South Africa

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MARKET AND REGULATION

1. Please give a brief overview of the public M&A market in your jurisdiction. (Has it been active? What were the big deals over the past year?)

The M&A market continued to grow in 2005. Again, this was driven by Black Economic Empowerment (BEE) transactions (transactions for the acquisition by previously disadvantaged people of direct ownership in an existing or new entity in any sector of the economy). The largest BEE transactions during the year were:

- The R7.8 billion (about US$1.3 billion) acquisition by empowerment groups of a 10% interest in the FirstRand banking group.
- The R6.6 billion (about US$1.1 billion) acquisition by Public Investment Commission of shares in Telkom Limited for the purposes of future BEE transactions.
- The sale by De Beers Consolidated Mines to a consortium comprising employees and community interests of a 26% stake in its South African division for R3.8 billion (about US$623 million).

Apart from the BEE transactions referred to above, other significant transactions included:

- The completion of a R30 billion (about US$4.9 billion) acquisition by Barclays PLC of a 56% interest in Absa Bank Limited.
- The disinvestment from Australia by Metcash Limited for a consideration price of R5.2 billion (about US$853 million).
- The merger of SA Chrome & Alloys Limited with Xstrata in a transaction valued at R8.2 billion (about US$1.35 billion).

2. What are the main means of obtaining control of a public company? (For example, public offer, legal merger, scheme of arrangement and so on.)

The South African Companies Act No. 61 of 1973 (Companies Act) permits the following three ways of obtaining control of a public company:

- A scheme of arrangement (section 311, Companies Act). This is the most commonly used method of obtaining control in a recommended offer. A scheme of arrangement is a statutory procedure whereby a company makes an arrangement or compromise with its members or creditors (or any class of them). It can be about anything on which the company and its creditors or members can properly agree. A company can bring about almost any kind of internal reorganisation, merger or demerger using a scheme, provided that the necessary approvals have been obtained (court approval of the subject matter is required). A scheme of arrangement requires the consent of shareholders holding at least 75% of the shares of the company represented at the meeting convened to consider the scheme.
- A takeover offer (section 440A - 440N, Companies Act). This method is most commonly used where the offer is not recommended (that is, in a hostile bid situation). In order to acquire all the shares for which the offer is made (compulsory acquisition), the offer must be accepted by shareholders holding at least 90% of the shares which are the subject of the offer (see Question 19).
- A sale of business (section 228, Companies Act). This is where control of a public company is obtained by the bidder, or a vehicle set up for that purpose, by purchasing the assets of the target. This transaction must be approved by a simple majority of the target’s shareholders in a general meeting (for details of expected reforms in this area, see Question 28).

3. Are hostile bids allowed? If so, are they common? If they are not common, why not?

Hostile bids are allowed but are not common. This is probably due to the relative smallness of the market rather than because of any legal, regulatory, political or "cultural" obstacle. A high profile hostile takeover bid (by Harmony Gold to acquire Gold Fields Ltd) failed during the course of 2005.

4. How are public takeovers and mergers regulated and by whom?

Takeovers and mergers are governed by the Securities Regulation Panel (Panel) (see box, The regulatory authorities) under the Securities Regulation Code on Takeovers and Mergers (Code) and the Rules of the Panel.
The Code applies to all transactions:

- Which result in a change of control in a company. Control is deemed to be acquired when a person (or a group of persons acting together) holds shares entitling the holder to exercise 35% of the voting rights of a company.
- Where one shareholder (or a group acting together) increases its holdings to 100% (affected transactions).
- By public companies and by private companies where the shareholders' interest in the company exceeds R5 million (about US$820,200) and where there are more than ten beneficial shareholders.

The Code is largely based on the UK City Code on Takeovers and Mergers (see chapter, Mergers and Acquisitions: UK (England and Wales)). However, unlike the UK City Code, the Code is statutory and is enforced by the courts rather than through self-regulation.

