) advise the Minister on matters of national policy relating to company and intellectual property law, and recommend to the Minister changes to bring the law and the administration of this Act up to date and in line with international best practice;
 - (b) report to the Minister annually on the volume and nature of registration and enforcement activities in terms of this Act and on any other matter as prescribed by the Minister; and
 - (c) enquire into and report to the Minister on any matter concerning the purposes of this Act, and advise the Minister in respect of any matter referred to it by the Minister.
 - (2) The Commission must increase knowledge of the nature and dynamics of company and intellectual property law, and promote public awareness of company and intellectual property law matters, by—
 - (a) implementing education and information measures to develop public awareness of the provisions of this Act, and in particular to advance the purposes of this Act;
 - (b) providing guidance to the public by—
 - (i) issuing explanatory notices outlining its procedures, or its non-binding opinion on the interpretation of any provision of this Act; or
 - (ii) applying to a court for a declaratory order on the interpretation or application of any provision of this Act;
 - (c) conducting research relating to its mandate and activities and, from time to time, publishing the results of that research; and
 - (d) over time, reviewing legislation and public regulations, and reporting to the Minister concerning matters relating to company and intellectual property law.
 - (3) The Commission may—
 - (a) liaise with any regulatory authority on matters of common interest, and without limiting the generality of this paragraph, may exchange information with, and receive information from any such regulatory authority pertaining to—
 - (i) matters of common interest; or
 - (ii) a specific complaint or investigation;
 - (b) negotiate agreements with any regulatory authority, and exercise its authority through any such agreement, to—
 - (i) co-ordinate and harmonise the exercise of jurisdiction over company and intellectual property law matters within the relevant industry or sector; and
 - (ii) ensure the consistent application of the principles of this Act;
 - (c) participate in the proceedings of any regulatory authority; and



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- (d) advise, or receive advice from, any regulatory authority.
- (4) The Commission may liaise with any foreign or international authorities having any objects similar to the functions and powers of the Commission.
- (5) The Commission may refer to—
 - (a) the Competition Commission any concerns regarding conduct that may be prohibited or regulated in terms of the Competition Act;
 - (b) the South Africa Revenue Service any concerns regarding behaviour or conduct that may be prohibited or regulated in terms of legislation within the jurisdiction of that Service;
 - (c) the Independent Regulatory Board for Auditors any concerns regarding behaviour or conduct that may be prohibited or regulated in terms of the Auditing Profession Act; or
 - (d) any other regulatory authority any concerns regarding behaviour or conduct that may be prohibited or regulated in terms of legislation within the jurisdiction of that regulatory authority.