Securities Finance

Contributing editor
Andrew Pitts

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GETTING THE DEAL THROUGH

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Securities Finance 2018

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Andrew Pitts

Cravath, Swaine & Moore LLP

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Fifteenth edition

Getting the Deal Through is delighted to publish the fifteenth edition of *Securities Finance*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Qatar.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Andrew Pitts of Cravath, Swaine & Moore LLP, for his continued assistance with this volume.

GETTING THE DEAL THROUGH

London
March 2018

South Africa

Ezra Davids, David Yuill and Ryan Wessels

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Statutes and regulations

1 What are the relevant statutes and regulations governing securities offerings? Which regulatory authority is primarily responsible for the administration of those rules?

The relevant statutes governing securities offerings and trading are the Companies Act 2008 (the Companies Act), the Collective Investment Schemes Control Act 2002 (CISCA), the Financial Advisory and Intermediary Services Act 2002 (the FAIS Act), the Banks Act 1990 (the Banks Act) and the Financial Markets Act 2012 (the Financial Markets Act). This legislation applies to listed and unlisted securities.

Regulations

Historically, there has been one licensed exchange in South Africa, the Johannesburg Stock Exchange (JSE), for the listing of equity and debt securities, although recent developments have seen four new exchanges, ZAR X, 4 Africa Exchange, A2X and the Equity Express Securities Exchange, being licensed by the South African Financial Services Board. The JSE has two primary boards: a main board and an alternative exchange (AltX) for small and medium-sized companies.

Previously, debt securities were listed on and regulated by the Bond Exchange of South Africa (BESA), which was a licensed exchange separate from the JSE. However, BESA became a wholly owned subsidiary of the JSE in June 2009. The listing of debt securities is now regulated by the JSE pursuant to the Debt Listings Requirements of the JSE (the Debt Listings Requirements).

The Financial Markets Act consolidates the law relating to the regulation and control of, inter alia, exchanges and securities, trading, central securities depositories (relevant for dematerialised shares), the custody and administration of securities, market abuse matters, restrictions on who may market securities, and ancillary matters.

The listing of equity and debt securities on the JSE is subject to compliance with the Listings Requirements of the JSE (the Listings Requirements), the Debt Listings Requirements and JSE approval. The JSE must approve all circulars and offering documents prior to such documents being sent to shareholders or, in the case of debt securities, to potential investors. Sponsors must approve all announcements to be made prior to publication except for those containing JSE regulated timetables, which aspect of the announcement will also require JSE approval.

The issue of debt securities can be construed as 'the acceptance of deposits from the general public', which activity, under the Banks Act, requires a banking licence unless the debt securities are issued in accordance with the provisions of the Commercial Paper Regulations (the CP Regulations) or the Securitisation Regulations published in terms of the Banks Act, in which case the issuer is not required to have a banking licence. The CP Regulations were created specifically to allow non-bank entities to issue debt securities and it is under this safe harbour that the majority of South African issues of debt securities are undertaken.

Exchange controls restrict how non-South African companies raise capital in South Africa (inward listings) and how South African companies and local authorities raise capital abroad.

Regulatory authorities

The regulatory authorities responsible for the administration of the rules and regulations governing securities offerings include the Commissioner of the Companies and Intellectual Property Commission (the Commission) (who has replaced the Registrar of Companies of the Companies and Intellectual Property Registration Office), the Registrar of Securities Services (this has remained unchanged since the Financial Markets Act came into force), and the Financial Services Board (FSB). The Companies Act has also established a Companies Tribunal with the authority to review decisions of the Commission (the Companies Tribunal). In the case of equity and debt securities, the authorities include the Issuer Services Division (formerly the Listings Division) of the JSE and the Takeover Regulation Panel (TRP) (which has replaced the Securities Regulation Panel under the old Companies Act 1973). In the case of debt securities, the Registrar of Banks is one of the regulatory authorities. The regulatory authority that deals with exchange controls is the Financial Surveillance Department of the South African Reserve Bank (FSD).