In addition to the Code, there are other regulations which apply to public takeovers (that is, the types of transactions set out in Question 2), including:

- The Companies Act, which governs:
  - the compulsory acquisition of minority shareholdings when the bidder acquires 90% of the shares in the target (see Question 19); and
  - disposals by a company in a sale of business.
- The Securities Services Act No. 36 of 2004 which, among other things, houses the South African insider trading and market manipulation legislation.
- The Listings Requirements (Listings Requirements) of the JSE Limited (JSE) (see box, The regulatory authorities), which apply if:
  - the bidder's or target's shares are listed on the JSE. Under the Listings Requirements, the bidder's shareholders must approve an acquisition if the offer consideration is larger than 30% of the market capitalisation of the bidder; or
  - any new shares being offered as part of the bid consideration are to be listed on the JSE.
- The Competition Act No. 89 of 1998 as amended (Competition Act), which requires mergers of a certain size to be approved by the Competition Commission or the Competition Tribunal (see box, The regulatory authorities) before they can be implemented (see Question 24).

### PRE-BID

#### 5. What due diligence enquiries does a bidder generally make before making a recommended bid and a hostile bid? What information is in the public domain?

**Recommended bid**

The scope of the due diligence enquiry usually depends on the time available to conduct the investigation and the need to preserve secrecy and prevent leaks about the proposed transaction. The scope of the due diligence ranges from limited to comprehensive. A comprehensive due diligence will include a legal and financial investigation into significant contracts, employment and pensions, litigation and environmental and regulatory issues relating to the target.

**Hostile bid**

Due diligence investigations are usually very limited as there is no obligation on the target to grant a bidder a due diligence investigation. Due diligence information would invariably only comprise of information which is in the public domain.

**Public domain**

The following information is publicly available:

- The company's memorandum and articles of association.
- The company's share register, which is kept at its registered office and includes details of the company's issued share capital and shareholders.
- Details of the company's directors.
- Accounts and directors' and auditors' reports.
- Any prospectus or circular which the company has published.
- Research published by investment banking analysts.

If the target is a listed company, it also has a continuing obligation under the Listing Requirements to disclose:

- Anything likely to have a significant financial effect on the company.
- Any new developments which are not public knowledge and which will lead to significant movements in the company's share price.

Any significant acquisitions or disposals must therefore be disclosed. The company must also publish its interim report and its financial results.
6. Are there any rules as to maintaining secrecy until the bid is made?

Secrecy must be observed before the announcement of a firm intention to make an offer (Code). Any person aware of confidential information (price sensitive or otherwise) concerning an offer or potential offer must treat that information as secret and must act in a way that minimises the chances of any information being leaked.

7. Is it common to obtain a memorandum of understanding or undertaking from key shareholders to sell their shares? If so, are there any disclosure requirements or other restrictions on the nature or terms of the agreement?

It is common for the bidder to seek irrevocable undertakings of acceptance from major shareholders of the target and, in a recommended bid, from directors who hold shares. The undertakings generally require the acceptance of the offer and a prohibition against taking any action that could prejudice its success. They are generally subject to both:

- The offer being made within a certain period.
- A more favourable offer not being received.

Undertakings to vote for, accept or otherwise support the bid, must be disclosed in the announcement of an offer and in the offer documents.

8. If the bidder decides to build a stake in the target before announcing the bid, what disclosure requirements, restrictions or timetables apply? Are there any circumstances in which shareholdings of associates could be aggregated for these purposes?

There are no thresholds which trigger the compulsory disclosure of acquisitions of shares. However, a listed company must disclose shareholdings of more than 5% in its annual reports and its shareholders’ circulars (Companies Act and Listings Requirements).

In addition, a nominee shareholder (a registered holder of shares in a listed company held on behalf of another person (beneficial holder)) must disclose to the company the identity of the beneficial holder every three months (Companies Act). The company can also oblige the nominee shareholder to disclose the identity of the beneficial holder at any time.

