

Directive * of 2014

FINANCIAL SERVICES BOARD

FINANCIAL MARKETS ACT, 2012

(ACT NO. 19 OF 2012)

PROPOSED DIRECTIVE

I, Dube Phineas Tshidi, the Registrar of Securities Services, under section 6(4)(a) of the Financial Markets Act, 2012 (Act No. 19 of 2012), hereby invite comments concerning the intended directive regarding the implementation and administration of the Act as it relates to infrastructures provided by companies to facilitate trading in their own securities.

Definition

1. In this Directive, “**the Act**” means the Financial Markets Act, 2012 (Act No. 19 of 2012) and any word or expression to which a meaning has been assigned in the Act has the meaning so assigned to it.

Legal and policy framework

2. An exchange is defined as “a person who constitutes, maintains and provides an infrastructure-
 - (a) for bringing together buyers and sellers of securities;
 - (b) for matching bids and offers for securities of multiple buyers and sellers; and
 - (c) whereby a matched bid and offer for securities constitutes a transaction”.
3. The definition of an “exchange” is independent of the instrument type, volume of securities traded, market capitalisation, number of investors or the number of issuers whose securities trade on the infrastructure.

4. A person who maintains or provides an infrastructure which meets the three requirements set out in the definition, accordingly operates an exchange, regardless of whether the infrastructure is provided for transactions in only one security.
5. Section 7(1) provides that all exchanges must be licensed under the Act. In terms of section 109(c) a person who acts as an exchange without being licensed as such commits an offence.
6. The Act clearly sets out the measures required to ensure fair, efficient and transparent markets. Non-compliance with any one of these requirements could have an adverse effect on investor protection and the market.

Infrastructures carrying on the business of an exchange without a licence

7. A number of issuers currently provide infrastructures conforming to the definition of an exchange where the issuer facilitates trade in its own securities.
8. The registrar, as the custodian of the Act¹, cannot allow current exchange infrastructures to operate illegally nor can a proliferation of illegal exchanges be allowed. The situation is exacerbated if the infrastructures/ persons selling shares in the secondary market do not comply with the disclosure requirements as outlined in the Companies Act, 2008 (Act no. 71 of 2008).
9. The affairs of all unlicensed exchanges must urgently be regularised, either by these exchanges ceasing the illegal unlicensed exchange activities and therefore not falling within the ambit of the Act, or by them obtaining the requisite licence to operate an exchange.

¹ Section 6(2), and (3).

Licensing of exchanges

10. Sections 7(3) and 8 of the Act set out the requirements that applicants for an exchange licence must meet. Amongst others, the exchange (applicant) must have made arrangements for the efficient and effective surveillance of all transactions effected through the exchange and for the supervision of authorised users so as to identify possible market abuse and ensure compliance with the exchange rules and exchange directives and the Act (section 8(1)(d)).
11. The Act does not provide for the licensing of different tiers of market infrastructures and/or licensed exchanges with different sets of requirements without fulfilling the functions and role of a self-regulatory organisation as outlined in the Act.
12. Section 6(3)(m) of the Act provides the Registrar with powers to grant persons exemptions from the provisions of a section of the Act, but only if the Registrar is satisfied that the application of the section will cause the applicant or clients of the applicant financial or other hardship or prejudice, and that the granting of the exemption will not conflict with the public interest or frustrate the achievement of the objects of the Act, which include investor protection and the promotion of fair, efficient, transparent and systemically sound financial markets.
13. In light of the aforesaid, the Registrar does not believe that any relaxation from the self-regulatory model requirements as outlined in paragraph 10 is prudent in respect of any exchange that must be licensed under the Act.

Transitional arrangements

14. Persons that currently provide an exchange infrastructure in contravention of the Act must –
 - Cease the illegal unlicensed exchange activities; or
 - Change their business model to not be an exchange; or

- Apply for a temporary exemption from the exchange licensing requirements pending their application to be licensed as an exchange before **31 July 2014**.

15. Applications for a temporary exemption will only be considered if the applicant:

- (1) advises the Registrar before **31 July 2014** that it intends to apply for an exchange licence and furnishes detailed motivations² as to why the Registrar should grant a temporary exemption to it, if it has not done so already.
- (2) At a minimum, the undertakings to comply with the following conditions will have to be included in the motivation:
 - (a) it undertakes to not market itself as an exchange as defined in the Act and does not create the impression that it is regulated in the same manner as a licensed exchange³;
 - (b) it records all information with regard to transactions that take place on the exchange trading platform and has arrangements in place to store such information indefinitely;
 - (c) it has arrangements in place for efficient and effective security and back-up procedures to ensure the integrity of the records of transactions effected through the exchange;
 - (d) it puts in place sufficient arrangements for the efficient and effective surveillance of all transactions effected through the exchange to identify possible market abuse;
 - (e) it makes provision for simultaneous and comprehensive disclosure of price sensitive information where applicable;
 - (f) it ensures that adequate arrangements are put in place for the segregation of individual client funds and securities;
 - (g) it collects and pays to the Registrar the investor protection levies determined by the Registrar;

² The detailed motivations must include, but not be limited to, the name of the security that trades on the platform, the number of securities traded on a daily basis during the last year, the number of shareholders, whether the shareholders are limited to any specific group, the value of daily transactions during the last year, how the infrastructure operates and what investor protection measures it currently has in place.

³ Section 4(2) of the Act.

(h) it immediately complies with all requests for information from the Registrar;
and

(i) it immediately implements any other measure that the Registrar may require.

(3) submits a complete application for an exchange licence to the Registrar on or before **30 January 2015**, which complies with the provisions of the Act and Board Notices 98 and 104 of 2013.

16. The transitional arrangements are only applicable to unlicensed exchanges operated by companies with the aim of making a market in only their own securities, and not to other unlicensed exchanges.

17. The public is hereby invited to make written representations concerning the directive on or before **23 May 2014**, by email to Norman Muller, Head, Capital Markets at norman.muller@fsb.co.za or via facsimile to 012 346 6533



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Registrar of Securities Services

