10 NOVEMBER 2021

CORPORATE & COMMERCIAL **ALERT**

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Take-private transaction roadmap: Getting your delisting transaction off the ground and across the line

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Draft Companies Amendment Bill: Some good news for companies undertaking share buy-backs

On 1 October 2021, the Department of Trade, Industry and Competition published the Draft Companies Amendment Bill, 2021 (Draft Amendment Bill) for public comment. The Draft Amendment Bill seeks to propose various amendments to the Companies Act 71 of 2008 (Companies Act) and, amongst the various proposed amendments, it seems that one in particular could finally put to bed an issue that has, for over a decade, created a great deal of uncertainty with respect to share buy-backs.

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Take-private transaction roadmap: Getting your delistingtransaction off the ground and across the line

Small- and medium-cap companies that listed on the JSE with the promise of ready access to capital are finding it difficult to raise equity in the current market but remain saddled with the additional costs associated with being listed on the JSE, as well as having their ability to nimbly capitalise on new opportunities or respond to difficult operating environments curtailed by the regulatory limitations imposed on JSE-listed companies.

Today's market is primed for take-private transactions. Private equity funds and similar investment houses are sitting on committed funds they've been reluctant to deploy in uncertain market conditions during recent times and many JSE-listed companies (primarily the small- and medium-cap companies) are trading at enticing price points relative to their intrinsic value.

In addition, small- and medium-cap companies that listed on the JSE with the promise of ready access to capital are finding it difficult to raise equity in the current market but remain saddled with the additional costs associated with being listed on the JSE, as well as having their ability to nimbly capitalise on new opportunities or respond to difficult operating environments curtailed by the regulatory limitations imposed on JSE-listed companies.

This is a roadmap for initiating a take-private transaction. While we frame our discussion from the perspective of a third-party offeror (offeror) seeking to take private a JSE-listed target company (target), much of the analysis is equally applicable to public-to-private transactions undertaken by the JSE-listed company itself.

Initiating the transaction: Initial engagement and mitigating execution risk

Engagement with key shareholders

Engagement with shareholders of a regulated target in relation to a potential takeover is commonly referred to as "*wall-crossing*" as these shareholders are brought into the fold in relation to (typically) non-public information in respect of the potential transaction.

An offeror typically engages with key shareholders early in the process in order to (i) get a sense of potential support for the transaction before investing unnecessary time and money; (ii) obtain commitments in the form of irrevocable undertakings or letters of support to vote in favour of the transaction or accept the offer; and (iii) assist in convincing the target's board that the potential transaction is one that merits being proposed to the target's shareholders for consideration.

When approaching shareholders prior to the release of the firm intention announcement in respect of a potential transaction, the offeror should comply with the guideline published by the Takeover Regulation Panel (TRP) in terms of which an offeror may approach no more than five shareholders, each holding not less than 5% of the shares (see TRP Guideline 1/2013). However, application can be made to the TRP for a dispensation approving approaches to further shareholders.

Institutional shareholders or asset managers typically agree to being wall-crossed only if the offeror commits to the potential transaction being publicly announced or abandoned within a limited period of time. The reason for this is that such shareholder may, once wall-crossed, constitute an "*insider*" and thereby be prohibited from dealing in the target's securities in terms of the insider trading rules of the Financial Markets Act 19 of 2012.

It is often possible to structure the engagement with these shareholders without agreeing to such a condition by carefully managing the timing of shareholder engagement and the

Take-private transaction roadmap: Getting your delisting transaction off the ground and across the line*...continued*

The EOI may contain certain binding terms. These would typically include provisions regulating the diligence process, exclusivity arrangements, confidentiality, announcements and break fees (as applicable).

information sharing process to ensure that the shareholder is not appraised of any inside information until sufficient deal certainty has been secured.

Expression of interest letter

It is often useful for an expression of interest letter (sometimes referred to as a "*non-binding offer*") (EOI) to be submitted to the target for consideration and, if appropriate, signature. An EOI typically registers the offeror's interest in pursuing the potential transaction and contains information in relation to the offeror, the source of the offeror's transaction funding, the potential transaction structure and, possibly, an indicative offer price or price-range.

When crafting the terms of the EOI, in order to avoid contravening the Takeover Regulations or unwittingly triggering an announcement obligation, particular care should be given to ensuring that certain provisions of the EOI are expressly denoted as "*non-binding*" provisions.

The EOI may contain certain binding terms. These would typically include provisions regulating the diligence process, exclusivity arrangements, confidentiality, announcements and break fees (as applicable).