9. If the board of the target company recommends a bid, is it common to have a formal agreement between the bidder and target? If so, what are the main issues that are likely to be covered in the agreement?

Merger agreements are becoming more commonly used. The merger agreement usually provides for a period of exclusivity during which the target undertakes not to solicit a competing offer. Where the merger is implemented by a scheme of arrangement, the merger agreement also usually sets out how the target will pursue the scheme (in other words, make the necessary court applications and hold the scheme meeting).

10. Is it common on a recommended bid for the target company to agree a break fee if the bid is not successful? If so, please explain the circumstances in which the fee is likely to be payable and any restrictions on the size of the payment.

The Panel has indicated that it does not prohibit break fees and they are becoming increasingly popular in large transactions.

Break fees are not yet regulated, but it is likely that a limit of 1% of the value of the transaction will be set by the Panel. However, as the imposition of a limit seems closely related to the reasonable costs of the bid (including professional and other advisers’ fees), this figure could be lower yet, as these fees are often comparatively lower in South Africa.

Ultimately, the level and incidence of break fees will be determined by the courts, which will decide in the best interests of the shareholders as a whole.

11. Is committed funding required before announcing an offer?

When an offer is wholly or partially for cash, the offer document must state both that:

- An irrevocable guarantee or other proof by an appropriate third party (for example, the bidder’s bank or financial adviser) has been given in favour of the relevant target’s shareholders.
- Sufficient resources are available to the bidder to satisfy full acceptance of the offer.

In practice, the Panel must be satisfied with the guarantee or other proof (see Question 12).

ANNOUNCING AND MAKING THE OFFER

12. Please explain how (and when) the bid is made public (highlighting any relevant regulatory requirements) and set out brief details of the offer timetable. (Consider both recommended and hostile bids.) Is the timetable altered if there is a competing bid?

The approach

The bid must be notified, in writing, to the target’s board or its advisers (Code). There is no requirement for earlier notification to the Panel. The Panel is only required to be notified when a cautionary announcement (see below, Cautionary announcement) or a firm intention announcement (see below, Firm
intention announcement) is made, although it encourages the parties to consult with it before then. However, the offer document must be approved by the Panel before it is posted to the target’s shareholders.

The identity of the bidder must be revealed where the offer is made by its representative. The target's board is entitled to be reasonably satisfied that the bidder is, or will be, in a position to implement the offer in full. The Panel must also be satisfied that the bidder has sufficient resources before approving the offer document.

Cautionary announcement

A cautionary announcement is a brief statement published in the press and on the JSE news service. Its aim is to preserve the integrity of trading in a company's shares on the JSE, both before and during negotiations concerning an offer. It usually only states that either:

- Talks are taking place and that a potential bidder is considering making an offer.
- An announcement is pending which could have a material effect on the price of the bidder's or the target's shares.

A cautionary announcement must be made by the bidder or the target (depending on the circumstances) when either:

- An offer is under discussion and:
  - the target is the subject of rumour and speculation; or
  - there is an abnormal movement in the price of the target's shares on the JSE.
- A company acquires knowledge of any material price sensitive information and:
  - the necessary degree of confidentiality of the information cannot be maintained; or
  - the company suspects that confidentiality may have been breached.

The name of the bidder must be disclosed in the cautionary announcement. However, the Panel will ordinarily dispense with this requirement.

Firm intention announcement

An announcement of a firm intention to make an offer must be made when the target's board has been notified, in writing, of a firm intention to make an offer from a serious source. The target is responsible for making the announcement. It is published in the press and on the JSE news service and must contain:

- The terms of the offer.
- The identity of the bidder.
- The details of any existing holders of shares in the target.
- All material conditions to which the offer is subject.
- The details of any arrangements which exist between the bidder and the target or any concert party of the bidder or the target.

