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GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS

DEPARTMENT OF TRADE, INDUSTRY AND COMPETITION

NO. 248

23 March 2021

**INVITATION FOR THE PUBLIC TO COMMENT ON THE PROPOSED
REGULATIONS ON NON-BINDING ADVISORY OPINIONS**

1. By virtue of the powers vested in me in terms of section 21(4) of the Competition Act, 1998 (Act No. 89 of 1998) (the Act), I, Ebrahim Patel, Minister of Trade, Industry and Competition, after consultation with the Competition Commission, hereby intend to prescribe regulations in terms of section 79A of the Act as set out in the Schedule hereto.
2. Stakeholders and interested persons are invited to submit comments in writing on the proposed regulations within a period of 30 days of the publication of this notice to the Director-General: Department of Trade, Industry and Competition, for the attention of Mrs Linda Herbst, email: lherbst@thedtic.gov.za or hand delivered at 3rd Floor, Block E, 77 Meintjies Street, Sunnyside, 0132.

**MR EBRAHIM PATEL****MINISTER OF TRADE, INDUSTRY AND COMPETITION**DATE: 19/3/2021

SCHEDULE

Definition

1. In these regulations any word or expression to which a meaning has been assigned in the Act shall bear that meaning and, unless the context otherwise indicates, –

- 1.1. **“Act”** means the Competition Act, No.89 of 1998, as amended;
- 1.2. **“Commission”** means the Competition Commission of South Africa;
- 1.3. **“Competition Commission Rules”** means the Rules for the Conduct of Proceedings in the Competition Commission published in Government Notice No. 22025 in Government Gazette Vol.428 on 1 February 2001;
- 1.4. **“Constitutional Institutions”** means an institution listed in Schedule 1 of the PFMA;
- 1.5. **“Department”** means a national or provincial department or a national or provincial government component;
- 1.6. **“Major public entities”** means the entities listed in Schedule 2 of the PFMA;
- 1.7. **“Micro, small or a medium enterprise”** is a firm that satisfies the criteria mentioned in column 3 and 4 of the schedule to the National Small Enterprise Act No.102 of 1996, as amended;
- 1.8. **“Non-binding advisory opinion”** means a written advisory opinion as contemplated in section 79A of the Act;
- 1.9. **“Non-profit organisation”** has the meaning set out in section 1 of the Nonprofit Organisations Act No.71 of 1997, as amended;
- 1.10. **“Other public entities”** means the entities listed in Schedule 3 of the PFMA;
- 1.11. **“PFMA”** refers to the Public Finance Management Act No.1 of 1999, as amended; and
- 1.12. **“Requesting party”** means a market participant that has requested a non-binding advisory opinion from the Commission, whether or not legally represented.

Purpose

2. The purpose of these Regulations is to set out–
 - 2.1. the process for requesting a non-binding advisory opinion contemplated in section 79A of the Act;
 - 2.2. the legal status of a non-binding advisory opinion; and
 - 2.3. the fees payable for a non-binding advisory opinion.

Request for a non-binding advisory opinion

3. A request for a non-binding advisory opinion must be made in writing to the Commission.
4. The request for a non-binding advisory opinion must set out, *inter alia*, the following:
 - 4.1. The name of the requesting party;
 - 4.2. Market(s) in which the requesting party operates;
 - 4.3. Reason(s) why a non-binding advisory opinion is sought from the Commission;
 - 4.4. Nature of the legal advice sought;
 - 4.5. The relevant information to enable the Commission to determine whether the requesting party falls within the category of firms contemplated in regulation 7; and
 - 4.6. All relevant facts, information and supporting documents that may assist the Commission in providing the non-binding advisory opinion.

5. The Commission may request additional facts, information and/ or supporting documents for purposes of considering a request for a non-binding advisory opinion.

Fees for non-binding advisory opinions

6. The following fee structure is applicable to requests for a non-binding advisory opinion:

No.	Requesting party	Fee payable
1.	Medium enterprises	R20 000.00 (twenty thousand Rand)
2.	Other market participants	R50 000.00 (fifty thousand Rand)

7. Notwithstanding regulation 6, the following entities are exempted from paying the fee for a non-binding advisory opinion:

- 7.1. Constitutional institutions;
- 7.2. Departments;
- 7.3. Major public entities;
- 7.4. Micro enterprises;
- 7.5. Non-profit organizations;
- 7.6. Other public entities; and
- 7.7. Small enterprises.

Legal status of a non-binding advisory opinion

8. The objective of the non-binding advisory opinion is to assist market participants to comply with the provisions of the Act and to provide market participants with non-binding guidance on compliance with the Act.
9. A non-binding advisory opinion does not constitute a decision or a finding of the Commission in terms of the Act and does not fetter the Commission's discretion in the exercise of its functions in terms of the Act. A non-binding advisory opinion

is issued based on information submitted to the Commission by the requesting party.

10. An advisory opinion contemplated in section 79A has no binding legal effect on the Commission, the Competition Tribunal, the Competition Appeal Court, and the requesting party.
11. The Commission may, in its discretion, at any time review, revise or withdraw its non-binding advisory opinion if the advisory opinion is likely to undermine the objectives of the Act.
12. Should the facts and information submitted to the Commission in the request for a non-binding advisory opinion change in any way, the advisory opinion issued by the Commission will not apply to such changed facts.

Outcome of request for advisory opinion

13. Upon receipt of a request for a non-binding advisory opinion, the Commission may, in its discretion:
 - 13.1. Issue a non-binding advisory opinion to the requesting party;
 - 13.2. Decline to issue a non-binding advisory opinion at any time after receiving the request and refund the fee paid by the requesting party if it appears from the facts that the issuing of a non-binding advisory opinion is likely to undermine the objectives of the Act; or
 - 13.3. Determine whether the issues set out in the request for a non-binding advisory opinion should be dealt with, in an investigation or any other appropriate process in terms of the Act.

Repeal

14. The fees set out in Regulation 10(4) of the *Competition Commission Rules* for advisory opinions are hereby repealed.

Short Title

15. These Regulations shall be cited as the *Regulations on Non-Binding Advisory Opinions, 2020*.

Commencement

16. These regulations shall come into operation on the date of publication in the government gazette.

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