



JSE CONSULTATION PAPER



On possible regulatory responses to recent events
surrounding listed issuers and trading in their shares.

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011 520 7000 | info@jse.co.za

www.jse.co.za



Johannesburg
Stock Exchange



CONTENTS

Important information

Introduction

Part I

1. An introduction to the listing eco-system
2. The JSE's regulatory duties and functions in respect of new listings applications: is there discretion?
3. Considerations for strengthening the regulation of primary listings
4. Considerations for strengthening the regulation of secondary listings
5. Composition of the Board of directors

Part II

1. Concerns over the impact of short selling
2. More regular disclosure of the status of market abuse investigations
3. Guardians of governance

Closing remarks

Annexure A

IMPORTANT INFORMATION

The JSE Limited (the “JSE”) has developed this consultation paper with the aim of obtaining public input on possible improvements to its regulatory approach to new and existing listings on the JSE, as well as to share the JSE’s perspectives on other steps which could be considered in order to enhance investor confidence, but which are not within the JSE’s regulatory ambit. These steps/measures are equally applicable to companies on the Main Board and the Alternative Exchange (“AltX”).

Submissions received by the JSE on this paper will be taken into account in future enhancements to the manner in which the JSE regulates new and existing listings.

Readers should note that information, proposals, statements and opinions contained in this consultation paper should not be read as a commitment on the part of the JSE to implement, or take any steps to implement, in whole or in part, any proposal or action considered or mentioned in this consultation paper.

HOW TO RESPOND TO THIS CONSULTATION PAPER

The JSE invites comments on this consultation paper and comments on related matters that may have an impact on the subject matter, on or before Monday, 22 October 2018.

Comments on all issues addressed in this consultation paper can be sent by mail, hand delivery or e-mailed for the attention of:

John Burke: Director: Issuer Regulation - JSE Issuer Regulation Division
Mail: JSE Limited, Private Bag X991174, Sandton, 2146
By Hand: JSE Limited, One Exchange Square, Gwen Lane, Sandown
By E-Mail: consultation@jse.co.za

The JSE may publish its findings and certain responses on a named basis, following this consultation process. If you do not wish your identity to be disclosed publicly, please clearly state so when responding.

It should be noted that this consultation paper may impact specific areas of the JSE Listings Requirements (the “Listings Requirements”). In the event that amendments may be required to the Listings Requirements, these will be undertaken using the standard process, which includes a separate public consultation process, pursuant to the provisions of the Listings Requirements and the Financial Markets Act No. 19 of 2012 (the “FMA”).

Finally, the JSE, its subsidiaries, employees and officers have endeavoured to ensure the accuracy and reliability of the information provided in this consultation paper, but do not guarantee its accuracy and reliability and accept no liability whatsoever for any loss or damage arising from any inaccuracy or omission or from any decision, action or non-action based on or in reliance upon information contained in this consultation paper.

John Burke

Director: Issuer Regulation
JSE Limited

INTRODUCTION

The South African financial markets have, over the past year, been shaken by a range of corporate scandals, rumours and innuendo. As one might expect, these have led to questions about how certain alleged activities were able to happen (apparently undetected), whether regulators such as the JSE could have taken action to prevent certain activities and whether those events have highlighted any regulatory provisions that might need to change.

For the JSE, the events of the past year have highlighted the need for it to review its responsibilities and that certain aspects of the manner in which it regulates both primary and secondary listings could be strengthened. More broadly, these events have emphasised the need for all role-players within the broader financial market eco-system to consider their roles in addressing the concerns of the South African investment community.

The JSE is clear about its regulatory role and responsibilities as a licensed stock exchange. As a frontline regulator the JSE advocates for the enhancement of corporate governance and the quality of financial reporting disclosures by companies listed on the JSE, for the benefit of shareholders, investors, and other market stakeholders. The JSE has also invested considerably in skills and technology that enable it to electronically monitor trading activity in its markets and review that activity for potential market abuse breaches under the FMA. Market activity that may require further investigation is referred to the Financial Sector Conduct Authority (“FSCA”), which has the statutory power to investigate market abuse and initiate the necessary criminal or civil action.

The areas discussed in this paper speak to the need to recognise that financial markets must provide a trusted space before investors will be comfortable transacting. That trust is built inter alia through:

- Regulation which is appropriately pitched and equitably enforced;
- Robust technology systems which allow investors to execute trades;
- Disclosure standards which require relevant information to be published publicly and at regular intervals; and
- Governance structures which allow for entrepreneurs to build their businesses with appropriate checks and balances to protect investors.

Readers will note that not all the proposals in this consultation paper fall to the JSE to implement. Certain areas are outside of the JSE’s ambit and responsibility. This consultation paper also provides perspectives on other steps which could be considered in order to enhance investor confidence, but which are not within the JSE’s regulatory ambit, including:

- The disclosure of short sales;
- The disclosure of progress on market abuse investigations;
- The responsibilities of other guardians of governance such as Boards of directors; audit firms; analysts; large asset managers and shareholders.