Following the announcement, the bidder must proceed with the offer in 30 days, unless the posting of the offer is subject to a condition which has not been fulfilled (for example, approval of the bid by the bidder's shareholders or the competition authorities). Therefore, an offer should not be announced until the bidder has resources available to satisfy all acceptances.

Timetable for takeover offers

There is a strict timetable for takeover offers, both recommended and hostile, as follows (Code):

- The timetable begins when the firm intention announcement is published.
- After publication of the firm intention announcement, the bidder has 30 days to post the offer document to the target's shareholders. The Code sets out the information which must be contained in the offer document (see Question 14).
- The offer must initially be open for acceptance for at least 21 days after the offer document is posted.
- The target's board must advise its shareholders of their views of the offer within 14 days of the posting of the offer document.
- The offer must be declared unconditional as to acceptances (that is, that all the necessary acceptances have been received) within 60 days from the posting of the offer document, or the offer will lapse.
- Once the offer has been declared unconditional as to acceptances, the offer must remain open for a further 14 days.
- The consideration for the offer must be posted to the target's shareholders who have accepted the offer within seven days of the offer becoming or being declared unconditional, or the offer being accepted, whichever is the later.
- If an offer is revised, it must remain open for a further 21 days following the posting of the revised offer document.
- The consent of the Panel is required to revise an offer and it usually does not allow offers on less favourable grounds (for example, an additional condition to the offer). Shareholders who have accepted the original offer must receive the revised offer terms.

If a competing offer is announced in respect of the target, both bidders will usually be bound by the timetable established by the competing offer.

Timetable for schemes of arrangement

The timing set out in the Code also largely applies to a scheme of arrangement, in particular:
13. What conditions are usually attached to a takeover offer (in particular, is there a regulatory requirement that a certain percentage of the target's shares must be offered/bid)? Can an offer be made subject to the satisfaction of pre-conditions (and, if so, are there any restrictions on the content of these pre-conditions)?

Takeover offers and schemes of arrangement must be approved by certain regulatory bodies. These approvals can operate as conditions to the offer, the most common being approval from the:

- Relevant competition authorities (see Question 24).
- Exchange Control Department of the South African Reserve Bank (SARB) (see box, The regulatory authorities), where the transaction requires exchange control approval.

In addition to these conditions, takeover offers are usually subject to the condition that either:

- 90% of the target's shareholders accept the offer, where the bidder intends to obtain 100% of the target's shares (see Question 19).
- More than 50% of the target's shareholders accept the offer, where the bidder only intends to obtain control of the target.

Takeover offers can also be subject to the bidder obtaining the necessary shareholder approval to make the offer.

Takeover offers cannot be made subject to conditions which may be deemed to have been satisfied (or not) at the discretion of the bidder (Code). However, offers can be made subject to the fulfillment of certain pre-conditions, the most common being completion of a satisfactory due diligence investigation (see Question 5).

14. What documents do the target's shareholders receive on a recommended and hostile bid? (Please briefly describe their purpose and main terms, and which party has responsibility for each document.)

**Takeover offer**

In both recommended and hostile takeover offers, the bidder must post the offer document to the target's shareholders. This document must state, among other things (Code):

- The reasons for the offer, and the intentions of the bidder in relation to the continuation of the business and the continuation in office of the target's directors.
- Financial and other information on the target and the bidder.
- The bidder's holdings in the target.
- Whether directors' remuneration will be affected by the acquisition of the target or by any other associated transaction.
- The terms and mechanics of the takeover offer.
- The ultimate owner of the shares to be acquired.
- Arrangements, undertakings or agreements between the bidder and the target in relation to the takeover offer.

In the 14 days following the posting of the offer document, the target's board must circulate its views on the takeover offer (and make any alternative offers known) to the target's shareholders. The target's board document must set out (Code):

- Any external advice given to the target's board.
- The board's comments on the statements in the offer document in relation to the bidder's intentions for the target and its directors.
- The holding of any shares in the bidder by the target.
- Whether the target's directors intend to accept or reject the offer in respect of their own holdings.
- Material particulars of the service contracts of the directors.
- Disclosures of any arrangements, undertakings or agreements between the bidder and the target.

