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CORPORATE & COMMERCIAL ALERT

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Recent Financial Sector Tribunal decision provides interpretation of 'solicitation' for the purposes of Section 65 of the Collective Investment Schemes Control Act, 2002

In a recent decision handed down in respect of the matter between 36One Asset Management (Pty) Ltd (36One) and the Financial Sector Conduct Authority (FSCA), the Financial Sector Tribunal (Tribunal) provided an interpretation of the meaning of "solicit" as defined in the Collective Investment Schemes Control Act, 2002 (CISCA).

Are you compliant? CIPC Compliance Checklist now mandatory

During the latter part of 2019, the Companies and Intellectual Property Commission (CIPC) issued Notice 52, announcing a CIPC Compliance Checklist (Checklist) requiring companies to declare their compliance status in relation to specific sections of the Companies Act when submitting their Annual Return.

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Background and Issue

The decision pertained to publication by 36One - an approved manager of collective investment schemes in terms of CISCA - of information concerning certain unapproved offshore funds on its website, periodic newsletters, and in presentations to its clients. The issue in dispute was whether such publication constituted soliciting of investment in an unapproved foreign collective investment scheme. The decision of the Tribunal turned on the proper meaning of the term "solicit" as used in section 65(3) and defined in section 1 of CISCA namely as "any act to promote investment by members of the public in a collective investment scheme".

In terms of section 65(1) of CISCA, soliciting of investment in offshore funds may only be done upon approval of such offshore funds by the FSCA. Section 65(3) criminalises soliciting of investments in unapproved offshore investment funds with potential liability on conviction to a fine not exceeding R10 million or to imprisonment for a period not exceeding 10 years, or to both such fine and imprisonment.

36One submitted that the information it had provided was in line with international best practice in the asset management industry to provide full and transparent data regarding a firm's product offering when presenting such information to investors. For this reason, all the portfolios that were offered by 36One, both approved and unapproved, were published on its website.

In respect of each of the approved and unapproved funds there was an icon labelled "Invest" on the website. If the "Invest" icon was clicked in respect of an unapproved fund the website user would be required to complete their details to

2018 1ST BY M&A DEAL FLOW FOR THE 10TH YEAR IN A ROW.

2018

1st by M&A Deal Flow.
1st by M&A Deal Value.
2nd by General Corporate Finance Deal Flow.
1st by BEE M&A Deal Value.
2nd by BEE M&A Deal Flow.
Lead legal advisers on the Private Equity Deal of the Year.

2017

2nd by M&A Deal Value.
1st by General Corporate Finance Deal Flow for the 6th time in 7 years.
1st by General Corporate Finance Deal Value.
2nd by M&A Deal Flow and Deal Value (Africa, excluding South Africa).
2nd by BEE Deal Flow and Deal Value.

2016

1st by M&A Deal Flow.
1st by General Corporate Finance Deal Flow.
2nd by M&A Deal Value.
3rd by General Corporate Finance Deal Value.

2015

1st by M&A Deal Flow.
1st by General Corporate Finance Deal Flow.

DealMakers

2014

1st by M&A Deal Flow.
1st by M&A Deal Value.
1st by General Corporate Finance Deal Flow.

2013

1st by M&A Deal Flow.
1st by M&A Deal Value.
1st by Unlisted Deals - Deal Flow.

Recent Financial Sector Tribunal decision provides interpretation of 'solicitation' for the purposes of Section 65 of the Collective Investment Schemes Control Act, 2002...continued

The Tribunal accepted the submission that, for purposes of section 65(3), the act of promoting an investment in an offshore fund requires the intent to promote, and that an innocent promotion may not be struck by the prohibition.

enable 36One to contact them. No details were provided on the website as to how to invest and subscription forms were not made available online.

The 36One website also contained a pop-up disclaimer which included the following wording:

"The information and documentation presented on this site do not constitute a solicitation, invitation or investment recommendation, and prior to selecting a financial product or fund it is recommended that investors seek specialised financial, legal and tax advice. The laws of the Republic of South Africa shall govern any claim relating to or arising from the contents of this site."

Tribunal's Findings

The Tribunal accepted the submission that, for purposes of section 65(3), the act of promoting an investment in an offshore fund requires the intent to promote, and that an innocent promotion may not be struck by the prohibition. This leads to two discrete enquiries – first, whether the website and other information promoted the products it mentioned and, second, what was the subjective intention of the asset manager in providing the information on the website.

36One argued that it did not intend to promote, but that it merely intended to provide information to the market. The Tribunal found that this argument failed to distinguish between motive and intent – the motive may have been to give the market information but one of the purposes of giving that information was to promote its business.

The purpose of publication of investment funds in its portfolio by a company, whose business entails administration of those investment funds, can hardly exclude the marketing of those funds. It may not be the sole purpose for publication, but marketing or soliciting investment in those funds would definitely be amongst the purposes.

The Tribunal also found that the fact that the promotion was ineffective (i.e. no South African investor invested in the offshore funds by virtue of having seen them in any of the publications) does not mean that the act was not one of promotion. It is the act which is prohibited, irrespective of success.