The JSE will review all responses to this consultation paper and consider whether changes or improvements are required to its Listings Requirements. It is as important, we believe, for other stakeholders – and specifically the “guardians of governance” – to consider whether the past year has highlighted any issues that need to be addressed by them.

1 | An introduction to the listing eco-system

1.1 The regulatory environment for licensed exchanges

A brief picture of the regulatory environment of South Africa's financial markets may assist readers in contextualising their responses to this paper.

In April 2018, the FSCA replaced the Financial Services Board as the statutory regulator of market conduct in South Africa's financial markets, among other responsibilities. This includes oversight of South African licensed exchanges which, in terms of the FMA, are required to perform the role of front-line regulators of the markets operated by the respective exchanges.

In relation specifically to exchanges, the FSCA has the power to grant exchange licenses as well as to investigate market abuse, including taking civil action or initiating criminal action in relation to market abuse where warranted.

Exchanges on the other hand act as listings authorities that set and monitor compliance with Listings Requirements, as well as front-line market regulators in that they set trading rules for the exchange members and monitor trading activity on the exchange to identify possible market abuse. Suspicious trading activity is referred to the FSCA for further investigation.

In a nutshell, the JSE has regulatory powers over its listed companies and its members in terms of Listings Requirements and exchange rules respectively, with the FSCA being the regulator with statutory power to investigate breaches of the FMA and launch criminal and civil proceedings in relation to such breaches.

1.2 Regulation of listed entities

It is an integral function of the JSE to provide facilities for the listing of securities (including securities issued by companies - domestic or foreign), to provide the JSE's users with an orderly marketplace for trading in such securities and to regulate the market accordingly.

The Listings Requirements published by the JSE apply to companies seeking a listing for the first time; currently listed companies; all securities listed by an applicant; to directors of issuers and to listing sponsors. The Listings Requirements contain the rules and procedures governing new applications, all corporate actions and all continuing obligations applicable to issuers and issuers of specialist securities.

The Listings Requirements are aimed at ensuring that the regulation of listings is carried on with due regard to the public interest.

1.3 Applying to list on the JSE

An applicant issuer seeking a listing on the JSE may do so through means of a primary or secondary listing. A listing may be sought on the Main Board of the JSE or the Alternative Exchange ("AltX"). The Main Board is the premium segment of the List maintained by the JSE and AltX is predominantly a market for small to medium companies.

With a primary listing, the JSE is the primary front-line regulator and the applicant issuer has to comply with the provisions of the Listings Requirements in all respects, notwithstanding the fact that the applicant issuer may also be listed elsewhere in the world. In the case of a secondary listing, the applicant issuer has a primary listing and regulator elsewhere in the world with the JSE being the regulator of its secondary listing.

The Listings Requirements currently stipulate that secondary listing status means that once an applicant issuer is listed, it will only be required to comply with the listings requirements of the exchange where it has its primary listing, save as otherwise specifically stated in the Listings Requirements (which primarily deals with certain continuing obligations).

1.4 Requirements for listing on the JSE

The Listings Requirements prescribe the minimum conditions that an applicant must comply with in order to list on the JSE. Applicant issuers that wish to apply for a listing must, inter alia, produce a pre-listing statement that sets out the detailed disclosures that are required in terms of the Listings Requirements. The detailed disclosure includes, but is not limited to, information on the applicant issuer itself, its operations, its financial information (historical information and pro-forma financial information/forecast financial information (if applicable)) and on its corporate governance arrangements.

The JSE reviews and considers all the information disclosed in the application to list, including the pre-listing statement, to assess whether the applicant issuer complies with the requirements for listing.

The aim of disclosure is two-fold. First, the JSE has to determine whether the applicant issuer complies with the Listings Requirements and, second, the JSE has to ensure that shareholders are provided with sufficient information to make an informed investment decision.

The protection of investors (retail and wholesale) is front of mind when setting regulatory standards. As with its global peers, the JSE does this through ensuring that:

- All applicant issuers meet minimum entry requirements. Compliance is determined based on the input of independent advisors to the issuer (as set out below); and
- Sufficient disclosure of relevant information is made available publicly and timeously so that investors are able to inform themselves of all salient facts before deciding whether to trade in securities.