Transaction-related announcements

From an offeror's perspective, it is usually preferrable to delay the release of announcements in relation to the potential transaction until as late as possible before the firm intention announcement is released. An announcement may signal to the market that the target is "*in play*", thereby increasing the risk that an interloper may see an opportunity to muscle in on the transaction. In addition, the target has an obligation of equal disclosure in terms of which any information that it has shared with the offeror must also be shared with any other bona fide third-party offerors (or potential offerors) upon request, irrespective of whether the approach by that third-party is welcomed by the target board (see regulation 92 of the Takeover Regulations).

However, the target has a general obligation of disclosure to release a "*cautionary announcement*" without delay after it becomes aware of any of price sensitive information in relation to its securities (see para 3.4(a) of the JSE Listings Requirements). However, the JSE Listings Requirements allow that, provided that the information can be kept confidential, the target is entitled to refrain from publishing the announcement for a limited time period.

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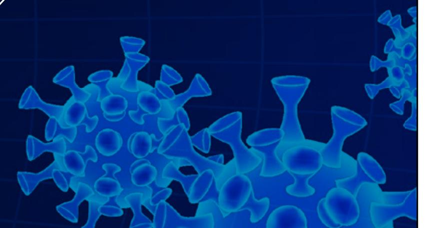

Take-private transaction roadmap: Getting your delisting transaction off the ground and across the line*...continued*

A scheme is an arrangement between the target and its shareholders which binds all shareholders, irrespective of whether each individual shareholder actually supported the scheme.

A conservative target board may be inclined to publish a cautionary announcement earlier rather than later, potentially introducing additional transaction execution risk. In this regard, the following should be considered:

- the general disclosure obligation relates only to "*price sensitive information*", which is information that is (i) specific or precise; and (ii) would, if published, materially affect the price of the target's securities. During early engagement in relation to a potential transaction, the former criterion may not be present, making the release of a cautionary announcement premature, but this must be assessed on a case-by-case basis, having regard to the specific circumstances;
- the JSE has issued guidance requesting that issuers release cautionary announcements only when technically required and not prematurely. Similarly, the TRP has warned against regulated companies trading under cautionary for protracted periods of time; and
- the target is entitled, under the JSE Listings Requirements, to refrain from releasing a cautionary announcement for a limited period of time when confidentiality of the price sensitive information can be maintained. To mitigate risk, template "*leak*" cautionary announcements assuming different factual circumstances may be prepared in advance to enable the target to release the announcement without delay following indications of a leak of information in relation to the potential transaction.

The content of a cautionary announcement to be released is also a common pressure point. The JSE prefers detailed cautionary announcements to be published, whereas the TRP requires that, given that cautionary announcements are published prior to the release of the firm intention announcement, cautionary announcements in respect of affected transactions (including take-private transactions) do not include the level of detail typically included in a firm intention announcement.

Engagement with the target should be carefully managed in order to ensure that its disclosure obligations are recognised but that announcements are not released at junctures in the process which are likely to introduce necessary execution risk.

Transaction structuring

In order to procure the delisting of the target from the JSE, an offer must be made to all the target's shareholders enabling them to exit for cash. The two primary transaction structures utilised for this purpose are (i) a "*scheme of arrangement*" (scheme) in terms of section 114 of the Companies Act 71 of 2008 (Companies Act); and (ii) a "*general offer*" (sometimes referred to as a "*tender offer*").

Schemes

A scheme is an arrangement between the target and its shareholders which binds all shareholders, irrespective of whether each individual shareholder actually supported the scheme.

Take-private transaction roadmap: Getting your delisting transaction off the ground and across the line*...continued*

A scheme binds all shareholders and not only those who support the scheme. Therefore, minority shareholders' shares may be expropriated as part of the scheme and the administrative burden of minority shareholders retaining their holdings in the delisted vehicle is avoided.

In the context of a take-private transaction, the primary benefits of a scheme (as opposed to a general offer) are that:

- the scheme binds all shareholders and not only those who support the scheme. Therefore, minority shareholders' shares may be expropriated as part of the scheme and the administrative burden of minority shareholders retaining their holdings in the delisted vehicle is avoided;
- the termination of the target's listing does not require approval by the target's shareholders or the JSE, rather the delisting occurs as a feature of the scheme; and
- while the target's independent board will retain an independent expert to report on the fairness and reasonableness of the offer (which will be distributed to shareholders) there is no requirement that the offer be fair or reasonable in order to be implemented and competently delist the target.

If a scheme is to be proposed, the following should be considered:

- a scheme cannot be proposed by the offeror directly, but rather must be proposed by the independent board of the target. Accordingly, the target independent board must agree to propose the scheme (which it is entitled not to do) in order for the scheme to get off the ground;
- a scheme requires the support of at least 75% of shareholders, excluding the offeror, its related persons and any parties acting in concert with the offeror; and
- if minority shareholders oppose the scheme but the scheme is approved by the requisite 75% majority nonetheless, the minorities will be entitled to: (i) if the scheme was opposed by ≥15% of shareholders, require that the target make application to court to approve the scheme (thereby causing a time delay, additional cost and risk that the transaction is not approved by the court); and/or (ii) demand that the target make a separate offer for their shares at a "*fair value*" in terms of section 164 of the Companies Act. It is possible to mitigate against these risks by making the scheme subject to appropriate conditions.