The only difference between the publication on the website of the approved funds in which investment was undeniably being solicited and the unapproved funds was that (1) there was a disclaimer

Recent Financial Sector Tribunal decision provides interpretation of 'solicitation' for the purposes of Section 65 of the Collective Investment Schemes Control Act, 2002...continued

The most prudent way to avoid contravention of section 65 would be to ensure that as far as practicable no specific reference is made to any unapproved offshore funds in any promotional material.

in respect of unapproved funds that the publication did not constitute solicitation of investment and (2) that, unlike the approved funds in respect of which the website provided investment procedure and subscription forms to apply for investment, the website merely provided a prospective investor with a form to complete their details for 36One to contact them.

The Tribunal found that the disclaimer was in this regard disingenuous. It recognises that solicitation was not allowed but then proceeded to provide a button which invited the user to contact 36One in connection with the product. In addition, the fact that the disclaimer states that information published in respect of the unapproved offshore funds reveals that 36One was conscious of the soliciting effect of that publication but sought to undo it by a disclaimer.

The Tribunal confirmed that as long as the publication of the information has the effect of promoting the product or arousing an interest in investing in the product it amounts to soliciting, and in light of the above it found that the 36One publications in question constituted "soliciting" investment in those unapproved offshore funds in contravention of section 65 of CISCA.

The Tribunal emphasised the significance of the risk imposed by soliciting investment in unapproved or unregulated funds in a society like ours, and in determining an appropriate penalty sought to strike a balance between effective deterrence from contravention of financial sector laws and unreasonably harsh penalties.

Practical Implications

In light of the Tribunal's broad interpretation of "solicitation" in this decision, it is advisable that managers exercise caution when including references to unapproved offshore funds in any promotional material. Given the interpretation to include a subjective test, there may be some scope to argue that the intention of the inclusion of such information is not to solicit investment, however, the Tribunal's distinction between motive and intention should be carefully noted. The most prudent way to avoid contravention of section 65 would be to ensure that as far as practicable no specific reference is made to any unapproved offshore funds in any promotional material. Finally, and importantly, it should also be noted that "solicitation" for the purposes of section 65 may be found to occur even where a disclaimer is included which seeks to state otherwise.

Nuhaa Amardien and John Gillmer

Are you compliant? CIPC Compliance Checklist now mandatory

The Checklist will be used by the CIPC to ensure, regulate and monitor compliance of the mandatory requirements of the Companies Act.

During the latter part of 2019, the Companies and Intellectual Property Commission (CIPC) issued Notice 52, announcing a CIPC Compliance Checklist (Checklist) requiring companies to declare their compliance status in relation to specific sections of the Companies Act when submitting their Annual Return. As of 1 January 2020, the Checklist is mandatory and is applicable to all companies, including private companies, public companies, state-owned companies, non-profit companies and personal liability companies. At present, close corporations are not required to complete the Checklist.

The Checklist will be used by the CIPC to ensure, regulate and monitor compliance of the mandatory requirements of the Companies Act. It is also intended to be used by directors, company secretaries and other company personnel, in educating and guiding them in respect of their responsibilities under the Companies Act. Penalties for non-compliance, as regulated by Section 216 of the Companies Act, may include an administrative fine.

The Checklist contains 24 yes/no questions, some of which are highlighted below:

1. Did the company comply with section 4 (solvency and liquidity test) during the previous calendar year?
2. Did the company comply with section 15 (Memorandum of Incorporation, shareholders' agreement and rules of the company) during the previous calendar year?
3. Did the company comply with section 26 (Access to company records) during the previous calendar year?
4. Did the company comply with section 27 (Financial year of company) during the previous calendar year?
5. Did the company comply with section 28 (Accounting records) during the previous calendar year?
6. Did the company comply with section 29 (Financial statements) during the previous calendar year?
7. Did the company comply with section 30 (Annual financial statements) during the previous calendar year?
8. Did the company comply with section 32 (Use of company name and registration number) during the previous calendar year?
9. Did the company comply with section 33 (Annual return) during the previous calendar year?
10. Did the company comply with section 44 (Financial assistance for subscriptions of securities) during the previous calendar year?
11. Did the company comply with section 45 (Loans of other financial assistance to directors) during the previous calendar year?
12. Did the company comply with section 50 (Securities register and numbering) during the previous calendar year?

Are you compliant? CIPC Compliance Checklist now mandatory...continued

There seems to be a potential discrepancy between financial and compliance reporting periods, which may arise when submitting the Checklist.

The nature of the Checklist has however presented some practical issues. For example, it does not allow respondents an opportunity to explain or expand upon their responses to the questions posed. Another issue raised by stakeholders is that some sections of the Companies Act do not seem to contain obligations, yet are mentioned in the questionnaire. For example, section 4 of the Companies Act merely explains how the solvency and liquidity test should be applied, while the compliance obligation is contained in other sections of the Companies Act, such as section 46.

Furthermore, there seems to be a potential discrepancy between financial and compliance reporting periods, which may arise when submitting the Checklist. A company's annual financial statements

submitted with the annual return normally represents the financial position of the previous financial year while the responses to the Checklist are in respect of the past calendar year. As a calendar year is not defined in the Companies Act and since the annual return must be filed within 30 business days after the anniversary of the company's incorporation, it is therefore unclear to which period the Checklist is referring to and the reporting periods may therefore not align.

Nevertheless, since compliance with the Companies Act is mandatory, company secretaries and directors must ensure that a company complies with the Companies Act at all times and are therefore advised to sufficiently prioritise the submission of the Checklist with their annual return.

Willem Jacobs and Reza Ahmed

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