

Public consultation process on proposed changes to JSE Listings Requirements in relation to various issues

23 October 2012

We have recently undertaken several visits to sponsors and designated advisers to discuss various matters. During these visits certain issues were brought to our attention regarding the applicability and practicality of certain provisions of the JSE Listings Requirements (the “Requirements”).

The JSE demonstrated the importance of the issues highlighted in relation to the Requirements by undertaking a general consultation process amongst the sponsors and designated advisers in order to obtain an industry and practitioner view on these issues.

Note: In order to give interested parties a general background and rationale for each specific consulted item, we have extracted the item directly from the consultation document to sponsors and designated advisers.

1) Consultation Item: Category 1 Requirements and circulars – the 28 day rule

The requirement of the “28 day rule” pursuant to paragraph 9.20(b) of the Requirements has made frequent appearances in recent times at our technical meetings as regard dispensation requests.

For ease of reference we have included an extract of the relevant requirement:

“9.20 Upon the terms of a Category 1 transaction being agreed, the issuer must:

- (a) immediately comply with the requirements for a Category 2 transaction and state within the announcement that the transaction is subject to shareholders’ approval and that a circular to shareholders will be issued in compliance with 9.20 (b); and
- (b) within 28 days, dispatch a circular to shareholders containing a notice of general meeting to obtain their approval and any agreement effecting the transaction must be conditional upon such approval being obtained. The JSE may, in its sole discretion, extend this period provided that there is sufficient justification to do so.”

(the “28 day rule”)

Based on the volume of dispensation requests we have been receiving on the 28 day rule, we have thought it wise to obtain your view on the matter.

Various reasons for dispensation on the 28 day were provided to the JSE. The question now is whether the 28 day rule pursuant to the requirement is too short and should therefore be extended or, whether the



requirement should be dispensed with as a whole on the basis that no transaction can proceed without shareholders voting thereon (thus requiring a circular to be prepared and be sent to shareholders).

Thus, the point that we are seeking input on is whether:

- The 28 day rule should be extended? If yes, what would be considered to be a reasonable extension and what is the rationale behind such extended period? OR
- Should the 28 day rule be dispensed with as a whole on the basis that it is in the interests of the issuer and the sponsor to have the circular prepared and sent to shareholders as soon as possible in order to affect the proposed transaction?

JSE Response:

The JSE is of the view that although the issuer and the sponsor has a direct interest in completing a transaction as soon as possible, we are of the view that dispensing with the 28 day rule as a whole may go too far. The JSE further has a concern that if the 28 day rule is dispensed with as a whole it would be inundated with queries from shareholders and stakeholders following up on the progress on the posting of circulars. By extending the 28 day rule, the JSE will still have a finger in the pulse as it relates to the progress of transactions.

The JSE has also been mindful of the volume of dispensation requests received on the 28 day rule and has come to the conclusion that the period should be extended to lessen the volume of ruling requests and to afford issuers and sponsor more time to finalise circulars and getting same approved by the JSE.

On this basis, the JSE proposes to amend the 28 day rule and allow 60 days for the dispatch of the circular to shareholders from the date of the transaction being announced.

See **Annexure 1** for the proposed amendments to the Requirements.

2) Consultation Item: Repurchases of equity securities

Issuers are required pursuant to paragraph 11.27 of the Requirements to announce when it has cumulatively repurchased 3% of the initial number of relevant class of securities and for each 3% in aggregate of the initial number of that class acquired thereafter.

It has come to the attention of the JSE that there is no requirement for the adequate and full disclosure of any such repurchases undertaken in any one financial year, dealing with:

- The total shares repurchased;
- The average price paid for all the repurchased shares;
- The number of shares held in treasury, and
- The number of shares cancelled (thus falling back to the authorised but not issued share capital).

The JSE is of the view that details in respect of the above should be included as a table in the annual financial statements of the issuer.

JSE Response:

There was overwhelming support for the additional disclosures suggested by the JSE and as such the JSE proposes to amend the Requirements to accommodate the above approach.

See **Annexure 2** for the proposed amendments to the Requirements.

3) Consultation Item: Removal of DA

The JSE has always seen the role of the DA as very close to the issuer and its board. This is affirmed by the provisions as set out in paragraph 21.16 of the Requirements, being the DA's role is of particular importance to the successful operation of ALTx, since it is the requirement of the JSE that each issuer must, with the guidance and assistance of the DA, comply with and discharge its responsibilities under the Requirements. In this regard, the DA is expected to advise the issuer on all of the issuer's responsibilities in a competent, professional and impartial manner.

Paragraph 21.12 of the Requirements require that a new applicant seeking a listing of securities on ALTx must appoint a DA in terms of a written contract and must ensure that it has a DA at all times.

It has come to the JSE's attention that in certain circumstances a DA could be removed by the CEO or FD of the issuer on the basis that the appointment is a contractual arrangement. It should be remembered that the DA is expected to advise the issuer on all of the issuer's responsibilities under the Requirements in a competent, professional and impartial manner.

