



Centre for Environmental Rights

Advancing Environmental Rights in South Africa

John Burke
Director: Issuer Regulations
JSE Issuer Regulation Division
By email: consultation@jse.co.za

22 October 2018

Dear Mr Burke

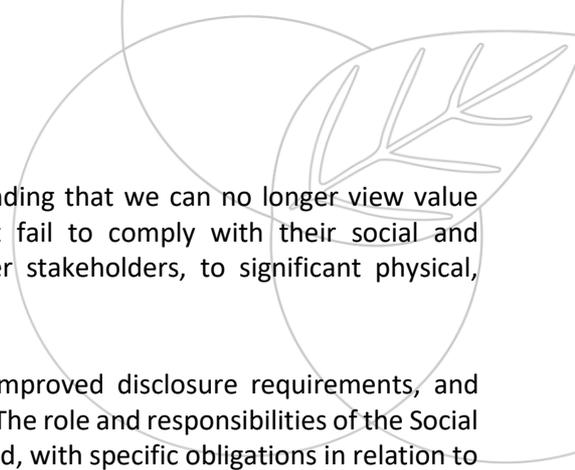
COMMENTS FROM THE CENTRE FOR ENVIRONMENTAL RIGHTS ON THE JSE'S CONSULTATION PAPER DATED 19 SEPTEMBER 2018

Introduction

1. The Centre for Environmental Rights (CER) is a non-profit organisation of activist lawyers who help communities and civil society organisations in South Africa realise our Constitutional right to a healthy environment, by advocating and litigating for environmental justice.
2. As part of our work to achieve improved governance of natural resources by the state, and to hold corporate actors accountable for violations of environmental laws, we conduct assessments of corporate environmental compliance in South Africa, and provide investors and other stakeholders with information on the environmental track record of South African companies.
3. As part of our *Full Disclosure* series of reports,¹ we have assessed the environmental disclosures of some of South Africa's biggest polluters. Our reports have shown that many companies which have been hailed as shining examples for their approach to managing environmental, social and governance factors have in fact committed serious violations of environmental laws, and in many cases have failed to disclose those violations to their shareholders.
4. We welcome the opportunity to provide input on the JSE's consultation paper, and we commend the JSE for taking the initiative to review its responsibilities, and to consider whether changes or improvements are required to its Listing Requirements.
5. The Listing Requirements are a powerful tool to regulate corporate abuse. In its review of the Listing Requirements, the JSE should pay particular attention to the incorporation of more listing requirements related to the environmental and social impacts of companies. Corporate law and governance requirements have

¹ 2015: <https://fulldisclosure.cer.org.za/2015/>; 2016: <https://fulldisclosure.cer.org.za/2016/>; and 2018: <https://fulldisclosure.cer.org.za/> (our 2018 report, unlike our 2015 and 2016 reports, focused on the reporting of a specific environmental issue – the funds that are available for environmental rehabilitation of mining operations).

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developed considerably in the 21st century, in line with an understanding that we can no longer view value creation in terms of financial performance alone. Companies that fail to comply with their social and environmental obligations can expose their shareholders, and other stakeholders, to significant physical, economic, and reputational risks.

6. These risks can be managed in the Listing Requirements through improved disclosure requirements, and through the determination of more specific board oversight functions. The role and responsibilities of the Social and Ethics Committee, for example, could be much more clearly defined, with specific obligations in relation to the oversight of environmental and social impacts and compliance.

Specific comments on the proposed considerations

Compliance with applicable laws

7. The CER supports the JSE's proposal to emphasise the requirement that the applicant issuer is in good standing with the laws applicable to that issuer.
8. Requiring disclosure in the pre-listing statement of the relevant laws that apply to the applicant issuer's establishment and main industry of operation, and extending this measure as a disclosure item in the annual report of the issuer, is strongly supported.
9. In addition to a general statement that the issuer is in compliance with applicable laws, the CER recommends that this requirement specifically refer to the authorisations required for lawful operation, and that the issuer should be required to list all of the authorisations required, and confirm that these authorisations have been obtained. For example, a mining company requires a suite of environmental authorisations, including a mining right, an environmental authorisation, a water use licence, and a waste management licence. These authorisations are all subject to conditions, which are set out in these licences. These licences should be publicly available, to ensure that the company is held accountable for any breach of its conditions of authorisation.