An application to list on the JSE requires the collaboration and interaction of various parties including the Board of directors of the applicant issuer, the listing sponsor, the auditors and various advisers/experts of the applicant issuer (depending on the industry). Each of these has specific responsibilities and, in certain instances, regulatory frameworks:

- The Board of directors has the responsibility of communicating transparently and honestly to the JSE and their advisers about their business and financial performance. This approach is supported by the mandatory corporate governance arrangements required by the JSE, requiring the establishment of mandatory Board committees being (i) the audit committee, (ii) the remuneration committee and (iii) the social and ethics committee. Further specific responsibilities are placed on these committees, especially the audit committee which has to (i) consider the expertise and experience of the financial director on an annual basis, (ii) ensure that the applicant issuer has established financial reporting procedures and that those procedures are operating and (ii) applying a detailed and robust approach when considering the appointment of the auditor;
- The listing sponsor must execute its responsibilities imposed by the JSE in terms of the Listings Requirements. The responsibilities include, but are not limited to, advising the applicant issuer on the application of the Listings Requirements, ensuring that all documents submitted to the JSE comply with the Listings Requirements, informing the JSE if an issuer has breached the Listings Requirements or has reason to believe that the Listings Requirements may have been breached, ensuring that the directors of the applicant issuer are aware of their responsibilities pursuant to the provisions of the Listings Requirements and approving all Stock Exchange News Service ("SENS") announcements before dissemination to the market;
- The independent auditor (reporting accountant) is engaged by the applicant issuer to provide an opinion on whether the applicant issuer's financial statements are presented fairly, in all material respects, in accordance with International Financial Reporting Standards. This is an important requirement, aimed at enhancing the degree of confidence of intended users of the financial statements. Globally, the audit profession is typically governed by a regulatory body for auditors, such as the Independent Regulatory Board for Auditors ("IRBA"), whose primary role is to protect the financial interests of the investor public through effective regulation of assurance conducted by registered assurance providers in accordance with International Auditing Standards and applicable legislation. The regulatory body's mandate includes competence requirements to qualify as an auditor, the auditing framework to be used by auditors, inspection of auditors' work to ensure compliance with the relevant auditing frameworks and discipline of auditors who are not compliant with laws and regulations. The IRBA has issued a rule that mandatory audit firm rotation will become effective in April 2023;
- Depending on the industry, certain specialised information of an applicant issuer requires the independent verification and sign-off by an appointed adviser/expert. For example, mining companies are required to prepare a competent person's reports (in accordance with the SAMREC/SAMVAL codes) on their mineral assets reviewed by the JSE's Readers Panel. Property companies are required to prepare valuation reports on their properties prepared by an independent property valuer.

2 | The JSE's regulatory duties and functions in respect of new listings applications: is there discretion?

The provisions of the FMA impose a statutory obligation on the JSE, as a licensed exchange, to fulfil its licensed functions. A cornerstone of these functions is the obligation imposed on the JSE to enforce all of its Listings Requirements in their entirety on an equal basis (see section 10(2)(e) of the FMA). This principle is also enshrined in the principle of legality in our Constitution and it obliges the JSE (and all licensed exchanges) to act only in accordance with the powers conferred upon it by the provisions of its enabling statute, the FMA.

There have been some questions posed about the "discretion" of the JSE to refuse an application for listing in circumstances where an applicant issuer complies with all the relevant criteria as set out in the FMA and the Listings Requirements. The provisions of the FMA do not invest the JSE with the discretion to decide when it will enforce its Listings Requirements and when it may choose not to. On the contrary, the existence of such far-reaching 'discretion' would be in conflict with the well-established principles of legality, the principles of the Constitution and the provisions of the FMA, as noted above.

It is important for the integrity of the South African financial markets that the Listings Requirements adopted by licensed exchanges provide an effective and appropriate regulatory structure to ensure a fair, efficient and transparent market in the securities listed and traded on an exchange and that this is applied equitably in respect of all issuers and investors. These important principles and objectives would be rendered meaningless if employees of an exchange are permitted to use their personal judgement or subjective opinions in deciding when they will enforce the Listings Requirements and when not.

The question therefore is whether there are additional objective criteria that the JSE could consider including in the Listings Requirements to address the concerns raised during the year. We have set some proposals out below and would welcome any other proposals that readers may have.

3 | Considerations for strengthening the regulation of primary listings

In section 3 we address elements relevant to primary listings. Secondary listings are addressed in detail in section 4 of this paper.

In relation to primary listings, areas for possible attention relate to the initial listings criteria. For each of these, the possible considerations are set out below.

3.1 Enhanced Main Board initial listing criteria

There are two elements of the initial Main Board listing criteria that appear to require consideration:

Subscribed capital

In order to qualify for listing, an applicant issuer seeking a listing on the Main Board must have, amongst others:

- Subscribed capital of R50 million;
- Audited financial statements for the preceding three years;
- Reported an audited profit of at least R15 million before taxation and after taking into account the headline earnings adjustment on a pre-tax basis in the last audited financial year; and
- If the issuer does not meet the profit requirement, it requires R500 million in subscribed capital.

In considering the R500 million subscribed capital entry criteria, the following is noted:

- The R500 million subscribed capital amount was introduced by the JSE in September 2007 and has since remained unchanged; and
- The R500 million subscribed capital amount is permitted to be raised through the listing process.

