

Proposed Requirements for the accreditation of an “accredited entity” as defined in Section 166 (3) of the Companies Act No. 71 of 2008 – **Working Draft**

Definitions

- a. “**Accredited entity**” means a juristic person or an association of persons accredited by the Commission or an organ of state, or entity established by or in terms of a public regulation that is mandated, among other things, to perform mediation, conciliation or arbitration, and has been designated by the Minister as an accredited entity
- b. “**Act**” means the Companies Act No. 71 of 2008
- c. “**ADR**” means Alternative Dispute Resolution
- d. “**Commission**” means the Companies and Intellectual Property Commission
- e. “**Companies Tribunal**” means the Companies Tribunal
- f. “**Minister**” means the member of the Cabinet responsible for companies

Introduction

Section 166 of the Act provides for ADR, specifically subsection 166(1) of the Act states that as an alternative to applying for relief to a court, or filing a complaint with the Commission a person who would be entitled to apply for relief, or file a complaint in terms of the Act, may refer a matter that could be the subject of such an application or complaint for resolution by mediation, conciliation or arbitration to:

- (a) The Companies Tribunal;
- (b) An accredited entity, as defined in subsection 166 (3) of the Act; or
- (c) Any other person.

Subsection 166 (2) of the Act states that if the Companies Tribunal, or an accredited entity, to whom a matter is referred for alternative dispute resolution concludes that either party to the conciliation, mediation or arbitration is not participating in that process in good faith, or that there is no reasonable probability of the parties resolving their dispute through that process, the Companies Tribunal or accredited entity must issue a certificate in the prescribed form (Form CTR 132.3) stating that the process has failed.

Subsection 166 (3) of the Act states that an “accredited entity” means—

- a) a juristic person or an association of persons accredited by the Commission in terms of subsection 166 (4) of the Act; or
- b) an organ of state, or entity established by or in terms of a public regulation that—
 - i) is mandated, among other things, to perform mediation, conciliation or arbitration; and
 - ii) has been designated by the Minister in terms of subsection 166 (5) of the Act as an accredited entity.

Subsection 166 (4) (a) of the Act states that the Commission **may** accredit, with or without conditions, a juristic person or an association that —

- i) functions predominantly to provide conciliation, mediation or arbitration services;
- ii) has the demonstrated capacity to perform such services within the context of company law; and

iii) satisfies the prescribed requirements for accreditation;

(b) **must** monitor the effectiveness of any accredited person or an association relative to the purposes and policies of the Act; and

(c) **may** —

i) reasonably require any person or association accredited by it to provide information necessary for the purpose of monitoring in terms of subsection 166 (4) (b) of the Act; and

ii) **with reasonable notice, withdraw any accreditation granted by it in terms of this section if the person or association no longer satisfies the criteria set out in subsection 166 (4) (a) of the Act.**

Subsection 166 (5) of the Act states that the Minister, after consulting the Commission —

a) **may** designate any organ of state or other entity contemplated in subsection 166 (3) (b) of the Act as an accredited entity; and

b) **must** prescribe criteria for the Commission to follow in assessing whether an applicant for accreditation in terms of subsection 166 (4) of the Act meets the requirements of this section.

Accreditation Requirements

A **juristic person or association of persons** applying for accreditation *as an alternative dispute resolution provider must be made to the Commission in **Form CoR 134.1 together with the payment of the application fee and must provide the following:***

- A profile of the company
- Proof of compliance with all regulatory and statutory requirements for registration and ongoing conduct of business
- List of officers and directors
- Name of auditors
- The responsible person who will deal with the Commission
- Details of a case management system
- Contact information (office address, telephone and fax numbers, website address and e-mail address)

- List and description of the types of ADR services offered
- Rules of procedure adopted for each type of ADR service offered
- Enforcement mechanism for ADR outcomes
- Roster of accredited ADR practitioners
- Schedule of ADR practitioner fees
- Qualification standards for ADR practitioners
- The geographic area covered by ADR practitioners
- Code of ethics/ethical rules that the applicant has adopted
- Recourse mechanism for parties in the event of complaints against ADR practitioners

Assessment and Issuance of Certificate of Accreditation

Subsection 166 (4) (a) of the Act states that the Commission **may** accredit, with or without conditions, a juristic person or an association that —

- i) functions predominantly to provide conciliation, mediation or arbitration services;
- ii) has the demonstrated capacity to perform such services within the context of company law; and
- iii) satisfies the prescribed requirements for accreditation.

Upon determination that the foregoing requirements have been satisfactorily complied with, the Commission shall issue a Certificate accrediting an entity as an alternative dispute resolution provider, with or without conditions (**Form CoR 134.2**).

Defective Application

Where the application and its supporting documents are incomplete or defective, the Commission may direct the applicant to make the corresponding corrections or submit additional documentation.

Effects of Accreditation

The accreditation by the Commission of an **ADR provider** shall have the following effects:

- The ADR **provider** shall be included in the list of accredited ADR Provider Organizations on the Commission's website.
- Any certification or accreditation of individual ADR practitioners granted by such **ADR provider** shall be recognized by the Commission, but only within the period within which the **ADR provider** remains accredited.
- Accreditation will be for an 18 month period and the ADR provider must renew to remain accredited.
- Renewal will involve the accredited entity meeting the requirements and lodging with the Commission the standard application containing all the required information, and the prescribed fee.
- Accreditation will not be automatic following payment of the prescribed fee. The Commission will have the right to decline an application to accredit if the applicant does not appear to meet the requirements.

Compliance Monitoring

The Commission shall monitor the effectiveness of any accredited person or an association relative to the purposes and policies of the Act and **may** —

- i) reasonably require any person or association accredited by it to provide information necessary for the purpose of monitoring.
- ii) with reasonable notice, withdraw any accreditation granted by it in terms of the Act if the person or association no longer satisfies the accreditation requirements.