In practice, in a recommended bid, all this information will be in the offer document prepared jointly by the bidder and the target.

The offer document and the target's board document must satisfy the highest standards of accuracy and the information given must be adequately and fairly presented. In all cases, the documents must be approved by the Panel before posting.

If the offer is revised, an updated offer document must be sent to the target's shareholders. This document must contain details of any material changes in information previously published by, or on behalf of, the parties during the offer period.
Scheme of arrangement

The scheme document convening the scheme meeting must be posted to the target’s shareholders by the board of the target. This document must set out all the information required in an offer document and a target’s board document in a takeover offer (Code) (see above, Takeover offer).

15. Is there a requirement to make a mandatory offer? If so, when does it arise?

A mandatory offer must be made for the rest of the target’s shares if a bidder’s holding (or its combined holding with any concert party) increases:

- To 35% or more of the voting rights of the target.
- By 5% or more of the voting rights of the target during any 12-month period when the bidder or any concert party (or both) already have control of between 35% and 50% of the voting rights of the target.

Mandatory offers must be made at the highest price paid for the relevant shares in the three months preceding the offer.

The Panel may waive the requirement to make a mandatory offer if the holders of a majority of the independent shares of the target (in other words, excluding shares held by the bidder and its concert parties) agree.

CONSIDERATION

16. What form of consideration is commonly offered on a public takeover?

A bidder can offer cash, shares or other securities, or a mixture of any of these, as consideration for a bid. However, where the bidder, or its concert parties, acquires shares in the target carrying 10% or more of the voting rights in the three-month period before the offer being made, the offer must be in cash (or accompanied by a cash alternative) at not less than the highest price paid by the bidder in that three-month period.

17. Are there any regulations that provide for a minimum level of consideration? If so, please give details.

The offer price cannot be lower than the price paid for any shares in the three months leading up to the beginning of the offer period (see Question 16).

The Panel can also require the offer price to be no lower than the price paid for any shares bought before this time, if it considers this necessary to ensure all the target’s shareholders are treated equally. Also, if the bidder, or a concert party of the bidder, buys shares above the offer price during the bid, it must increase its offer price to all shareholders.

A mandatory offer must be made in cash or include a full cash alternative. The price offered must be equivalent to the highest price paid for any shares in the three months before the mandatory offer (see Question 15).

18. Are there additional restrictions or requirements on the consideration that a foreign bidder can offer to shareholders? If so, please give details.

A bidder must not offer shares in a foreign company which is not listed on the JSE as consideration, without the approval of the Exchange Control Department of the SARB (Exchange Control Regulations 1961 (Regulations)). The Exchange Control Department is unlikely to allow this form of consideration and, if it did, strict conditions would be imposed governing the sale of the shares and the repatriation of the proceeds of the sale.

Foreign companies are now allowed to list their shares on the JSE. South African private individuals and institutional investors are able to invest in these shares using their existing foreign investment allowances. South African shareholders are able to accept these shares as acquisition consideration and to exercise their rights in terms of a rights’ offer (that is, an offer to all existing shareholders entitling them to subscribe for additional shares pro rata to their existing shareholdings). If this results in a shareholder exceeding its foreign investment allowance, it has 12 months in which to re-align its portfolios.

The cash consideration paid to shareholders residing in South Africa must be paid in South African rands. Therefore, if the consideration is offered in any other currency, it must first be converted into South African rands.

POST-BID

19. Can a bidder compulsorily purchase the shares of remaining minority shareholders? If so, please give details.

Where a takeover offer is made and 90% of the target’s shareholders accept the offer, the bidder can compulsorily purchase the shares of the non-accepting shareholders (section 440K, Companies Act).

