

176 B

Proposed Amendments to the Equities Rules and Directives

The proposed amendments to the equities rules and directives, attached as annexures A and B respectively, are proposed mainly as a result of the replacement of the Securities Services Act (“SSA”) by the Financial Markets Act (“FMA”) and are made in accordance with the provisions of sections 17 and 71 of the FMA and in terms of equities rule 2.60.

Equities rules (Annexure A)

Section 1 – Interpretation and definitions and Section 2 – General provisions

The changes to the definitions are made in order to ensure that the terminology used in the equities rules is consistent with that of the FMA. Certain new definitions have also been introduced where a word or term has been used in a new rule or directive which has been introduced to comply with the requirements of the FMA and that term requires a definition.

References to sections of the FMA, the Companies Act and other rules

Changes have been made to those rules that make specific reference to sections of the FMA and the Companies Act, in order that these rules refer to the correct sections of these Acts. We have amended cross-references in the rules that have been made necessary by these proposed amendments and have also corrected some existing incorrect cross-references.

Section 3 – Authorisations and approvals

Rule 3.30 has been amended to include compliance by the member with the Financial Intelligence Centre Act as a specific condition of membership, in accordance with the Financial Intelligence Centre Amendment Act of 2008 (Act No. 11 of 2008) which entitles a supervisory body to include measures to ensure compliance with the Financial Intelligence Centre Act as a condition of any licence or authorisation granted by the supervisory body.

The definition of “investment services” has been amended to accommodate the changes made to the definition of “advice” and now also includes the provision of a service relating to the execution of transactions in JSE authorised investments other than equity securities. This additional service has been included as a result of the requirement expressed by members for such execution services to be provided for as part of the suite of services that may be offered by them, in addition to the advisory and discretionary investment services that they may provide in respect of both equity securities and other JSE authorised investments. Rule 3.60.1 has then been amended to clarify that a member or an applicant for membership may apply for authorisation to provide one or more of the services incorporated in the revised definition of “investment services” and does not have to apply for or be authorised to provide all of the services incorporated in the definition.

Rule 3.130 has been amended to refer to the business rescue and insolvency proceedings provided for in the Companies Act 2008 (Act No. 71 of 2008).

Section 4 – Management and control

The fit and proper requirements of rule 4.10.2 have been amended to include additional criminal conviction criteria and contraventions of legislation regarding market abuse, money laundering and terrorist activities, which will be taken into account as part of the JSE’s process of determining whether a person is of good character and high business integrity.

Section 7 – Market conduct

Section 7 of the rules has been amended to remove the provisions in relation to prohibited trading practices that are already addressed in the FMA. A breach of the relevant provisions of the FMA by a member or its employees will be dealt with by the FSB’s Directorate of Market Abuse and the FSB Enforcement Committee and there is no need to duplicate the offence in the JSE rules and to take action in terms of the JSE’s enforcement rules. Section 7 now places emphasis on the gatekeeping role that members play in preventing market abuse through the introduction of provisions that require members to take specific steps to prevent and detect market abuse.

Section 8 – Conduct of business

Rule 8.75 has been inserted in order to comply with section 17(2)(i) of the FMA, which requires the JSE to specify that authorised users may not conduct business with a person whom they believe or suspect requires approval as a nominee under section 76 of the FMA, without having taken reasonable measures to ascertain whether such person has the necessary approval.

Section 9 – Client assets

Section 9 of the rules has been amended in order to comply with the requirement of section 22(2)(b) of the FMA, whereby reconciliation differences between a nominee register controlled by a CSP and the securities custody account at the CSDP must be rectified within the time period prescribed in the rules. We have proposed that this period be one day unless circumstances beyond the control of the CSP prevent resolution within one day, in which case such difference must be rectified as soon as is reasonably possible. This section is further amended in accordance with section 39 of the FMA, which specifies the manner in which a pledge or cession of equity securities in *securitatem debiti* must be effected by the member.

Section 10 – Clearing and settlement

Section 10 of the rules has been amended in order to comply with section 17(2)(bb)(i) of the FMA, which requires the JSE to specify the circumstances under which it will limit the revocation of any settlement instruction given by an authorised user or its client.

Section 11 – Complaints and disputes

Section 11 of the rules has been amended in order to comply with section 17(2)(s) of the FMA, which requires the JSE to establish a process whereby members may make complaints against the JSE in respect of the exercise of the JSE of any of its exchange functions. We do not wish to be prescriptive in relation to the manner in which members may raise issues of concern with the JSE regarding the exercise by the JSE of its functions in terms of the Act. However, we are of the view that if the nature of a member's complaint is such that the member requires a written response to their complaint then a process needs to be established whereby the member can direct their complaint to a particular person at the JSE and the JSE will follow particular steps in responding to the complaint.

Section 13 – Default

Section 13 of the rules has been amended to provide clarity on the sharing of losses that could arise upon the default of a member if there is a shortfall in equity securities held on behalf of controlled clients, as a result of a difference between the quantity of equity securities reflected in the member's BDA nominee register and the actual amount of equity securities in the controlled client custody account held with the CSDP.

There is no provision in section 17 of the FMA (Exchange rules) that is equivalent to section 35(2)(x)(iii), which requires a central depository to make rules regarding loss sharing in the event of insolvency of a CSDP. However, we are of the view that a shortfall in equity securities held on behalf of clients can arise equally in the event of a default of a member as it can in the event of insolvency of a CSDP and therefore it would be appropriate to provide certainty in the JSE rules as to how such a shortfall would be dealt with.

In providing for the manner in which a shortfall would be apportioned amongst the clients whose securities are held in the omnibus nominee account at the member's CSDP, it is important to mention that one of the main objectives of this provision is to enable the JSE to return the quantity of securities held in the nominee account at the time of the default to the relevant clients as soon as possible, albeit that that quantity may be less than the total quantity owed to clients. Failure to apportion a shortfall in a particular equity security amongst the affected clients would result in the JSE being unable to return any of the equity securities of that kind to clients pending the resolution of the shortfall. Once the JSE has returned to clients the quantity of equity securities held in the nominee account (after apportioning the shortfall), the JSE will still use its best endeavours to remedy the shortfall which will include giving consideration to claims against the JSE's Comprehensive Crime insurance policy and the JSE Guarantee Fund.

Section 14 – Transitional provisions

Members will be given 6 months from the date of approval of the amended rules within which to conduct the necessary training and formulate and implement the compliance monitoring procedures referred to in rules 7.10.2 to 7.10.4 dealing with the prevention of market abuse. A guidance note will be issued in due course in respect of the compliance monitoring procedures, which will provide examples of the type of procedures that the JSE would expect a member to implement in

order to achieve the objectives of the new rules. Members may use the guidance note to ensure that the measures they have employed are as comprehensive as possible, but should not delay the start of their initiatives to formulate and implement the appropriate procedures pending the issue of the guidance note.

Equities directives (Annexure B)

The amendments to the directives have been made to those sections that make specific reference to sections of the FMA, the Companies Act and the equities rules in order to ensure accurate cross referencing to the relevant sections and rules.

Paul Hartzenberg

Designation Manager: Market Regulation

Division Market Regulation

Tel +27 11 520 7584

E-mail address: paulh@jse.co.za