General offer

In the context of a take-private transaction, the benefits of a general offer are that:

- The target's board is not required to approve, sanction or propose the transaction, meaning that the transaction may be launched even where the target's board opposes the transaction.
- The general offer does not require any shareholder approval or minimum acceptance. The offeror may elect to impose a minimum take-up condition, but this is discretionary.
- Where acceptances by ≥90% of offeree shareholders is obtained, the compulsory squeeze out mechanism in terms of which the offeror can squeeze-out minorities that rejected the general offer may be utilised (see section 124 of the Companies Act). Of course, this is a higher threshold than the 75% required to approve a scheme, but may be valuable where a general offer construct is adopted due to opposition by the target's board.

Take-private transaction roadmap: Getting your delisting transaction off the ground and across the line*...continued*

Once the FIA has been released, the transaction is subject to a regulated process and neither the offeror nor the target can voluntarily withdraw from the transaction.

If a general offer construct is adopted, the following should be considered:

- Unless the compulsory squeeze-out provisions apply (which requires ≥90% acceptances by offeree shareholders), those shareholders that reject the offer will retain their shares in the target.
- The delisting will be contingent on (i) an outright majority (i.e. 50% + 1) of the target's shareholders, excluding any controlling shareholder, approving the delisting; (ii) the JSE approving the delisting; and (iii) the offer being regarded as "*fair*" by an independent expert retained by the target's board.
- The delisting application is an application made to the JSE by the target. The target's board is also required to issue a delisting circular and pronounce the offer to be fair in order for the JSE to approve the delisting. Accordingly, while launching and implementing the general offer does not require the co-operation of the target's board, the delisting application does require such co-operation.

Given the benefits and drawbacks associated with each of these transaction structures, a take-private transaction may be structured by utilising both constructs in tandem, with the scheme being the primary transaction structure and the general offer supplementing the scheme as a fall-back offer which kicks in should the scheme fail.

Pre-requisites to making a firm offer

When the offeror submits a valid notice of firm intention to make an offer to the target, the target is required to issue a "*firm intention announcement*" (FIA) (see regulation 101 of the Takeover Regulations). Once the FIA has been released, the transaction is subject to a regulated process and neither the offeror nor the target can voluntarily withdraw from the transaction.

In order for an offeror to be entitled to submit its firm intention to make an offer and oblige the target to release the FIA:

- to the extent that the transaction consideration is to be cash-settled, the offeror must provide the TRP with an acceptable confirmation of funds in the form of a bank guarantee or confirmation of funds held in escrow (see regulation 111(4) and (5) of the Takeover Regulations) (which in effect requires the offeror to have finalised all its funding arrangements relating to the transaction); and
- the transaction must not be subject to any condition, the fulfilment of which is (i) a matter of subjective assessment; or (ii) within the control of the offeror or its directors (see regulation 96 of the Takeover Regulations). Therefore, any conditions in relation to obtaining deal finance or satisfaction with the outcome of a diligence process must be fulfilled prior to going firm on the offer.

Take-private transaction roadmap: Getting your delisting transaction off the ground and across the line*...continued*

While the release of the FIA imposes a statutory obligation on the target to proceed with the transaction, the offeror may wish to "*lock-in*" the target prior to the FIA being released as the offeror often invests substantial time and resources in getting the take-private transaction to FIA stage.

While the release of the FIA imposes a statutory obligation on the target to proceed with the transaction, the offeror may wish to "*lock-in*" the target prior to the FIA being released as the offeror often invests substantial time and resources in getting the take-private transaction to FIA stage. In order to solve for this, the offeror and target may enter into an "*implementation agreement*", which is a process agreement which may include:

- certain pre-conditions relating to items such as raising deal funding and satisfaction with the results of the diligence, on the basis that pursuant to those conditions being fulfilled the target is obliged to release the FIA and propose the transaction;
- interim conduct provisions which regulate the target's conduct during the period preceding the date on which the transaction closes and is implemented;
- an undertaking not to solicit competing offers, and the manner in which unsolicited competing offers, if received, will be regarded and dealt with by the target; and
- provision for break fees, should the transaction fail to complete.

Dane Kruger and Peter Hesseling

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Draft Companies Amendment Bill: Some good news for companies undertaking share buy-backs

It seems that one in particular could finally put to bed an issue that has, for over a decade, created a great deal of uncertainty with respect to share buy-backs.

