

20 January 2010

Mr MacDonald Netshitenzhe
The Department of Trade and Industry
MNetshitenzhe@thedti.gov.za

Dear Mr Netshitenzhe

Submission on the Rectification of the Companies Act, 2008

We thank the Department of Trade and Industry (“Dti”) for the opportunity to contribute to the development of legislation governing companies in South Africa. We also express our appreciation for the consultative process followed by the CCRD drafting team and for the opportunity to engage with them as a stakeholder to provide insights on matters affecting companies and registered auditors.

We express our support for the overall objectives and principles set out in the Companies Act, 2008 (the “Act”) which the Dti is seeking to achieve for corporate entities. We are committed to contributing to the development of the legislation and welcome the opportunity to provide further support and assistance when called upon to do so.

Comments related to the Rectification

Government Notice 1633 published in Government Gazette No. 32832 on 22 December 2010 provided a 2 ½ page list of Sections in the Act requiring rectification due to errors which are indicated in the Notice as: *“These errors relate to provisions that appear to be incomplete as well as grammatical, technical and incorrect cross references, which may give rise to different interpretation of the provisions concerned”*. Comment was called for within 30 days of publication of the Notice, i.e. by 21 January 2010.

Details of the actual corrections being made by the Dti were not provided to the general public which made it impossible for the IRBA and the general public to comment as requested. We managed to get a copy of a 66 page Table on 12 January 2010, dated 30 August 2009, prepared by the drafter, Mr Phil Knight, listing *“Errors and Issues requiring Rectification”* identified by him, which we gather may not have been available to the general public. Although we will work through the “errors” listed as

quickly as possible, the document does not give us any idea whether all items identified, have in fact been rectified and further whether the changes actually made are those recommended by him. Consequently, the information available to the general public and time allowed for comment are, in our view, wholly insufficient.

We are also concerned that the “rectification” amendments, some of which may introduce changes other than simply a correction of “errors” will simply be tabled in Parliament as “administrative changes” to the Act, and will not require further debate or scrutiny in Parliament. We are particularly concerned that, should the proposed corrections not be rectified for any particular reason, the legislation will ‘give rise to different interpretations of the provisions concerned’, which was what the rectifications were trying to avoid. This is the most significant legislation affecting the entire economy and all corporate entities and consequently, if it is flawed, the potential implications may be significant. Any attempt to rush into its implementation, so as not to cause any further delays, appears unseemly, and any adverse consequences which may result, may take years to rectify.

We are also not aware whether a Regulatory Impact Assessment has been performed, but some of the new concepts introduced in the Act, and extended into the complex Draft Regulations are likely to carry a significant additional compliance and cost burden for the thousands of both small and large companies, and to the extent affected by amendments to the Act, potentially for Close Corporations. It should be borne in mind that one of the principle objectives of the legislation was to reduce unnecessary burdens on small companies. Accordingly, we recommend that an impact assessment should be performed by independent assessors before implementation of the Act and its Draft Regulations.

Implications for comments on the Draft Regulations

The Rectification Notice was published simultaneously with the Draft Regulations pursuant to the Act (Government Notice 1664), which creates an impossible situation as commentators cannot determine whether these have been prepared on the basis of the existing Companies Act, 2008, including the errors, or are based on the sections of the Act that have been rectified, of which the public has yet to see the details.

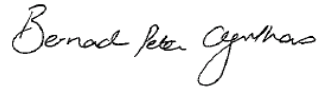
This renders the exposure process for the Draft Regulations pursuant to the Act open to criticism, since it is difficult to comment on Draft Regulations pursuant to an Act that is being “rectified” in ways unknown to the general public, and which will clearly influence the Regulations thus drafted.

Although we will submit our detailed comments on the Draft Regulations in due course, from our initial review of the Draft Regulations, it appears that several of the Draft Regulations are an attempt to rectify shortcomings in the Act itself. We suggest that this is not competent legal drafting convention in South Africa and may thus face legal challenges once implemented if due process is not properly followed.

In conclusion, however, we believe that we could make a valuable contribution should the regulations be promulgated, if we are given an opportunity to do so, to assist the Dti in implementing the various provisions, given the IRBA's history and experience in regulating a profession. We welcome the opportunity to further engage with the Dti to discuss any assistance we could provide.

Kindly contact Ms. Sandy van Esch, Director: Standards at the IRBA at 082-322-6324 or 087-940-8871 should you wish to clarify matters or if we can assist further in any way.

Yours Faithfully

A handwritten signature in black ink that reads "Bernard Peter Agulhas". The signature is written in a cursive style with a large initial 'B'.

Bernard Peter Agulhas
Chief Executive Officer