Public offerings

2 What regulatory or stock exchange filings must be made in connection with a public offering of securities? What information must be included in such filings or made available to potential investors?

Primary and secondary markets – equity and debt

In terms of the Companies Act, an offer of securities (including equity and debt securities) to the public can only be made by a South African public company or a foreign company (incorporated outside South Africa) that has lodged its constitution and details of the board of directors with the Commission.

An offer to the public must usually be accompanied by a prospectus that is registered with the relevant exchange, in the case of offerings of listed securities; or with the Commission, in the case of offerings of unlisted securities. If the document is a prospectus, then the JSE also requires proof that it has been registered with the Commission. Detailed disclosures must be made in the prospectus in accordance with the relevant provisions of the Companies Act and, in the case of listed securities, the Listings Requirements.

The 'public' includes any section of the public, whether selected as holders of the company's securities, clients of the person issuing the prospectus concerned, or holders of any particular class of property. The latter phrase appears to be the legislature's response to a criticised decision of the Supreme Court of Appeal in 2005, where the court held that an offer to subscribe for equity securities made by a listed company to shareholders of another listed company on a particular date was not an offer to the public. The Companies Act also contains safe harbours from 'offers to the public' so that offers can be made without a prospectus to, inter alia, persons whose ordinary business it is to deal in securities, or persons who fall into certain categories of institutional investors, or persons who are paying more than a prescribed amount (at present 1 million rand) for the securities to be acquired by them.

The Companies Act contains the requirement that a prospectus must contain all the information that an investor may reasonably require to assess the assets and liabilities, financial position, profits and losses, cash flow and prospects of the company in which a right or interest is to be acquired and to assess the securities being offered and rights attached to them. Permission to exclude information will, in the case of offers of listed securities, need to be obtained from the

relevant exchange and, in the case of offers of unlisted securities, from the Commission. In addition, the Companies Act provides that the prospectus must comply with the detailed disclosure requirements set out in the Regulations to the Companies Act.

The Companies Act envisages three types of offerings: primary, secondary and initial public offerings (IPOs). These terms are specifically defined. In a primary offering, the offer is made by the issuer itself or a member of the same group of companies. In a secondary offering, the offer is made for investors to purchase (not subscribe for) securities already in issue from a seller that is not the issuer or a subsidiary of the issuer. An IPO is an offering (primary or secondary) by a company whose shares have never been offered to the public before or, where they have been offered before, all of those that were offered have been reacquired by the issuer. The securities offered under an IPO need not be listed. In this article, these terms will only be used in the manner defined in the Companies Act where specifically mentioned.

Primary offers – equity

Listings and additional listings of equity securities are subject to the provisions of the Listings Requirements and JSE approval. All applications for listing are to be submitted to the JSE through a sponsor. In accordance with the Listings Requirements, applicants seeking to list any securities are required to submit a number of documents to the JSE for review. Comprehensive pre-listing statements must be prepared and distributed. Sometimes a circular, rather than a pre-listing statement, must be prepared and distributed. A circular has less comprehensive disclosure requirements than a pre-listing statement. In practice, if a prospectus is required in terms of the Companies Act, it will be the same document as the pre-listing statement or circular and will need to be registered with the relevant exchange. The content requirements of a pre-listing statement and prospectus are largely the same. An announcement containing an abridged pre-listing statement must also be published. Depending on which market on the JSE the proposed listing will occur, certain profit history and public shareholding is required in respect of the issuer.

Primary offerings of securities to the public include IPOs, issues for cash or rights offers.

Historically in South Africa, an IPO involved an offer to the public to take up securities in a company that is not yet listed but which will be listed if the offer is successful. In terms of the Companies Act, an IPO is a more specific concept (as noted above) and will always require a prospectus (which will be lodged with the Commission in the case of unlisted securities or with the relevant exchange in the case of listed securities).