On this basis it is conceivable that if a CEO or FD does not approve or appreciate the guidance that is given to him/her by the DA, he/she can then unilaterally remove the DA and then appoint another. We are not suggesting any malicious wrongdoing by any party. It should also be appreciated that a decision to remove a DA could also be based on very justifiable reasons such as an unreasonable increase in fees or poor performance by the DA. We are only merely highlighting the fact that a DA can be removed by the decision of one person alone, whatever the reason. This may raise questions from a due process point of view.

It has therefore been suggested that we make the removal of a DA subject to board approval of the issuer resulting in due consideration at board level as regards the termination of the services of the DA, for whatever reason. This route will ensure due process in the removal of the DA as well as written records to the rationale and discussions held in respect thereof.

The point that we are seeking input on is whether you are in agreement with the suggested route as it relates to the removal of a DA by the board of directors of the issuer.

JSE Response:

There was overwhelming support for making the removal of a DA subject to board approval. The JSE is of the view that the board's participation in such decision is important taking into account (i) due process and (ii) the closeness of the DA to the board of the issuer. On this basis, the JSE proposes to amend the Requirements accordingly.

See **Annexure 3** for the proposed amendments to the Requirements.

4) Consultation Item: Removal of Sponsor

The JSE wishes to obtain your views and thoughts on whether there would be any objections in applying the approach suggested above for the removal of a DA to the removal of a sponsor? As such, the removal of a sponsor would also be subject to board approval.

Pursuant to paragraph 2.6 of the Requirements, an applicant issuer must advise the JSE in writing (providing a copy to the sponsor) of the appointment, resignation or dismissal of a sponsor. Where a sponsor is dismissed or resigns, the applicant issuer and the sponsor must immediately inform the JSE separately in writing of the reasons for the dismissal or resignation. We are of the view, that such a report by the outgoing sponsor should also be provided to the new sponsor as is the case with the outgoing DA (see paragraph 21.32).

On this basis, we wish to suggest the following amendments: (i) The removal of the sponsor will be subject to board approval and (ii) the reasons for resignation or dismissal of the sponsor as provided to the JSE by the outgoing sponsor must be made available to the new sponsor. The new sponsor must take into account the reasons for the resignation or dismissal before accepting the appointment.

JSE Response:

There was overwhelming support for making the removal of the sponsor subject to board approval. The JSE is of the view that the board's participation in the removal of the sponsor supports due process. On this basis, the JSE proposes to amend the Requirements accordingly.

See **Annexure 4** for the proposed amendments to the Requirements.

5) Consultation Item: Financial Director – Appropriate expertise and experience

A general issue has been raised recently whether the DA is the correct person/entity to sign off on the expertise and experience of the financial director of the issuer as it pertains to his/her role. Paragraphs 21.3(e) of the Requirements stipulate the following:

“The applicant issuer must appoint an executive financial director and the DA must be satisfied (and submit confirmation in writing to the JSE) that the financial director has the appropriate expertise and experience to fulfil his role.”

(the “**FD adequacy**”)

DAs may have their own view on this matter and may feel that the FD adequacy sign-off performed by the DA should rather be the responsibility of the audit committee as is the case with main board issuers.

The point that we are seeking input on is whether the DA is the correct person/entity charged with the FD adequacy sign-off? If not, what would be the alternative and please explain the rationale.

JSE Response:

There was overwhelming support that the FD adequacy sign-off performed by the DA should rather be the responsibility of the audit committee. The JSE is of the view that it would be proper for this responsibility to rather rest with the audit committee as is the case with main board issuers. On this basis, the JSE proposes to amend the Requirements accordingly.

See **Annexure 5** for the proposed amendments to the Requirements.

Consultation Item: Category 1 Requirements and circulars – the 28 day rule

Category 1 requirements

9.20 Upon the terms of a Category 1 transaction being agreed, the issuer must:

(a)

(b) within **6028** days, dispatch a circular to shareholders containing a notice of general meeting to obtain their approval and any agreement effecting the transaction must be conditional upon such approval being obtained. The JSE may, in its sole discretion, extend this period provided that there is sufficient justification to do so.

Reverse take-over requirements

9.24 The announcement of a reverse take-over must contain adequate warning as to the uncertainty of whether or not the JSE will allow the listing to continue following the acquisition. The issuer must prepare a Category 1 circular and listing particulars as though the issuer were a new applicant. If such Category 1 circular and listing particulars are not provided to shareholders within **6028** days of the announcement, the JSE may suspend the listing of the issuer's securities. The Category 1 circular must clearly advise shareholders whether or not the JSE will continue to grant a listing to the issuer if shareholders approve the acquisition.