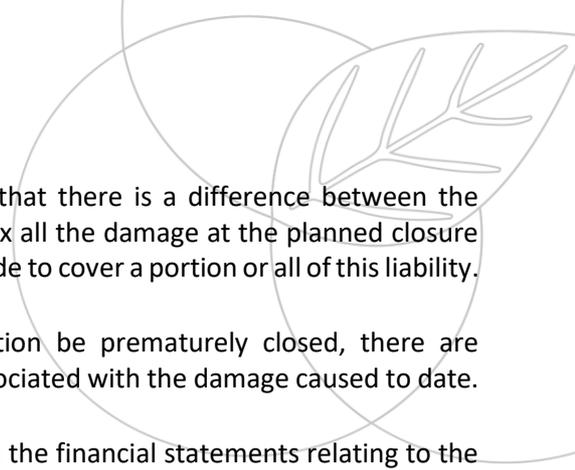
Information on the availability of financial provision for environmental rehabilitation

10. The CER's latest *Full Disclosure* report² analyses disclosures by eleven listed mining companies about their financial provision for environmental rehabilitation, i.e. the money that mining companies must set aside to rehabilitate the environmental damage they cause.
11. This report found that neither the law, nor the accounting standards governing company disclosures, ensure the necessary transparency and accountability about financial provision for environmental rehabilitation.
12. The information disclosed by mining companies, about the costs of rehabilitation of the environmental damage that they cause, and about the money that they are obliged to set aside to fix it, is inconsistent, unclear, in some cases unreliable, and not comparable between companies. It is therefore impossible for shareholders or taxpayers to hold companies or regulators to account.
13. Mining causes severe, long-term damage to the environment. It destroys ecosystems and pollutes water, soil and air. These impacts have consequences for the health and well-being of affected communities. In South Africa, mining is encroaching on our strategic water source areas. In Mpumalanga, which contains most of the country's high yield soils, and where coal mining has dramatically reduced the availability and productivity of this land, its impacts have potential implications for our future food security. Mining is also increasingly being

² <https://fulldisclosure.cer.org.za/>

permitted near to or in protected areas and environments, including national parks and reserves, which will negatively impact our tourism industry.

14. It is therefore crucial for mining companies to mitigate and rehabilitate negative environmental impacts. This is expensive. But by law, in accordance with the “polluter pays” principle, the mining company that causes the environmental impacts (and reaps the profits from doing so) must pay these costs.
15. Environmental laws in South Africa require mining companies, before they start mining, to prepare detailed studies setting out the damage that the mining will cause, and how they will rehabilitate it. Mining companies are required to determine the costs of rehabilitation, and are required to set aside money to cover those costs. This is supposed to ensure that there is enough money set aside to rehabilitate the environment when mining operations cease.
16. However, in reality, this system has failed in South Africa. It is clear from the situation on the ground that rehabilitation is often not happening at all, and our landscape is littered with unrehabilitated mines.
17. From our assessment of the financial statements of 11 listed mining companies, we cannot easily ascertain how much money is held for rehabilitation, where and how it is held, who administers it, who has access to it, how it is spent, who calculates it and how it is calculated. The problem is compounded by the fact that the Department of Mineral Resources’ compliance monitoring and enforcement of rehabilitation obligations is poor.
18. The CER recommends that the Listing Requirements require specific financial disclosures in relation to financial provision for environmental rehabilitation. In particular, the CER recommends that the Listing Requirements specifically require mining companies to disclose the following information:
 - 18.1. Companies should clearly describe and distinguish the roles of management and independent experts in carrying out the specialist assessments which determine the costs of environmental rehabilitation.
 - 18.2. Companies should disclose the names of the service providers contracted to calculate the financial provision for environmental rehabilitation. The experience and expertise of individual consultants should also be disclosed. If it is not practical to do so in the annual financial statements (AFS), then the AFS should refer to the specific page on the company’s website where this information can be found. This disclosure will assist stakeholders in assessing the adequacy and accuracy of financial provision, and will encourage a culture of accountability amongst service providers.
 - 18.3. Companies should publish all assessments (including reviews) of financial provision for environmental rehabilitation on their websites. The AFS should clearly refer to the specific page on a company’s website where this information can be found.
 - 18.4. Companies should disclose all information relating to financial provision at the level of each operation.
 - 18.5. Companies should provide a clear, understandable commentary to explain any significant changes in the figures for financial provision for environmental rehabilitation, as they appear in the AFS from year to year.
 - 18.6. Companies should clearly explain how they account for financial provision for environmental rehabilitation for joint ventures.