The JSE recognises a non-pre-emptive primary offering, being an issue of equity securities (or securities convertible into equity) for cash. The issuer can make such offer on a non-pre-emptive basis if the terms of the issue are:

- specifically approved by 75 per cent of equity securities holders present and voting in a general meeting in respect of that particular issue excluding any parties and their associates participating in the issue (known as a 'specific issue for cash'). Full details of the proposed issue of equity securities must be included in a circular to shareholders convening the meeting to waive their pre-emptive rights and for issues to related parties at a discount, and the board must obtain a fairness opinion; or
- approved under a general authority by 75 per cent of equity securities holders present and voting at a general meeting by their giving of a renewable mandate to the directors of the issuer, to issue up to 15 per cent of equity securities for cash (although, in practice, shareholders will often only approve a lower percentage) subject to the Listings Requirements and to any other restrictions set out in the mandate (known as a 'general issue for cash'). In a general issue of shares for cash, the equity securities must be issued to public shareholders and not to related parties (broadly defined to include, among others, shareholders holding at least 10 per cent of the equity securities, directors and connected persons) and may not be issued at a discount of more than 10 per cent. No regulatory filings are required when the authority for a general issue of shares is sought but announcements are required if shares are issued in terms of such authority.

Rights offers are offerings by companies to their existing security holders in terms of which such holders have a right to subscribe for additional securities in proportion to their existing holding. The subscription price is usually below market price and accordingly the right to subscribe at that price may have value and may be traded. No prospectus is required for a rights offer (as this falls under one of the safe harbours), but a circular is required to be sent to existing security holders in terms of the Listings Requirements and a more detailed pre-listing statement (known as revised listings particulars) where the dilution will exceed 50 per cent. The Companies Act also requires the rights offer circular to contain prescribed information. Renounceable letters of allocation, conferring rights on the recipients to either subscribe for securities in terms of the rights offer or renounce and cede their subscription rights to existing security holders or third parties, must be approved by: the JSE and conform to the applicable provisions of the Listings Requirements, in the case of listed securities; and the Commission and conform to the provisions of the Companies Act, in the case of unlisted companies.

The Companies Act, subject to the relevant company's memorandum of incorporation (MOI), gives the board the authority to issue shares provided that (in the case of private companies) it is done on a pre-emptive basis. In the case of listed public companies, the Listings Requirements typically require that the MOI contain a provision requiring all issues of shares to be ordinarily on a pro-rata pre-emptive basis, except in certain limited circumstances (such as for the acquisition of assets) or unless otherwise approved by shareholders (eg, specific authority to issue shares for cash). However, in the case where any primary offer results in the voting rights of a particular class of shares issued or to be issued pursuant to the transaction being equal to or exceeding 30 per cent of the voting rights in respect of all the shares of that class held by shareholders immediately before the transaction, the issue of those shares will require approval by shareholders holding 75 per cent of the voting rights exercisable in that meeting in respect of that resolution (even if such issue is done on a pre-emptive basis).

Secondary offers – equity

Where a party acting independently of a company makes an offer to the public for the acquisition of securities in such company, the offeror is unlikely to be in a position to meet the requirements for the issue of a prospectus because such offeror is not privy to all the information required to be stated in the prospectus regarding the company. In these circumstances, the offeror is required, in terms of the Companies Act, to prepare a written statement, which must set out certain prescribed minimum information concerning the offeror, the securities offered, and the company concerned. If the offer is accompanied by a prospectus (eg, because there is a combined primary and secondary offering), then no written statement is required.

A copy of the written statement must be lodged with the Commission for registration before it is issued, distributed or published. No written statement is permitted to be issued, distributed or published more than three months after the date of registration thereof.