POSSIBILITIES FOR CONSIDERATION

The subscribed capital requirement could be strengthened in two ways:

- The current subscribed capital amount may need to be revised upwards. Subscribed capital of R500 million does not represent as large a base as it did when it was introduced by the JSE in 2007; and
- Issuers could be required to have the minimum subscribed capital amount in place prior to any capital raising through a listing on the JSE.

Public spread

In order to qualify for listing, an applicant issuer seeking a listing on the Main Board must have 20% of each class of equity securities held by the public to ensure reasonable liquidity.

POSSIBILITIES FOR CONSIDERATION

The public spread requirements for both Main Board and AltX companies could be strengthened in two ways:

- Currently, shares issued to associates of directors (the spouse and minor children of the director) do not qualify for public spread. The requirements dealing with the classification of public shareholders could be revisited to expand the principle that shares that are held by any person/s closely affiliated to the directors and management of the applicant issuer would not be regarded as publicly held. This would then go beyond the definition of associate and not only apply to directors, but to management as well. The intention would be to further exclude the following for purposes of achieving public spread:
 - o Shares issued to employees (irrespective of any trading restrictions); and
 - o Shares held subject to any lock-up provisions.
- Notwithstanding the current sponsor confirmation on public spread, consideration could be given to requiring independent members of the Board to confirm in writing to the JSE that the public spread requirements were met, accompanied by a detailed explanation with supporting documents on how the public spread requirements were indeed met. These confirmations and supporting documents would need to be submitted to the JSE prior to listing and a positive statement to that effect would need to be included in the pre-listing statement ("PLS").

3.2 Longer market notice for listings

The Listings Requirements currently stipulate that the applicant issuer must publish its PLS and inform the market by the release of an announcement by the applicant issuer through SENS, five business days before the date of the listing. This provides time for the listing to be analysed and absorbed by the market before trading commences.

POSSIBILITY FOR CONSIDERATION

Consideration could be given to requiring notice of a listing to be published on SENS more than five business days before the listing. The JSE is considering a ten business day notice period in this regard.

3.3 Compliance with applicable laws

The JSE has a general listing condition as a measure to ensure that the applicant issuer is in good standing with the laws applicable to that issuer. The requirement currently stipulates that an applicant must be duly incorporated or otherwise validly established under the law of the country of incorporation or establishment, and must be operating in conformity with its Memorandum of Incorporation or relevant constitutional documents, if not South African, and all laws of its country of incorporation or establishment.

POSSIBILITIES FOR CONSIDERATION

The JSE is considering whether it would be appropriate to emphasize this requirement by:

- First, requiring disclosure in the pre-listing statement of the relevant laws that apply to the applicant issuer's (i) establishment (Companies Act) and (ii) main industry of operation (i.e. mining issuer complying with relevant mining laws); and
- Second, requiring the Board of the applicant issuer to include and take responsibility for a positive statement regarding compliance with the above applicable legislation in the pre-listing statement. This would need to be accompanied by specific reference to the steps and measures undertaken to enable the directors to make the required positive statement. This measure could be extended as a disclosure item in the annual report of the issuer on an annual basis to ensure focused attention to the above applicable laws applying to the issuer.

3.4 Mandatory training for members of the Audit Committee and Company Secretaries

Audit Committee

Although the Regulations to the Companies Act No.71 of 2008 (the "Companies Act") addresses the qualifications of members of the audit committee, the Listings Requirements are silent. Vital responsibilities are placed on the audit committee pursuant to the provisions of Section 94 of the Companies Act and the Listings Requirements. However, questions have been raised on the expertise, competence and experience of members of the audit committee of issuers and whether too much reliance is placed on the auditors of the issuer.

Company Secretaries

As a listed company it is vital for the Board of directors to be kept abreast of developments in the regulatory environment, including amendments to the Listings Requirements. The JSE ensures that sponsors undertake mandatory training on amendments to the Listings Requirements: to enable them to advise the Board on developments to the Listing Requirements. Similarly, the Company Secretary should also be fully acquainted with the provisions of the Listings Requirements and any amendments made at all times, in his/her role when advising the Board. However, no mandatory training is prescribed in the Listings Requirements for Company Secretaries.

POSSIBILITIES FOR CONSIDERATION

Audit Committee

The JSE is considering introducing an amendment to the Listings Requirements, requiring all the members of the audit committee to undergo formal training on their responsibilities pursuant to the provisions of the Companies Act and the Listings Requirements:

- Prior to listing and as a continuing obligation post listing (for new members);
- On a continuing basis should there be material amendments to the Listings Requirements.

Company Secretary

The JSE is further considering introducing an amendment to the Listings Requirements, requiring all company secretaries to undergo formal training on the Listings Requirements:

- Prior to listing and as a continuing obligation post listing (for new appointments); and
- On a continuing basis should there be material amendments to the Listings Requirements.

3.5 Non-binding advisory vote on corporate governance

In 2016 and 2017 the JSE made amendments to the Listings Requirements focused on corporate governance arrangements, which specifically addressed elements of Board diversity and a mandatory non-binding advisory vote on remuneration.

