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CORPORATE & COMMERCIAL ALERT

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How should issuers convene and conduct shareholders meetings, amidst the spread of COVID-19?

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The JSE has issued a further statement addressed to issuers convening and conducting its shareholders meetings, amidst the spread of the Coronavirus.

The JSE reminds issuers, domiciled in South Africa, in accordance with section 63(2) of the Companies Act 71 of 2008 (Companies Act), that unless prohibited by the issuer's memorandum of incorporation:

- a shareholders meeting may be conducted entirely by electronic communication; or
- one or more shareholder, or proxies for shareholders, may participate by electronic communication in all or part of a shareholders meeting that is being held in person.

In order for an issuer to conduct a shareholders meeting, in accordance with section 63(2) of the Companies Act, the electronic communication employed must ordinarily enable all persons participating in that meeting to communicate concurrently with each other without an intermediary and the electronic communication must also enable all persons to participate in the meeting in an effective manner.

Every shareholders meeting of a public company must be reasonably accessible for electronic participation by shareholders, in accordance with section 61(10) of the Companies Act. Considering the spread of the Coronavirus, should the issuer wish to hold their shareholders meeting entirely electronically, the only requirement is that the notice of shareholders meeting provides

the following: (i) the availability of electronic participation; (ii) the necessary information to enable access to the medium of electronic communication; and (iii) that the access to the medium of electronic communication is at the expense of the shareholder or proxy, except to the extent the issuer determines otherwise.

If notice of a shareholders meeting has already been dispatched, without providing for the meeting to be held entirely electronically as above, the issuer will need to provide all shareholders notice of such detail, reasonably in advance of the meeting, using the prescribed modes of delivery and the deemed delivery provisions set out in Table CR3 of the Companies Regulations, 2011. For example, such notice may be posted to shareholders and will thereby require the issuer to provide for 7 calendar days for deemed delivery. Unfortunately, a SENS announcement will not suffice. What constitutes "reasonably in advance" is unclear but could for example, after consideration by the board of directors of the company, be set at 72 hours in advance of the shareholders meeting.

Given the nation-wide lockdown for 21 days with effect from midnight Thursday, 26 March 2020, it might however not be possible or practical to arrange for notices to be delivered in the prescribed manner during this period.

The Companies Act does not provide for a mechanism in which the company is able to postpone the shareholders meeting in advance of the meeting, other than at the meeting. Usually, should a quorum not be met at the shareholders meeting, the meeting is adjourned in accordance with section 64 of the Companies Act. Should an issuer be unable to co-ordinate a fully electronic meeting within the lockdown period, in accordance with the above, issuers do have the option of unilaterally cancelling the shareholders meeting altogether and to reconvene a shareholders meeting by issuing a new notice of shareholders meeting to shareholders.

The JSE has not elaborated on the conduct of shareholders meetings considering the impact of the Coronavirus for issuers not domiciled in South Africa. We therefore recommend that should the applicable laws of such issuers place of incorporation provide for shareholders meetings by electronic participation, such method should be considered.

We remind issuers to engage with their sponsors and/or designated advisors should there be further uncertainty around conducting and convening its shareholders meeting, amidst the spread of the Coronavirus.

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