Where the securities to which the offer relates are or will be listed on the JSE or in respect of which permission to deal therein has been granted by the JSE, no such written statement is required and the person making the offer must state such fact in writing in the offer. Further, no written statement is required if the parties to whom the securities are offered or the material is published are persons whose ordinary business or part of whose ordinary business it is to deal in shares, whether as principals or agents, or who are at the time of the offer the holders of shares of the same company.

Both primary and secondary offerings are subject to the same safe harbours in relation to the categories of person to whom the offer can be made without it being considered to be an offer to the public.

Generally, there are no disclosure requirements under the Listings Requirements applicable to secondary offerings of equity securities.

Primary offers – debt

The issue of debt securities to the public may necessitate the registration of a prospectus in accordance with the provisions of the Companies Act where such an issue constitutes an 'offer to the public' (see 'Primary and secondary markets – equity and debt' above).

Each issue of debt securities, regardless of whether such issue constitutes an 'offer to the public' as contemplated in the Companies Act,

will, unless specifically exempted, have to comply with the provisions of the CP Regulations and, in the case of securitisations, the Securitisation Regulations. The CP Regulations mainly impose additional disclosure obligations on an issuer over and above the disclosures required under the Companies Act (if applicable) and Debt Listings Requirements. The CP Regulations also provide directions as to who can issue debt securities and the denominations that an issue of debt securities can be issued in and they place restrictions on the purpose for which monies raised under an issue of debt securities may be applied.

Debt securities that are listed on the JSE will also have to comply with the Debt Listings Requirements.

Secondary offers – debt

In the same manner that secondary public offerings of equity securities require only a written statement under the provisions of the Companies Act rather than a prospectus, secondary public offerings of debt securities require only a written statement and do not require a prospectus. If the debt securities are listed, a written statement is not required either.

There are no disclosure requirements under the Debt Listings Requirements applicable to secondary offerings of debt securities.

Primary offer – inward listings by foreign entities on South African exchanges

A foreign entity wishing to list securities on the JSE requires prior FSD approval. To the extent that such foreign entity is conducting business in South Africa, it may be required to register as an external company. Under the Companies Act, making or offering of securities should not, in and of itself, constitute 'conducting business'.

Foreign companies with an inward listing are allowed to use shares as acquisition currency in South Africa and to include South African shareholders in a rights offer. As a result of recent relaxations of South Africa's exchange control restrictions, all South African residents' shareholdings in inward secondary listed securities are treated as the holdings of South African assets without any distinction between institutional and non-institutional investors. South African residents are now allowed to accept inwardly listed shares as acquisition currency in respect of acquisition issues and to exercise their subscription rights in terms of a rights offer.

A foreign entity with an inward listing that raises capital in South Africa must open a special bank account in South Africa for the duration of the listing for purposes of receiving and recording the capital raised. The capital raised must be deployed as soon as possible but not later than one month after being raised and recorded in the special bank account. There are no additional registrations or filing processes for foreign companies raising capital in South Africa (over and above the prospectus or placing document required by any local exchange) other than the requirement to file its constitution and board composition with the Commission.

3 What are the steps of the registration and filing process? May an offering commence while regulatory review is in progress? How long does it typically take for the review process to be completed?

Equity offerings

In terms of the Companies Act, when unlisted securities are to be offered to the public, the prospectus, including all copies of material contracts (including any underwriting agreement) to which the issuer is a party, must be lodged and registered with the Commission, which must ensure that all the statutory formalities have been complied with before such prospectus may be issued or the offer made. However, it is not the duty of the Commission to make any assessment of the merits of the offer, nor does the registration of a prospectus imply any approval of the offer.

There is no prescribed time period for registration by the Commission in the Companies Act; therefore, parties will have to take account of the process (based on market practice timelines) when preparing transaction timetables.