POSSIBILITIES FOR CONSIDERATION

The JSE is of the view, that there is a need for enhanced focus and accountability in respect of corporate governance. Currently, the JSE requires issuers to adopt and apply King IV (apply and explain basis) and further imposes certain mandatory corporate governance provisions on issuers. The JSE is considering, as is the case with a mandatory non-binding advisory vote on remuneration, implementing a mandatory non-binding advisory vote on the issuer's corporate governance report. In a similar fashion, as with the mandatory non-binding advisory vote on remuneration, the JSE would require engagement by the issuer if the governance report is voted down by shareholders exercising 25% or more of the voting rights. The JSE appreciates that practical issues have been raised on the manner of engagement with the mandatory non-binding advisory vote on remuneration and the JSE would appreciate any suggestions on improving the effectiveness of engagement where a non-binding advisory vote receives significant negative votes.

3.6 Dealings in securities

The JSE has taken note of recent transactions in securities relating to directors where (i) pressure was placed on the share price of the issuer's securities and (ii) the market was unaware of the arrangements that resulted in the transactions. Paragraph 3.63 and 3.64 of the Listings Requirements require an announcement of certain transactions in securities (including off-market transactions) relating to an issuer by or on behalf of (i) a director, (ii) the company secretary and (iii) any of their associates (an "affected party").

Submissions to the JSE have asked for more transparency on transactions where shares held by directors have been used as collateral/guarantees as security for financial commitments. The JSE is aware that certain transactions in securities by an affected party involve using securities as collateral for a financial obligation or otherwise. These transactions typically involve securities in the issuer being pledged as security/guarantee, resulting in a form of encumbrance over the securities in favour of a lender/arranger in order to secure a financial benefit. Such arrangement could result in the exercise of a right or discretion being afforded to the lender/arranger (as a result of the encumbrance) which could at the time of perfection of the security/guarantee lead to a change of beneficial ownership in the interest of the securities, with or without the participation of the affected party. Currently, disclosure is only required at the time of perfection of the security/guarantee and not at the time that the arrangement is entered into.

POSSIBILITIES FOR CONSIDERATION

- The JSE is considering enhancing disclosure of these arrangements as an announcement to be made pursuant to the provisions of paragraphs 3.64 of the Listings Requirements at the time that the arrangement is concluded, in addition to the disclosures currently required. Given that the above arrangement may impact a director's interest (directly or indirectly) in an issuer, the JSE would also consider requiring the necessary disclosure to be carried across into the annual report of the issuer.
- The JSE is further considering expanding the overall dealings in securities provisions to include senior management of the issuer.

4 | Considerations for regulation of secondary listings

4.1 Selection of equivalent exchanges

Currently, the JSE accepts secondary listings from companies that have primary listings on exchanges that are members of the World Federation of Exchanges or from companies that have a subscribed capital of R500 million or more (irrespective of country of primary listing).

POSSIBILITIES FOR CONSIDERATION

The JSE is considering becoming more selective on the jurisdictions it accepts for secondary listings. This approach would require the JSE to undertake a focused review of the regulation regime of any foreign primary exchange, before such an exchange will be accepted as a primary exchange and regulator for purposes of a secondary listing on the JSE. The review would entail a general understanding of the following suggested items, aimed at ensuring that these issues are dealt with in a manner that is broadly equivalent to how they are dealt with by the JSE in respect of primary listings¹:

- Continuing obligations such as –
 - o Disclosure of the sale or acquisition of a beneficial interest in the applicant issuer;
 - o Disclosure of major shareholders;
 - o Disclosure of director's dealings;
 - o Financial reporting requirements and publication periods; and
 - o Treatment of price sensitive information;
- Provisions in the listings requirements dealing with issues for cash, transactions and related party transactions;
- The applicable corporate governance regime;
- The manner of dealing with investigations and censures of issuers; and
- The applicable company laws of the jurisdiction of incorporation to obtain an understanding of the take-over provisions and appraisal rights (which are vital to the rights of shareholders).

In order to provide the market with certainty as to approved secondary listing regimes, the intention would be for the JSE to create a pre-approved list of foreign exchanges with regulatory regimes with which the JSE is comfortable. This approach is followed by peer global exchanges such as the Australian Stock Exchange and the Toronto Stock Exchange (refer to Annexure A). The JSE would strengthen (formalise) co-operative working relationships with the relevant regulators in these jurisdictions and implement information sharing protocols. This approach would enhance the overall regulatory oversight over the issuer in both markets.

Should the JSE receive an application for a secondary listing from an applicant issuer with a primary listing which is not on the pre-approved list, the JSE would need to undertake a separate detailed review on the regulatory regime of such primary exchange before such an exchange will be accepted as the primary regulator by the JSE. Should the primary exchange be acceptable to the JSE, the JSE would again proceed to engage with the foreign exchange to formalise co-operative working relationships and install information sharing protocols.