On 1 October 2021, the Department of Trade, Industry and Competition published the Draft Companies Amendment Bill, 2021 (Draft Amendment Bill) for public comment. The Draft Amendment Bill seeks to propose various amendments to the Companies Act 71 of 2008 (Companies Act) and, amongst the various proposed amendments, it seems that one in particular could finally put to bed an issue that has, for over a decade, created a great deal of uncertainty with respect to share buy-backs.

Section 48 of the Companies Act makes provision for the reacquisition by a company of its shares. Section 48(8)(b) provides that a decision by the board of directors of a company to acquire its own shares is subject to "*the requirements of*" sections 114 and 115 of the Companies Act if, considered alone or together with other transactions in an integrated series of transactions, it involves the acquisition by the company of more than 5% of the issued shares of any particular class of the company's shares. In a CDH alert titled "*Some good news and not so good news for companies undertaking share buy-backs*" published on 26 February 2021, we explored how the phrase "*the requirements of*" in section 48(8)(b) has led to vast uncertainty, and we also explored the finding of the Johannesburg High Court in the case of *First National Nominees Proprietary Limited and Others v Capital Appreciation Limited* [2021] (4) SA 516 (GJ) regarding whether a transaction falling within the ambit of section 48(8)(b) would be deemed a "*scheme of arrangement*" as contemplated in section 114, or whether the repurchase would merely be subject *mutatis mutandis* to the requirements of a scheme of arrangement.

The judgment settled the position that a contractual, "*one-on-one*" share buy-back in terms of section 48 does not in fact constitute a "*scheme of arrangement*" and therefore would not constitute an "*affected transaction*" under section 117(1)(c)(iii), which is regulated by the Takeover Regulation Panel. The judgment maintained, however, that although such buy-backs may not constitute schemes of arrangements, they still trigger the dissenting shareholder appraisal rights set out in section 164 of the Companies Act as these repurchases are subject to section 115(8), which cross-references section 164. Section 164 of the Companies Act affords a dissenting shareholder appraisal rights. In the event that the dissenting shareholder complies with the procedural requirements in objecting to certain categories of special resolutions, the company will be required to make a written offer, at fair value, for the dissenter's shares. Should the dissenter reject the company's offer, it may then approach the court requesting a judicial appraisal, or determination, of the fair value of the tendered shares. The appraisal remedy is aimed at maintaining an equilibrium between minority shareholders and controlling shareholders in that it empowers minority shareholders to withdraw from a company while obtaining fair value for their shares, in cases where the company proposes a fundamental transaction or materially and

Draft Companies Amendment Bill: Some good news for companies undertaking share buy-backs*...continued*

Although the wording needs to be refined, the Draft Amendment Bill will bring about a regime whereby all share buy-backs in terms of section 48 must be approved by a special resolution of the shareholders (but no independent expert's report would be required).

adversely alters share class rights. It is thus evident that the current position is that the appraisal right component is, by virtue of section 115(8), the common element of share buy backs in terms of section 48(8) and buy backs (by way of a scheme) in terms of section 114.

Separating the two

The Draft Amendment Bill seeks to finally cut the tie between the two sections, as the proposed amendments to section 48(8) contemplate the complete removal of the requirement set out in section 48(8)(b), which would result in a company undertaking to buy back more than 5% of its shares no longer having to comply with *"the requirements of"* sections 114 and 115 of the Companies Act.

Although the wording needs to be refined, the Draft Amendment Bill will bring about a regime whereby all share buy-backs in terms of section 48 must be approved by a special resolution of the shareholders (but no independent expert's report would be required). Section 48(8)(b) is amended by the proposed deletion of the existing section 48(8)(b) in its entirety and it introduces an exception to the requirement for the special resolution in the event that the shares to be acquired are as a result of (i) a pro rata offer made by the company to all shareholders of the company or a particular class of shareholders of the company; or (ii) transactions effected on a recognised stock exchange on which the shares are traded. It is not entirely clear what a *"recognised"* stock exchange would be, but presumably this would include any duly licenced exchange in South Africa.

The Draft Amendment Bill takes heed of and confirms the position in the Capital Appreciation judgment in so far as it relates to a section 48 buy-back not being a *"scheme of arrangement"*, as the proposed amendment makes it very clear that there is a distinction between a *"voluntary"* share buy-back in terms of section 48 and an expropriation share buy-back in terms of a scheme of arrangement contemplated in section 114 by virtue of the fact that there is no longer any mention of compliance with section 114 and 115. This is certainly a welcomed amendment as it removes a substantial layer of compliance such as the requirement to prepare an independent expert's report as set out section 114(2) and the appraisal right provisions set out in section 164 (read with 115(8)).

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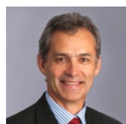

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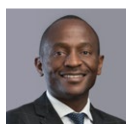

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