In the case of an offer of listed securities, the procedure for the approval of a pre-listing statement, placing of a document or offering a circular by the JSE is as follows: any potential issuer must appoint a sponsor who will be responsible for all dealings between the issuer and the JSE, including the filing of relevant documents. The sponsor must submit the documents to the JSE for informal comment and, following feedback, for informal approval and eventually formal approval. It typically takes between three to four weeks for the JSE review process to be completed.

Although only three submissions are required, it is not unusual for an additional fourth submission to be made. Other documents, such as the memorandum of incorporation of the listed company (which has to comply with Schedule 10 of the Listings Requirements), a competent person report (in the case of a mining company), or, in the case of the company establishing a share incentive scheme for its employees, the rules of such scheme, have to be submitted to the JSE for approval. The JSE has introduced a fast-track listing process whereby companies with primary listings on the main boards of certain foreign exchanges may apply for a secondary listing on the JSE's Main Board or companies with primary listings on junior boards of certain foreign exchanges may apply for a secondary listing on the JSE's AltX. The fast-track listing process is intended to be quicker than the normal JSE process as applicants do not need to produce a pre-listing statement, but instead a pre-listing announcement is required, which must contain a reduced list of prescribed information.

Debt offerings

The Debt Listings Requirements do not set out any specific timelines with regard to the listing process; however, the Debt Listings Requirements do stipulate that the submission of all necessary documentation and information required by the JSE must be done in accordance with the timetable detailed on the JSE website. In our experience, the JSE approval process for a placing document typically takes 10 business days. This timing may, of course, be affected by matters such as the identity of the issuer, the nature and complexity of the debt securities sought to be issued and the turnaround time for responding to the JSE's comments.

Preliminary approval of the relevant placing document may be obtained from the JSE when any placing document, offering, roadshow or marketing in connection with debt securities that are to be listed, is undertaken. Alternatively, should preliminary approval not be sought, the placing document may be used for marketing-related activities in respect of debt securities that are to be listed, provided that a statement in bold must be placed on the cover page that the JSE has not yet approved such document.

In practice, a person would typically obtain informal approval from the JSE prior to an offer being made. However, the Debt Listings Requirements do not prohibit an offer being made prior to informal approval being obtained. Nevertheless, the consequence of this is that the JSE could potentially deny the listing if the instrument does not comply with the Debt Listings Requirements. The granting of a listing of debt securities must be announced by the issuer on the Stock Exchange News Service no later than close of business on the day before the listing. A signed, final placing document must be made available to the JSE for formal approval and to investors within 48 hours prior to the listing date.

4 What publicity restrictions apply to a public offering of securities? Are there any restrictions on the ability of the underwriters to issue research reports?

In providing offering-related documentation to local investors, the marketing of securities restrictions under the Companies Act, CISCA and FAIS Act must be considered. For instance, under the Companies Act, an advertisement relating to a public offer may be considered as drawing the attention of the public to an offering of securities, and the Companies Act accordingly requires such an advertisement to: have satisfied the disclosure requirements of the Companies Act applicable to a registered prospectus; and be registered prior to being published. Where such advertisement, however, clearly indicates that it is not a prospectus, as well as where and how the relevant prospectus may be obtained, and further satisfies other prescribed requirements contained in the Companies Act, it need not be registered with: the relevant exchange, in the case of listed securities; or the Commission, in the case of unlisted securities. However, if an advertisement does not satisfy all of the requirements of the Companies Act, and despite any statement to the contrary contained in the advertisement, it nevertheless will be regarded as having been intended to be a prospectus and this would mean that anyone responsible for the dissemination of such advertisement would be guilty of an offence.

As a general comment, any communication (oral, internet website or otherwise) made, or written documentation disseminated, that could reasonably be construed as inviting, inducing or influencing investors to participate in an offer of securities or relate to the future profits or losses or valuation of a company or its securities, prior to, during, and immediately following an offering of securities, should: be fair and accurate and not misleading or untrue; if written, contain appropriate disclaimer language; be consistent with (and not contradict) the information that will be contained in any offering document; and in a listed context, if it contains any price-sensitive information, be released in a way that is appropriate and complies with relevant insider dealing legislation and stock exchange rules. Typically, in the context of security offerings, publicity guidelines are pre-agreed to effectively manage the release of communication from a regulatory and market practice compliance perspective.