The consequence of this approach would be that application for listing from issuers with primary listings that are not on the pre-approved list of the JSE would take longer to approve. If such an exchange is not approved by the JSE, the issuer would have the option to seek a primary listing on the JSE.

¹ This is not a definitive list and may be expanded.

4.2 Proactive monitoring processes

Since 2011, the JSE has pro-actively monitored and reviewed annual financial statements ("AFS") and interim reports of primary listed issuers in order to review the application and treatment of International Financial Reporting Standards in the preparation of AFS and interim reports. This is done in conjunction with the University of Johannesburg and the pro-active monitoring is a critical regulation tool for the JSE. The JSE does not presently have a pro-active monitoring process in place for secondary listed issuers. The current pro-active monitoring process only applies to primary listed issuers.

POSSIBILITY FOR CONSIDERATION

Based on the regulation value-add of pro-active monitoring, the JSE could introduce a pro-active monitoring process for secondary listed issuers. The approach would be to first identify the primary exchanges that do conduct pro-active monitoring in their markets. The JSE will then need to understand and satisfy itself on the foreign pro-active monitoring regime in each market in order to establish if they are reliable. Only then would the JSE apply its pro-active monitoring process to secondary listed issuers.

4.3 Expanded powers for ensuring ongoing compliance

The Listings Requirements stipulate that secondary listing status means that once an applicant issuer is listed, it will only be required to comply with the listings requirements of the exchange where it has its primary listing, save as otherwise specifically stated in the Listings Requirements.

POSSIBILITY FOR CONSIDERATION

The JSE may need to consider amending the Listings Requirements to include a general enabling power for the JSE to prescribe additional continuing obligations for secondary listed issuers with which they must comply. This general enabling power would only be utilised where a primary exchange was previously approved by the JSE and for some reason the primary exchange has amended its listings requirement to the extent that the JSE is no longer satisfied with the level of continuing obligations of the primary exchange. The intention would not be to place more onerous continuing obligations on the issuer than it has been used to, but to rather continue with a certain continuing obligation for the benefit of the South African market, although no longer required by the primary market regulator.

4.4 Move of primary listing

There is always a possibility that an issuer which has its primary listing on the JSE may want to move its primary listing from the JSE to another exchange/jurisdiction, but at the same time retain a secondary listing on the JSE. This would result in the issuer falling outside of the primary regulation scope of the JSE.

The JSE currently has two safeguards in place for such an event:

- Shareholders' approval: the Listings Requirements afford primary listed issuers the ability to move their primary listing from the JSE to another stock exchange, provided they keep their secondary listing on the JSE and the transfer of primary listing is supported with a majority shareholders' vote (excluding the votes of any controlling shareholder, its associates and any party acting in concert); and
- Primary regulation election: The JSE may deem the secondary listing to be a primary listing on the JSE, should both the volume and value of the securities traded on the JSE exceed 50% of all securities traded (measured over a 12-month period).

The safeguards above provide practical challenges:

- Shareholders' approval: This safeguard places the JSE in a position to accept another primary regulator proposed by the Board of the issuer to its shareholders, despite the fact that the majority of the trading or share register is held in South Africa; and
- Primary regulation election: This safeguard results in the JSE becoming a dual primary regulator which in turn leads to certain practical issues arising, such as conflicts in the application of the listings requirements of both primary exchanges. The election further leads to regulatory issues on the basis that the corporate laws of the jurisdiction of incorporation of such issuer may be totally unfamiliar to the JSE and could be contrary to certain provisions of the Listings Requirements.

POSSIBILITIES FOR CONSIDERATION

The safeguards could be strengthened in the following manner:

- Shareholders' approval: The JSE is considering whether it should be more selective on the primary listing jurisdictions it accepts when an issuer moves its primary listing, at its insistence, from the JSE and retains only a secondary listing on the JSE. The JSE could consider introducing further safeguards to permit the transfer of a primary listing only if the new primary exchange is an exchange of equivalent regulation to the JSE.
- Primary regulation election: In order to avoid regulatory issues with a forced primary regulation, the JSE could consider introducing a model where the JSE will not become the primary regulator in the full sense. The approach would be to ensure that the JSE does not become the primary regulator, but to rather apply an enhanced regulation approach to such secondary listed issuers in order to protect the interests of the shareholders on the South African register.

On this basis, it is suggested that the JSE apply an elevated regulation regime to such secondary listed issuers without becoming the primary regulator, which measures may include the application of additional listings requirement dealing with²:

- Disclosure of the sale or acquisition of a beneficial interest in the applicant issuer;
- Disclosure of major shareholders;
- Disclosure of director's dealings;
- Financial reporting requirements and publication periods; and
- Treatment of price sensitive information;
- Abide by the listings requirements dealing with (i) issues for cash, (ii) transactions and related party transactions;
- Abide by the JSE mandatory corporate governance provisions; and
- Pro-active monitoring.