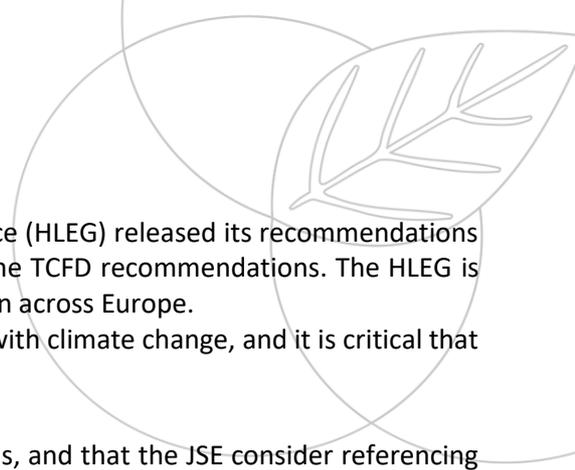
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- 18.7. Companies (and auditors) should make it clear in the AFS that there is a difference between the financial provision (i.e. the amount that will be required to fix all the damage at the planned closure date), and the amount of funds that have actually been set aside to cover a portion or all of this liability.
 - 18.8. Auditors should provide assurance that, should an operation be prematurely closed, there are sufficient funds set aside to cover the rehabilitation costs associated with the damage caused to date.
 - 18.9. Auditors should reconsider the language used in the notes to the financial statements relating to the estimates of financial provision. These notes contain disclaimers to the effect that financial provision estimates require significant “management judgment”, and that the estimates are based on costs, legal requirements and technologies that are inherently uncertain. While there are inevitable uncertainties in determining future liabilities, these disclaimers create the misleading impression that the calculation of financial provision is judgment-based and non-scientific. In fact, financial provision calculations are based on laws that are currently in force, and on specialist technical assessments of the costs of fixing the damage that the company has caused, and plans to cause.
 - 18.10. Companies should provide a narrative description of the type and extent of damage caused by their operations, as well as what rehabilitation work has been undertaken in the preceding financial year, and whether or not this has impacted the company’s overall assessment of its liability for environmental rehabilitation. This description should include information about the most significant environmental risks posed by its operations, and the remedial steps taken to minimise these risks.
 - 18.11. Companies should disclose the following information about trusts that are used as the financial vehicle for rehabilitation funds:
 - 18.11.1. The identity of trustees and beneficiaries;
 - 18.11.2. The trusts’ annual financial statements;
 - 18.11.3. How the funds in the trust are accessed;
 - 18.11.4. Whenever funds from the trust are used for rehabilitation and/or closure of any operations; and
 - 18.11.5. Whether the funds are used for concurrent rehabilitation or reserved exclusively for the purposes of closure.
 - 18.12. Companies should avoid fragmented disclosures in relation to financial provision for environmental rehabilitation. Information should be easily accessible, and where it is not possible to have all information in the same location, it must be appropriately cross-referenced.

Incorporating climate risks into financial disclosures

19. There is increasing recognition globally that climate change poses various financial risks to companies, particularly those operating within certain sectors or in certain regions.
20. There is a growing concern that climate-related risks, which represent material, financial risks to businesses, are being overlooked in financial disclosures. In June 2017, the Task Force on Climate Related Financial Disclosures (TCFD), a task force set up by the Financial Stability Board (FSB), published its recommendations for consistent climate-related financial risk disclosures for use by companies in providing information to stakeholders.³
21. The TCFD has received significant support from leading companies and organisations around the world since the publication of its recommendations in 2017.⁴

³ <https://www.fsb-tcfd.org>

⁴ <https://www.fsb-tcfd.org/supporters-landing/>

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22. In January 2018, the EU High Level Expert Group on Sustainable Finance (HLEG) released its recommendations for financing a sustainable European economy, in which it endorses the TCFD recommendations. The HLEG is also considering embedding the TCFD recommendations into regulation across Europe.
 23. South Africa is particularly vulnerable to the financial risks associated with climate change, and it is critical that South African companies assess, manage, and report on these risks.
 24. The CER recommends that the JSE endorse the TCFD recommendations, and that the JSE consider referencing the TCFD recommendations in the Listing Requirements.
 25. As the JSE recognises in its Consultation Paper, there are a number of role-players in South Africa's financial market eco-system. The CER supports the convening of a colloquium to discuss proposals regarding governance improvement, and would welcome the opportunity to take part in such a colloquium. The CER would also like to participate in any other opportunities for further engagement on the JSE's review of its obligations and the Listing Requirements.

We look forward to hearing from you.

Yours faithfully

CENTRE FOR ENVIRONMENTAL RIGHTS

per:



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