There are no specific restrictions dealing with the publishing of research reports by underwriters, but the considerations set forth above apply equally.

5 Are there any special rules that differentiate between primary and secondary offerings? What are the liability issues for the seller of securities in a secondary offering?

There are no special rules differentiating secondary and primary offerings other than the distinction made in the Companies Act, described in question 2, between the requirement of a written statement rather than a prospectus and the Listings Requirements' obligation.

There are onerous prospectus provisions that impose statutory liability on persons involved in the preparation of a prospectus and directors of the issuer could also incur liability in relation to a prospectus or offer document of South African common law (for deceit or negligence) or for negligent or fraudulent misrepresentation under the South African law of delict. This is not the case for secondary offerings that are accompanied by a written statement. A secondary offering accompanied by a prospectus (which in practice is only likely to occur as part of a combined primary and secondary offering) results in selling shareholders being subject to almost all of the same prospectus liability provisions of the Companies Act as the directors of the issuer who approved the prospectus. In particular, selling shareholders are liable (in the same manner that the directors of the issuer are liable) to pay compensation to all persons who have acquired any shares on the faith of the prospectus for the loss or damage they may have sustained by reason of any untrue statement in the prospectus, or in any report or memorandum appearing on the face of, or issued with, or incorporated by reference in, the prospectus.

6 What is the typical settlement process for sales of securities in a public offering?

Typically, the underwriter provides the issuer or seller with a subscription notice or a purchase notice setting out the name of each subscriber or purchaser, as the case may be, who is entitled to acquire securities and, if specified by the subscriber or purchaser, the details of its account with a South African central securities depository participant (CSDP) into which the securities offered are to be credited (for dematerialised securities).

The issuer or seller is then provided with evidence that the underwriter has transferred the aggregate offer consideration for the securities to be issued by the issuer to such underwriter, or to subscribers arranged for by such underwriter, or to be sold by the seller as the case may be, into a bank account designated by the issuer or seller less a commission equal to a percentage of the gross proceeds from the issue of any securities subscribed for, or the sale of any shares purchased, and the expenses of the offering.

Upon receipt of confirmation of the payment for the securities offered as contemplated above, the issuer will then issue or procure the issuance of the shares to subscribers, or the seller will transfer the shares, as directed by the underwriter in the subscription or purchase notices and will ensure that either the securities offered are credited to the account of the offeree with the CSDP, as designated by the underwriter in the subscription or purchase notice, by issuing an instruction to the relevant CSDP, or in the case of materialised securities, share certificates in respect of such offered securities are issued as instructed in the subscription or purchase notices.

Underwriters are generally responsible for determining the procedures necessary to ensure that the interests of subscribers or purchasers of the securities offered are protected.

Typically, all settlements are done through the JSE's electronic settlement system (ie, Strate), which operates on a three-day settlement cycle (although, this has been reduced by the JSE from a five-day settlement cycle).

Private placings

7 Are there specific rules for the private placing of securities? What procedures must be implemented to effect a valid private placing?

The Companies Act provides for the various instances in which the private placement of securities can occur. In a nutshell, a private placement under South African law is any offer for securities that does not constitute an offer to the public in accordance with the Companies Act. IPOs are often done on a private placement basis. The Companies Act only requires public offerings to be accompanied by a prospectus and has no rules or procedures for private placements.