As a further measure, when exercising its power to convert a secondary listing to an **ENHANCED SECONDARY LISTING**, the JSE may need to take cognisance, not only of the volume and value traded, but also of the composition of the share register of the issuer in question.

Notwithstanding the volume and value traded, if the South African share register represents the majority of investors across the registers, the JSE should also have the ability to convert a secondary listing into an enhanced secondary listing.

4.5 Avoidance of primary regulation

As mentioned above, the JSE may deem a secondary listing to be a primary listing on the JSE should both the volume and value of the securities traded on the JSE exceed 50% of all securities traded (measured over a 12-month period) or where the South African share register represents the majority of investors across the registers.

The JSE currently allows issuers to maintain a primary listing on another exchange notwithstanding the fact that both the volume and value of securities traded on the JSE exceed 50% of all securities traded, provided shareholders are afforded to vote thereon and shareholders are provided with a detailed summary of the differences in the regulatory regimes between the JSE and the primary exchange retained.

POSSIBILITY FOR CONSIDERATION

The JSE is considering removing the ability of shareholders to vote to retain a certain primary listing when both the volume and value of securities traded on the JSE exceed 50% of all securities traded. The JSE must be placed in the best position to require an enhanced secondary listing regime should the majority of the trading move to the JSE (measured over a 12-month period).

² This is not a definitive list and may be expanded.

5 | Composition of the Board of directors

4.1 Selection of equivalent exchanges

King IV requires the governing body to comprise the appropriate balance of knowledge, skills, experience, diversity and independence for it to discharge its governance role and responsibilities objectively and effectively.

The JSE has been supportive of this principle through the Listings Requirements, as issuers are required to have mandatory policies on the promotion of race and gender diversity.

Practice 10 under principle 7 provides wider clarity on Board diversity, suggesting the governing body should promote diversity in its membership across a variety of attributes relevant for promoting better decision-making and effective governance, including field of knowledge, skills and experience as well as age, culture, race and gender.

POSSIBILITIES FOR CONSIDERATION

In addition to the current requirement for mandatory policies on the promotion of race and gender diversity at Board level as required by the Listings Requirements, the JSE is considering requiring that more emphasis should be placed on overall Board diversity (in age, gender, race, qualifications and the like) so as to enhance the diversity of views expressed and oversight at Board level, something that becomes critical when a company has dominant and charismatic directors.

Creating a Board composed of directors with a broad range of perspectives needs to be a conscious choice by the nominations committee. The natural tendency to turn to existing or well-known relationships/connections when looking to identify candidates impedes diversity.

The JSE is therefore considering introducing a requirement that Boards have and publish a mandatory policy regarding diversity (in its broad sense) at Board level and that they publish performance against that policy on an annual basis.

A further consideration for the JSE is to add a separate mandatory non-binding advisory vote on Board diversity.

PART II

Other aspects to consider in enhancing investor confidence.

Introduction

There are a number of other steps that are outside the JSE's regulatory ambit, but which could enhance investor confidence. We have set out below our views in this regard.

2.1 Concerns over the impact of short selling

Short selling is the sale of a security which the seller does not own. Short sales are either used as a hedge by an investor against the decrease in value of another security or as a strategy to profit from a decrease in the value of the security that is the subject of the short sale. Short selling is a legitimate form of market activity and plays an important role in the price formation process, but the question arises whether some level of disclosure of short sale positions is appropriate. Information on short positions enables investors to make better risk assessments when investing and allows regulators to perform their market surveillance and market abuse investigation functions more effectively.

As is the regulatory practice in a number of foreign jurisdictions, the FSCA has decided to implement a short sale disclosure regime whereby information on short sales of listed securities is provided to the investing public and the regulators.

The JSE is strongly supportive of this initiative of the FSCA. We will comment on the details of the FSCA's proposed reporting regime, when proposals are released.

2.2 More regular disclosure of the status of market abuse investigations

The JSE Market Regulation Division performs a market surveillance function which includes monitoring trading in securities listed on the JSE to identify instances of possible market abuse. If the Market Regulation Division identifies trading activity that it believes warrants further scrutiny, it discusses its findings with the FSCA. The FSCA will then make a determination as to whether the trading activity referred by the Market Regulation Division should be formally investigated to determine whether a market abuse offence has been committed. The FSCA can also initiate a market abuse investigation based on information referred by another licensed exchange or by any other party.

Prior to the introduction of the Financial Sector Regulation Act (which introduced the Twin Peaks regulatory structure and resulted in consequential amendments to the FMA), the FSB's Directorate of Market Abuse ("DMA") made decisions on which market abuse matters to investigate and whether, on the conclusion of an investigation, a matter should be referred for enforcement action. After each quarterly meeting of the DMA, the FSB used to publish a list of all market abuse matters under investigation, together with the status of each investigation. This provided public information on the status of investigations.