A non-accepting shareholder can apply to court within six weeks of the posting of the compulsory acquisition notice for an order to prohibit it or make it subject to certain conditions. The shareholder can prevent the compulsory acquisition by convincing the court that, on the balance of probabilities, the offer is unfair or that there are special circumstances that require the court to make an order.

The offer document must state whether the bidder intends to invoke the compulsory acquisition. Conversely, where the compulsory acquisition is not invoked by the bidder, a shareholder who did not accept the offer can force the bidder to acquire its shares in the target.

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Where a scheme of arrangement is proposed, once the scheme of arrangement has been approved by a court, the shares of those shareholders who voted against it at the scheme meeting are compulsorily acquired by the bidder. Dissenting shareholders are entitled to attend or be represented at the court hearing in order to argue against this.

20. Are there any rules protecting the target from a further bid by the same bidder if the initial bid fails? If so, please give details.

Where an offer has not become or been declared unconditional, and has then been withdrawn or has lapsed, neither the bidder nor its concert parties can, for 12 months following the date on which the offer is withdrawn or lapses (except with the consent of the Panel):

- Make an offer for the target.
- Acquire any shares of the target which will result in a mandatory offer being required (see Question 15).

21. What action is required to de-list a company?

For a listed company to de-list its shares it must do both of the following (Listing Requirements):

- Submit an application to the JSE stating the time and date when the de-listing will be effective.
- Send a circular to all shareholders containing the details and reasons for the de-listing.

The Committee of the JSE will approve the de-listing if both:

- A general meeting of shareholders approved the decision before the application was made. The decision must be approved by more than 50% of the votes of all shareholders present in person or by proxy, excluding any controlling shareholder.
- The company states the reasons for de-listing in its written application.

The requirements of shareholder approval and the circular are not necessary in either of the following situations:

- Following a takeover offer, where the bidder gave notice in the initial offer document, or in any subsequent circular, of its intention to de-list.
- Where a transaction has been completed, and a circular has been sent to shareholders notifying them of the bidder’s intention to de-list the shares and requiring them to vote on the issue. The date for de-listing must be at least 21 business days after the relevant circular is issued.

TARGET’S RESPONSE

22. What actions can a target’s board take to defend a hostile bid (pre- and post-bid)?

Once a target’s board receives a genuine offer or believes that a genuine offer may be imminent, its actions are restricted. Company decisions which could result in any genuine offer being frustrated, or the target’s shareholders being denied an opportunity to decide on its merits, must be approved by the holders of the relevant shares in a general meeting.

Examples of situations where the approval of the shareholders of the target must be obtained (except where carrying out a contract entered into earlier by the company) include:

- Issuing any authorised but unissued shares.
- Issuing or granting options in respect of any unissued shares.
- Creating or issuing any shares carrying rights of conversion into, or subscription for, other shares (or allowing others to do the same).
- Selling, disposing or acquiring assets of a material amount.
- Entering into contracts other than in the ordinary course of business.
- Paying a dividend which is abnormal as to timing and amount.

TAX

23. Are any transfer duties payable on the sale of shares in a company that is incorporated and/or listed in your jurisdiction? Can payment of transfer duties be avoided?

Transfer duty on a sale of shares in a company that is incorporated in South Africa is payable at 0.25% of whichever is highest out of:

- The sale consideration.
- The market value of the shares.

The transfer duty is called stamp duty in relation to unlisted shares, and uncertificated securities tax in relation to listed shares. It is generally not possible to avoid payment of transfer duty in a takeover offer or a scheme of arrangement. The bidder must pay the transfer duty in relation to the shares being purchased.

Tax legislation exempts the payment of transfer duty in certain specific circumstances involving corporate restructuring.
OTHER REGULATORY RESTRICTIONS

24. Are there any other regulatory approvals required, such as merger control and banking? If so, what is the effect of obtaining these approvals on the public offer timetable (for example, do the approvals delay the bid process, at what point in the timetable are they sought and so on)?