If securities (including debt securities) are intended to be listed on the JSE following a private placement, the Listings Requirements (and in the case of debt securities, the Debt Listings Requirements) set out the specific requirements and documents to be submitted to the JSE by the issuer in order for the listing of the securities to take place. Typically, if an IPO is done by way of a private placement, a pre-listing statement will be required. The Listings Requirements also include rules that regulate vendor private placings (ie, private placings of shares issued to a vendor of assets to the company, to settle a vendor cash consideration). Privately placed debt securities (whether listed or unlisted) may also need to comply with the CP Regulations and, in the case of a securitisation, the Securitisation Regulations. If an existing issuer issues securities that are more than 50 per cent of its existing securities, revised listings particulars (effectively a new pre-listing statement) are required.

8 What information must be made available to potential investors in connection with a private placing of securities?

The disclosure requirements are contractual for private placings. If the private placing coincides with an initial listing of securities, then a pre-listing statement containing the prescribed information will need to be prepared.

9 Do restrictions apply to the transferability of securities acquired in a private placing? And are any mechanisms used to enhance the liquidity of securities sold in a private placing?

Restrictions

There are no special rules restricting the transferability of shares acquired in a private placement. This is usually governed by contract.

Mechanisms to enhance liquidity

This can be achieved by:

- placing appropriate provisions in the private treaties between the relevant parties;
- utilising the overallotment or 'greenshoe' options in the case of price stabilisation of listed securities (permissible in terms of the Listings Requirements or the disclosure requirements); and
- market-making in the case of debt securities (subject to the conditions set out in the CP Regulations) or a secondary listing.

Offshore offerings

10 What specific domestic rules apply to offerings of securities outside your jurisdiction made by an issuer domiciled in your jurisdiction?

Except for the prior approval of the FSD of the terms of the offerings and certain exchange control restrictions that may apply to such terms, there are no general South African rules or restrictions applicable to offerings of securities outside South Africa by South Africans. However, in certain industries, offerings of certain securities are restricted, for example, in the telecommunications industry.

For companies listed on the JSE, the Listings Requirements regulate dual listings and provide that the exchange on which the primary

listing resides takes precedence in the enforcement of any rules ahead of the exchange on which the secondary listing resides. However, where the primary listing is not on the JSE, the JSE reserves the right to instruct the issuer to comply with certain specific sections of, or in full with, the Listings Requirements, where it determines such requirements to be in the interest of shareholders. In the event that there is a conflict between the requirements of the relevant exchanges, the most stringent requirements must be complied with.

Notwithstanding any provisions in an issuer's memorandum of incorporation, an issuer may exclude from a rights offer any non-resident security holders with the Commission's approval, if the issuer can demonstrate that the number of excluded security holders is insignificant compared to the cost and inconvenience of issuing to them.

Particular financings

11 What special considerations apply to offerings of exchangeable or convertible securities, warrants or depositary shares or rights offerings?

Any issue of such convertible securities for cash (otherwise than to existing holders of equity securities in proportion to their existing holdings) requires approval from the JSE and from 75 per cent of equity securities holders present and voting in a general meeting. Pursuant to general issues for cash, issuers may not, in the aggregate in any one financial year, exceed 15 per cent of the issuer's relevant number of equity securities in issue of that class (taking into account the potential dilution effect, in the year of issue, of any convertible securities in issue). If the convertible securities are issued to a related party (broadly defined to include, among others, shareholders holding at least 10 per cent of the equity securities, directors and connected persons, etc) and the discount to the market price at the time of conversion of the convertible security is not known at the time of issue of the convertible security, or if it is known that the discount will exceed 10 per cent of the 30-day weighted average traded price of the security at the date of exercise, then the issue will be subject to the issuer providing holders of its securities with a fairness opinion from an independent professional expert acceptable to the JSE indicating whether or not the issue is fair to holders of the issuer's securities. The offering of convertible bonds through a book build has been made simpler by the removal of the requirement that convertible bonds can only be approved by shareholders after the specific terms of the convertible bonds have been agreed to.