Contents of circular

10.9 A circular in respect of a related party transaction must be issued within **6028** days of the publication of the terms announcement, must comply with the general requirements relating to circulars set out in Section 11 and must also include:

Specific issue for cash

11.19 Issuers seeking a listing for securities issued in terms of a specific issue of shares for cash that requires shareholders approval must send shareholders a circular within **6028** days of publication of the announcement containing the following:

Specific repurchases

11.23 The circular must be sent to shareholders within **6028** days of publication of the announcement and must comply with and/or contain the following information:

Specific payments (as defined in Section 5)

11.28 The circular must be sent to shareholders within **6028** days of publication of the announcement and must contain the following information:

Consultation Item: Repurchases of equity securities

Minimum contents of annual financial statements

8.63 In addition to complying with IFRS, Section 30 of the Act and paragraph 3.84 of the Listings Requirements, issuers are required to disclose the following information in the annual report (in the case of 8.63(a) and (l)), and in the annual financial statements (in the case of 8.63(b)–(k) and ~~(m)~~):

(a)...(b)...(c)...(d)...(e)...(f)...(g)...(h)...(i)...(j)...(k)...(l)...(m)...

(n) Repurchased equity securities

Details must be disclosed in respect of the acquisition by an issuer of its own securities or a purchase by a subsidiary of securities in its holding company (in accordance with section 48 of the Act) during the period under review.

In respect of the above acquisition of securities by the issuer and/or subsidiary, the following should be disclosed:

(1) the total number of equity securities repurchased;

(2) in relation to the total number, the number of equity securities -

(i) held as treasury securities by a subsidiary of the issuer;

(ii) which have reverted to authorised but unissued equity securities of the issuer in accordance with section 35(5) of the Act;

(3) the average price paid for the repurchased equity securities, calculated by dividing the number of acquired securities by the total amount paid.

8.64 The issuer's auditor shall modify the audit report as considered appropriate in cases of non-compliance with any of the requirements set out in paragraphs 8.63(b) to (k), ~~(m)~~ and ~~(n)~~.

Consultation Item: Removal of DA

Termination of contract

- 21.30 In the event that the appointment of the DA pursuant to paragraph 21.12 is terminated by the issuer, for whatever reason, such termination must be approved by the board of directors. Once the termination of the DA has been approved by the board of directors~~In the event that the contract between an issuer and its DA is terminated, for whatever reason,~~ the issuer and the DA must submit a report to the JSE stipulating the reasons for the termination, within 48 hours of such termination.
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Consultation Item: Removal of Sponsor**Appointment and resignation**

- 2.6 An applicant issuer must advise the JSE in writing (providing a copy to the sponsor) of the appointment, ~~or resignation~~ ~~or dismissal~~ of any sponsor. Where a sponsor ~~is dismissed~~ ~~or~~ resigns, the applicant issuer and the sponsor must immediately inform the JSE separately in writing of the reason for the ~~dismissal~~ ~~or~~ resignation. In such a situation, the applicant issuer has 30 days to appoint a new sponsor from the date of ~~dismissal~~ ~~or~~ resignation of the sponsor, unless the JSE decides otherwise. The replacement sponsor must ensure, before accepting an appointment, that it has requested the written reasons for the resignation as submitted to the JSE from the outgoing sponsor. The outgoing sponsor must supply the reasons to the replacement sponsor within five business days of such request and the replacement sponsor must take account of the reasons for the resignation before accepting the appointment. Failure to comply with this requirement may result in disciplinary action being taken in terms of the Listings Requirements.

Termination

- 2.6 (A) (a) In the event that the appointment of the sponsor is terminated by the issuer, for whatever reason, such termination must be approved by the board of directors. Once the termination of the sponsor has been approved by the board of directors, the issuer and the sponsor must submit a report to the JSE stipulating the reasons for the termination, within 48 hours of such termination.
- (b) In the circumstances set out in paragraph 2.6(A)(a), an issuer must immediately publish an announcement, stating the reasons for the termination of the services of the sponsor. The issuer must make immediate arrangements to appoint a replacement sponsor, within 30 business days of the date on which the former sponsor ceased to act, and must inform the JSE and publish a further announcement immediately after the appointment has been made.
- (c) The replacement sponsor must ensure, before accepting the appointment, that it has requested the report referred to in paragraph 2.6(A)(a) from the outgoing sponsor. The outgoing sponsor must supply this report to the replacement sponsor within five business days of such request and the replacement sponsor must take account of the reasons for the termination before accepting the appointment.
- (d) Failure to comply with this requirement may result in disciplinary action being taken in terms of the Listings Requirements.

Consultation Item: Financial Director – Appropriate expertise and experience

Conditions for listing

Suitability

- 21.3 In addition to the requirements of paragraphs 4.1 to 4.27, an issuer wishing to apply for a listing on ALT^x must comply (and after the listing has been granted must comply on a continuing basis) with the following requirements:
- (a)
 - (b)
 - (c)
 - (d)
 - (e) The applicant issuer must appoint an executive financial director and the audit committee of the applicant issuer appointed pursuant to paragraph 21.5(i)DA must be satisfied (and submit confirmation in writing to the JSE) that the financial director has the appropriate expertise and experience to fulfil his role;