Large and intermediate mergers must obtain prior merger approval from the South African merger authorities before they can be implemented. Small mergers may be implemented without merger approval. The merger authorities may investigate small mergers within six months of implementation but this is unusual.

A large merger is a transaction in which both:

- The combined annual turnover or assets (or a combination of turnover and assets) of the acquiring companies and the target companies, in, into or from South Africa in the previous financial year, was R3.5 billion (about US$540 million) or more.
- The combined annual turnover, in, into or from South Africa, or the asset value of the target companies in the immediately previous financial year, was R100 million (about US$15 million) or more.

An intermediate merger is a transaction in which both:

- The combined annual turnover or assets (or a combination of turnover and assets) of the acquiring companies and the target companies, in, into or from South Africa in the previous financial year, was R200 million (about US$30 million) or more.
- The combined annual turnover, in, into or from South Africa, or the asset value of the target companies in the immediately previous financial year, was R30 million (about US$4.6 million) or more.

Small mergers are those that fall below the intermediate merger threshold.

Due to the need to preserve secrecy and prevent leaks about the proposed transaction, the offer is usually announced subject to merger approval being obtained.

In a scheme of arrangement, court sanctioning of the merger is usually postponed until merger approval has been obtained.

Certain specific industries have statutory restrictions on the percentage of foreign shareholdings and certain exchange control approvals may be required (see Question 25).

25. Are there restrictions on foreign ownership of shares (generally and/or in specific sectors)? If so, what approvals are required for foreign ownership and from whom are they obtained?

In general, there are no restrictions on foreign ownership of shares. However, certain specific industries (including banking, insurance and broadcasting) have specific statutory restrictions on the percentage of holdings that a foreign shareholder can hold in a South African company.

In addition, all dealings in, and registration of, shares in which non-residents of South Africa are involved are governed by the Regulations.

A person cannot transfer any shares to a non-resident without the approval of the Exchange Control Department of the SARB, which must be obtained through an authorised bank. An authorised bank is a bank in South Africa specifically authorised by the SARB for the purposes of regulating foreign-owned shares. Approval is usually given, provided that the Exchange Control Department is satisfied that fair consideration for the shares has been received in South Africa.

The consideration for the shares must be channelled through an authorised bank, and the share certificate must be endorsed "non-resident" by an authorised bank. If the share certificate is not endorsed "non-resident" by an authorised bank, the shares must not be registered in the name of a non-resident and dividends cannot be paid to a non-resident (see Question 28).

26. Are there any restrictions on repatriation of profits or exchange control rules for foreign companies? If so, please give details.

Dividends declared by South African companies are remittable to a non-resident shareholder in proportion to the non-resident's percentage shareholding, provided that the share certificate has been endorsed "non-resident" (see Question 25).

To transfer the dividend to the non-resident shareholder, the company must produce an auditor's report to an authorised bank (see Question 25) confirming that the amount to be transferred arises from realised or earned profits on investments owned by the non-resident shareholder.

There are general restrictions in relation to the granting of local financial assistance to affected persons and non-residents. An affected person is a body corporate, foundation, trust or partnership operating in South Africa in which either:

- 75% or more of the capital, assets or earnings can be used for payment to, or for the benefit of, a non-resident.
- 75% or more of the voting shares, voting power, power of control, capital, assets or earnings are directly or indirectly controlled by a non-resident.

The restrictions on local financial assistance prohibit non-residents from borrowing more than 100% of the rand value of funds introduced into South Africa from abroad. In the case of an affected person, the permitted local financial assistance ratio is calculated by a formula which takes into account the percentage of the non-resident's interest in the affected person and expresses the permitted borrowings as a percentage of the effective capital of the affected person.
# THE REGULATORY AUTHORITIES

**Securities Regulation Panel (Panel)**

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**Main area of responsibility.** The Panel is responsible for, among other things, the regulation of takeovers and mergers in South Africa.

