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THE MINING ACT

(No. 12 of 2016)

THE MINING (STATE PARTICIPATION) REGULATIONS, 2017

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THE MINING ACT

(No. 12 of 2016)

IN EXERCISE of the powers conferred by Section 48 (4) of the Mining Act, 2016, the Cabinet Secretary for Mining makes the following Regulations—

THE MINING (STATE PARTICIPATION) REGULATIONS, 2017

1. These Regulations may be cited as the Mining (State Participation) Regulations, 2017.

2. In these Regulations, unless the context otherwise requires—
“Act” means the Mining Act, 2016;

“Cabinet Secretary” means the Cabinet Secretary for the time being responsible for matters relating to mining;

Citation.

Interpretation.

No. 12 of 2016

“farm-in agreement” means a written agreement under which a person or entity acquires an interest in, but not full ownership of, a prospecting licence by carrying out exploration work or prospecting operations, or contributing a proportionate part of the cost of the prospecting operations or exploration work to be carried out, in the area covered by the prospecting licence;

“free carried interest” means the grant of an equity interest by the holder to the State without any financial obligation, compensation or contribution to the holder of a mining licence by the State;

“paid equity participation” means the payment by government of its stake or equity in cash which entitles the State to share in revenue and pay for the costs of operations or mineral activities to be undertaken based on the percentage or proportionate of interest owned; and

“National Mining Corporation” means the National Mining Company established under section 22(1) of the Act.

3. The purpose of these Regulations is to provide for State participation in prospecting or mining operations carried out by a holder of a mineral right.

Purpose of
Regulations.

4. These Regulations shall apply to all applicants and holders of any mineral right—

Application of
Regulations

- (a) which entitles the State to a ten percent free carried interest;
- (b) where the State acquires any additional interest that may be agreed with the holder of a mining licence; and
- (c) where the State enters into an agreement to participate in prospecting operations or activities under a prospecting licence held by a holder other than the National Mining Corporation.

5. (1) The National Mining Corporation shall on behalf of the State, be the investment arm of the National Government in respect of all prospecting or mining operations.

Conduct of
prospecting and
mining operations
on behalf of the
State.

(2) Without limiting the scope of sub regulation (1), the National Mining Corporation –

- (a) shall hold the State’s ten percent free equity participation or free carried interest in all mining operations;
- (b) shall be responsible for engaging in any operations relating to any additional interest that the State may acquire and which may be agreed with the holder of a mining licence at a fair market value; and
- (c) may acquire any interest in or enter into a joint venture, farm-in agreement or any other arrangement with a holder of a prospecting licence for the purpose of conducting prospecting operations.

6. (1) Where a mining licence is granted in accordance with the Act, the State shall be entitled to a ten percent free equity participation or free carried interest in the mining operations to which the licence relates.

State right to free carried interest.

(2) The State shall not make or pay any financial contribution to the holder of a mining licence in respect of the interest acquired under sub regulation (1).

(3) Any free carried interest acquired by the State shall not be diluted unless the State transfers, assigns or sells part or all of interest to the holder or any other party.

(4) The State's right to a free carried interest shall not apply to any right that has been granted to a holder of a mining licence, to mine a mineral before the coming into force of the Act.

(5) The Cabinet Secretary shall by notice in writing to the holder of a mining licence, require the mining company to issue to the State a ten percent interest in the company for no consideration.

(6) The Cabinet Secretary and the holder of a mining licence shall agree on the timeframe for the issuance of shares and in any case shall not be more than one year after the grant of the mining licence.

(7) For the purpose of giving effect to sub-regulation (3), the holder of a mining licence shall undertake the necessary actions towards the issuance of the shares and enter the name of the State in the appropriate register and issue a share certificate to the State in accordance with the laws of Kenya.

(8) The State as a shareholder shall have the right to vote and is entitled to receive notice of, and to attend and speak at, a general meeting of the members of the holder of a mining licence or company.

(9) The Cabinet Secretary on behalf of the State may appoint any person or statutory body to act as its agent for the exercise of any of the rights of the state as a shareholder.

(10) The State as a shareholder shall have the right to transfer, assign or sell all or part of its shares to the holder of a mining licence or a third party for a consideration to be agreed with the holder or third party.

(11) The State shall afford the holder of a mining licence the right of first refusal in any transfer, assignment or sale of part or all of its shares.

(12) The State shall be entitled to receive a percentage of any dividends that are declared by the holder of a mining licence equal to the percentage of its equity share at the time the dividend is declared.

(13) The State shall be entitled to appoint a director or the number of directors proportionate to its shareholding to the Board of the locally incorporated company of the holder of the mining licence.

(14) The free carried interest shall not give the State the right to manage or participate in the day to day management of the operations of the holder of the mining licence.

7. (1) In addition to the free carried interest or equity that the State is entitled to under the Act and regulation 6(1), the State may purchase an additional interest or share capital of the holder of the mining licence in respect of the mining operations.

State right to paid equity participation.

(2) Nothing contained in this Regulation shall be construed as giving the State the right of compulsory acquisition or purchase of additional interest or share capital.

Any additional interest that the State may acquire shall be agreed with the holder of the mining licence and the purchase shall be at a fair market value.

(3) Where the State intends to transfer, assign or sell part or all of its additional interest, it shall by notice, offer the holder of the mining licence the right of first refusal.

(4) Subject to sub regulation (4), the holder of the mining licence shall within ninety days from the date of receipt of the notice, be required to notify the State whether it intends to acquire the additional interest.

8. (1) Where the holder of a prospecting licence exercises the discretion to invite other interested persons to participate in prospecting operations, the National Mining Corporation may on behalf of the State enter into an agreement with the holder for that purpose according to mutually agreed commercial terms.

State participation in prospecting operations.

(2) Without limiting the scope of sub regulation (1), the agreements that the National Mining Corporation may sign with a holder of a prospecting licence may include but shall not be limited to joint ventures and farm-ins.

9. Any agreement that is entered into or interest acquired pursuant to section 48 of the Act and Regulation 5 shall require the consent of the Cabinet Secretary.

Consent of the Cabinet Secretary.

Dated the 9th May, 2017.

DAN KAZUNGU,
Cabinet Secretary, Ministry of Mining.