Under the revised FMA, all investigative powers and enforcement decisions now vest fully with the FSCA, and the DMA acts in an advisory capacity, advising the FSCA on the appropriate course of action once a market abuse investigation has been completed by the FSCA's investigations unit. The FSCA has indicated that it will, in future, publish the status of its market abuse investigations on a monthly basis. The JSE is supportive of more frequent disclosures by the FSCA.

The JSE also intends to commence publishing monthly statistics on the number of instances in which trading activity has been referred by the Market Regulation Division to the FSCA for possible investigation of potential market abuse.

Taken together, these would help provide more up to date information to investors regarding the status of market abuse investigations. That said, investigations are often extremely complex requiring extensive interactions and interviews, often involving legal processes, before final decisions can be taken. Disclosure on the status of an investigation might therefore provide some insight, but would not necessarily help bring an investigation to completion.

2.3 Guardians of governance

This paper has addressed in some detail aspects under the JSE's regulatory remit which the JSE is considering refining. There are, however, other role-players in South Africa's financial market eco-system on whom investors rely in order to provide critical checks and balances in a robust governance eco-system. These include Boards of Directors, Board sub-committees, asset managers, pension fund trustees, analysts and auditors.

In our view, there is space for each of these role-players to consider whether there are aspects of what they do and how they do it, which should change or be enhanced in order to ensure that they play their part in strengthening governance and, thereby, investor confidence and trust.

Some examples include:

- Would it make a difference if members of the analyst community were required to report instances of being warned against writing or publishing a negative report about the prospects of a listed company? If so, to whom should such concerns be raised?
- Is there a need for guidance to be issued on how Boards might better hold management accountable?
- Should large shareholders (asset managers and holders of more than a certain % of a company's shares) be required to vote on every resolution at an AGM and, subsequently, to publish how they voted on SENS?
- Should pension fund trustees be required to publish their voting mandates to asset managers? If so, to whom should such information be provided?
- What additional requirements (if any) should be placed on statutory auditors given the reliance placed on the financials by investors? For instance, would it add value if companies were required to publish on SENS any material concerns raised by auditors regarding the nature of their interaction with management?

While the JSE is reviewing areas within its mandate, we do not suggest that we have solutions for the eco-system as a whole. Depending on the nature of the comments received in response to this paper, it may be appropriate to convene a colloquium to discuss proposals regarding the improvement of governance.

CLOSING REMARKS

As stated in the introduction of this paper, the events of the past year and the understandable public outcry have led to the JSE reflecting on its mandate and calling on other industry role-players to join us in a review of governance within the broader financial market ecosystem.

The JSE has indicated that it is considering the introduction of certain measures to improve the regulatory standards relating to primary and secondary listings. We have also identified possibilities for improvements outside the JSE's regulatory mandate.

We look forward to receiving comments on this paper and to the engagements that will undoubtedly follow.

ANNEXURE A

Australian Stock Exchange – Foreign Exempt Listings³

The main boards of the principle exchanges in developed markets are generally acceptable to the ASX. Second boards in developed markets and exchanges in emerging or developing markets are considered more carefully by the ASX and will only be acceptable to the ASX if they have a regulatory framework broadly equivalent to the framework applying to Australian entities with a primary listing on the ASX. An applicant seeking foreign exempt listing that has its primary listing on a second board or in an emerging market may be required by the ASX to make submissions on this point.

Although South Africa and Malaysia are considered emerging or developing markets, the JSE and Bursa Malaysia are considered by the ASX to be acceptable home exchanges for a Foreign Exempt Listing.

Approved Exchanges:

- Borsa Italiana
- Deutsche Borse
- Euronext (Amsterdam)
- Euronext (Brussels)
- Euronext (Lisbon)
- Euronext (Paris)
- Frankfurt Stock Exchange
- HKSE (Hong Kong)
- LSE (London)
- SGX (Singapore)
- SIX Swiss Exchange
- TSE (Tokyo)
- TSX (Toronto)
- NASDAQ
- NYSE
- NZX (New Zealand)

Toronto Stock Exchange⁴

SEC foreign issuers and designated foreign* issuers complying with the securities regulatory requirements in their home jurisdiction and the rules of the stock exchange(s) on which their securities are listed will satisfy Canadian requirements relating to certain items.

*“Designated foreign issuer” – those subject to the securities laws of Australia, France, Germany, Hong Kong, Italy, Japan, Mexico, the Netherlands, New Zealand, Singapore, South Africa, Spain, Sweden, Switzerland or the United Kingdom, but not subject to the rules of the U.S. Securities and Exchange Commission applicable to a reporting company. A designated foreign issuer must have less than 10% ownership in Canada.

³ https://www.asx.com.au/documents/rules/gn04_foreign_entities.pdf

⁴ <https://www.tsx.com/resource/en/184>



For additional information contact:

John Burke – Director:

Issuer Regulation – JSE Issuer Regulation Division

✉ Email: consultation@jse.co.za

🌐 www.jse.co.za

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