**Contact for queries.** srp@iafrica.com

**Obtaining information.** See website above.

**JSE Securities Exchange South Africa (JSE)**

**Head.** Russell Loubser (Chief Executive Officer)

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Given Lane
Sandown 2196
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E corpcomm@jse.co.za
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**Main area of responsibility.** The JSE functions as a primary exchange for the raising of new capital by business and as a secondary exchange for the subsequent trading of those shares.

**Contact for queries.** There is a contact list for queries on the website above.

**Obtaining information.** See e-mail address and website above.

**Competition Commission (Commission)**

**Head.** Advocate Menzi Simelane (Competition Commissioner)

**Address.** Building C
Mapungubwe Building
77 Meintjies Street
Sunnyside
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**Main area of responsibility.** The Commission’s main responsibilities include:

- Implementing measures to increase market transparency and develop public awareness of the provisions of the Competition Act.
- Investigating and evaluating alleged horizontal or vertical restrictive practices or abuses of dominance.
- Granting or refusing applications for exemption.
- Authorising (with or without conditions), prohibiting or referring to the Competition Tribunal mergers of which it receives notice.

**Contact for queries.** See e-mail above.

**Obtaining information.** See website above.

**Competition Tribunal (Tribunal)**

**Head.** David Lewis (Chairperson)
Shan Ramburuth (Administrative head; Registrar)

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**Main area of responsibility.** The Tribunal is the adjudicator and court of first instance for large mergers, restrictive horizontal and vertical practices and abuses of dominance.

**Contact for queries.** See e-mail above.

**Obtaining information.** See website above.

**The South African Reserve Bank (SARB)**

**Head.** TT Mboweni (Governor)

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E See website below
W www.reservebank.co.za

**Main area of responsibility.** The SARB is the central bank of the Republic of South Africa. Its primary goal is the achievement and maintenance of financial stability.

**Contact for queries.** See website above.

**Obtaining information.** See website above.
27. Following the announcement of the offer, are there any restrictions or disclosure requirements imposed on persons (whether or not parties to the bid or their associates) who deal in securities of the parties to the bid?

The Code requires that:

- The bidder and its concert parties may not sell any shares in the target without the consent of the Panel.
- Acquisition of shares in the target by the bidder and its concert parties must be disclosed and, if any acquisition of shares is at a price in excess of the offer price, the offer price must be increased by the bidder accordingly.
- All dealings in the bidder’s shares or the target’s shares by either the bidder or the target (or any of their concert parties) for their own account or on behalf of clients must be disclosed.

REFORM

28. Please summarise any proposals for the reform of takeover regulation in your jurisdiction?

There have been a number of changes in the corporate regulatory environment and more are expected in the future.

The Securities Services Act, No. 36 of 2004 has consolidated the legislation dealing with the regulation and control of exchanges (including the JSE), securities trading, central securities depositories, the custody and administration of securities and the prohibition of insider trading and market manipulation. This Act also contains new legislation to provide for the licensing of a clearing house.

It is generally expected that the SARB will continue its policy of relaxing the Regulations.

Competition law is relatively new in South Africa and it is likely that it will develop in the near future to eradicate some uncertainties.

The Code will also be amended. The Code is generally regarded as being vague on several issues and the proposed amendment of it has been largely welcomed.

An important amendment to the Companies Act is expected shortly to provide that the sale by a company of the whole or greater portion of its assets will require the approval of 75% of its shareholders (currently, only a simple majority is required). Once introduced, this change will affect a takeover of a company by a bidder (or its agent) purchasing the assets of the target (see Question 2). In addition, the Companies Act is currently the subject of comprehensive review. A recently published policy paper indicates proposed changes to the takeover legislation, including the introduction of a US style “merger” takeover method and amendments to the law prohibiting financial assistance in connection with the purchase or issue of a company’s securities.
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