

CORPORATE & COMMERCIAL ALERT

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IN THIS ISSUE

JSE Listings Requirements: Something out of the ordinary is taking place

On 4 May 2022, following a consultation process with market participants, the Johannesburg Stock Exchange (JSE) announced that the Financial Sector Conduct Authority had approved amendments to the JSE listings requirements (Listings Requirements). The amendments, which came into effect on 1 June 2022, have been introduced as part of the JSE's Cutting Red Tape Project at a time when a growing number of issuers are delisting from the JSE.



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The project aims to reduce red tape to facilitate a more enabling regulatory environment and entice more listings and less delistings, while simultaneously providing an appropriate level of regulation which will ensure protection against market abuse, manipulation, and the erosion of corporate governance principles.

The key amendments are aimed at affording issuers more flexibility when undertaking certain corporate actions and transactions, relating to (i) the ordinary course of business exemption for category transactions and related-party transactions; (ii) intragroup share repurchases; (iii) capital raising by bookbuilds; (iv) allowing directors to follow a rights offer and other entitlements during a closed period; and (v) clarification regard the circumstances that require the appointment of independent sponsors.

Section 9 of the Listings Requirements, for example, deals with the regulation of transactions, principally acquisitions and disposals,

by issuers and their subsidiaries. It describes how transactions are to be categorised, what the requirements are for announcements and circulars, and whether or not shareholders' approval will be required.

CATEGORY 1 AND CATEGORY 2 TRANSACTIONS

A transaction will be categorised as a Category 2 transaction where the value of the transaction's consideration is 5% or more, but less than 30%, of the issuer's market capitalisation, in which case the issuer will be required to publish an announcement containing the salient details of the transaction, immediately after the terms have been agreed. From a Listings Requirements perspective, no shareholder approvals are required in order to approve a Category 2 transaction.

A Category 1 transaction involves a transaction in which the value of the consideration is 30% or more of the issuer's market capitalisation, or where the total consideration of the transaction is uncapped.

Similar to a Category 2 transaction, a Category 1 transaction will trigger the requirement for the issuer to publish an announcement containing the salient details of such transaction, immediately after the terms have been agreed, however, a Category 1 transaction also triggers the requirement for a circular to shareholders containing a notice of a general meeting, and shareholder approval of the transaction.

Related party transactions are regulated in Section 10 of the Listings Requirements. Related party transactions are "*transactions*" (as that term is defined in Section 9) between an issuer, or any of its subsidiaries, and a "*related party*". Generally, a related party transaction requires an announcement, a circular to be issued to shareholders, a fairness opinion from an independent expert and shareholder approval of the transaction. However, where the value of the consideration in respect of the related party transaction is less than or equal to 5%, but exceeds 0,25%,

JSE Listings Requirements: Something out of the ordinary is taking place

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of the issuer's market capitalisation (a small related party transaction), lesser regulation applies and a circular to shareholders and shareholder approval are not required.

"ORDINARY COURSE OF BUSINESS" EXEMPTION

The Listings Requirements currently provide certain other exemptions. One of these exemptions applies to transactions in the "*ordinary course of business*", where the value of the transaction's consideration is equal to or less than 10% of the issuer's market capitalisation. This means that if (i) a transaction is classified as being in the ordinary course of business; and (ii) the transaction categorisation is equal or less than 10% (measured against the market capitalisation of the issuer at the time), it will not trigger the application of the regulations contemplated in Section 9 of the Listings Requirements, nor will the transaction (if it is a transaction with a related party) be regulated as a related party transaction in terms of Section 10 of the Listings Requirements.

The amendments increase the threshold of the ordinary course of business exemption from equal to or less than 10% to less than 30%, with the result that all related party transactions (i) categorised below 30%, but more than 5%, and (ii) which fall within the "ordinary course of business" safe harbour will now effectively be subject to the same requirements as a Category 2 transaction, as the issuer will only be required to publish an announcement containing the salient details of the transaction. Importantly, related party transactions that fall within the "ordinary course of business" safe harbour no longer require the preparation of a fairness opinion from an independent expert, except where the transaction is with a director and/or any associate of a director. Related party transactions (i) categorised below 5%, and (ii) which fall within the "ordinary course of business" provisions will now effectively have no obligation to even announce the transaction.

TEST FOR "ORDINARY COURSE OF BUSINESS" TRANSACTIONS

The test for determining whether a transaction should be classified as being in the "*ordinary course of business*" has also been expanded to include the following considerations:

- the size measured against similar transactions that have been concluded;
- whether the transaction contributes to the issuer's existing revenue stream, meaning income arising in the course of the issuer's ordinary activities;
- whether the transaction contributes to costs that relate directly to the revenue contemplated above; and
- whether the transaction constitutes ordinary course of business for both the issuer and the other transacting party.

JSE Listings Requirements: Something out of the ordinary is taking place

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The above means that issuers will still be required to engage with the JSE to determine whether their transaction falls within the “ordinary course of business” exemption and the JSE will make the final determination.

Additionally, new paragraphs 10.8 and 10.9 have also been introduced into the Listings Requirements which provide that:

- transactions with a director and/or any associate of a director will not be classified by the JSE as an ordinary course of business for an issuer; and
- as already mentioned, only transactions (i) classified as an ordinary course of business and (ii) where the categorisation is equal to 5% or more must be announced through SENS immediately after the terms have been agreed. The announcement must include the salient details of the ordinary course of

business transaction (excluding pricing information as it may be commercially sensitive) and the governance processes that were followed by the board of directors of the issuer to approve and conclude the transaction.

The JSE believes the amendments will enhance the integrity of the exemption, afford issuers more clarity on what constitutes “ordinary course of business”, and give issuers more flexibility when conducting their business from a cost, timing, and resources perspective, while also providing investors with an appropriate level of protection against abuse. While these amendments may be welcomed by market participants, whether they will achieve the end goal of making the listing environment more attractive to both local and foreign issuers and investors remains to be seen.

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DANE KRUGER**

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The Legal 500 EMEA 2022 recommended **Willem Jacobs** and **David Pinnock** as a leading individuals for commercial, corporate/M&A.

The Legal 500 EMEA 2022 included **Ian Hayes** in the 'Hall of Fame' for commercial, corporate/M&A.

The Legal 500 EMEA 2022 recommended **Johan Latsky, Peter Hesseling, Rachel Kelly, Vivien Chaplin, Roux van der Merwe, Roelof Bonnet, Brian Jennings** and **David Thompson** for commercial, corporate/M&A.

The Legal 500 EMEA 2022 recommended **Justine Krige** as a next generation lawyer for corporate, commercial/M&A.

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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