A rights offer, where the securities offered will be listed, will not be an offer to the public and hence will not require a registered prospectus although a rights offer circular complying with the Listings Requirements and the Companies Act will need to be prepared. In terms of the Companies Act, renounceable letters of allocation conferring rights on the recipients to either subscribe for securities in terms of the rights offer or renounce and cede their subscription rights to existing security holders or third parties, must be approved by the JSE in the case of listed securities, and the Commission in the case of unlisted securities.

Underwriting arrangements

12 What types of underwriting arrangements are commonly used?

'Best efforts' and 'bought deal' underwriting arrangements are common in South Africa. In a best efforts deal, the underwriter undertakes to use its best efforts to procure that the securities are taken up. Two types of bought deals are common: in the case of a bought deal where the underwriter is obliged to take up any shares that are not taken up by investors and there is a book build, there are 'soft' as well as 'hard' underwriting arrangements. In a hard underwriting arrangement, the underwriter agrees, before the offer is made, to take up any shares not taken up by the investors. In a soft under-writing arrangement, the underwriter only undertakes to take up shares investors applied for in the book build but did not pay for (ie, the underwriter takes on the 'settlement risk'). Often a soft underwrite is achieved by only signing the relevant agreement or the placing terms after the book build. Of the two, a soft underwrite is more common.

13 What does the underwriting agreement typically provide with respect to indemnity, force majeure clauses, success fees and overallotment options?

Underwriting is usually regulated by agreement between the underwriter and the issuer or seller in terms of which the underwriter agrees to subscribe for or purchase, for a commission, any or a specified portion of the securities that are not subscribed for or purchased by the persons to whom they are offered. The commission is usually calculated as a percentage of the issue or purchase price of the securities being underwritten.

Where warranties and indemnities are given by the issuer in underwriting agreements for secondary offerings, care should be taken to ensure that there is no contravention of the provisions of the Companies Act prohibiting the granting of financial assistance by an issuer for the purchase of or subscription for its shares, although the Companies Act allows for this to be condoned in certain circumstances.

With regard to success fees, the parties are free to agree whatever they deem appropriate (subject to the restrictions on underwriting commissions as outlined below). However, the amount of the commission must be disclosed in the prospectus.

All force majeure clauses are subject to agreement between the parties.

Overallotment options are regulated by the Listings Requirements or disclosure requirements in the case of listed securities.

14 What additional regulations apply to underwriting arrangements?

In respect of an underwritten public offering requiring a prospectus, the underwriting agreement relating to the public offering must be filed with the Commission and accompanied by a sworn declaration by two directors of the underwriter that it is, and will be, in a position to carry out its obligations even if no securities are applied for.

Even if an offer of securities is made in respect of which no prospectus is required by the Companies Act, a copy of the underwriting agreement and sworn declarations must be lodged with the Commission no later than the date of the proposed offer of securities.

The Listings Requirements state that if a public offer is underwritten, the underwriter must satisfy the JSE that it can meet its commitments in the manner required by the JSE. Additionally, any underwriting commission paid to a shareholder of the issuer should not be greater than the current market rate payable to independent underwriters as the Listings Requirements limit the amount of commission payable and such limitation generally equates to (but does not exceed) the current market rate payable to independent underwriters. The applicant is required to present evidence to the JSE proving the reasonableness of such underwriting commission. The agreement and affidavits or declarations along the lines of those referred to above are also required to be provided to the JSE.

Ongoing reporting obligations

15 In which instances does an issuer of securities become subject to ongoing reporting obligations?

The Listings Requirements (including the Debt Listings Requirements) set out certain continuing obligations that an issuer is required to observe once any of its securities have been admitted to listing on the JSE. In addition, the CP Regulations provide for quarterly returns to be furnished by the issuer of a commercial paper to the Registrar of Banks. In the case of secondary listings, the JSE will generally (with certain limited exceptions) defer to the rules of the primary exchange.

Issuers of unlisted securities must comply with the Companies Act's reporting obligations (including that reviewed interim and audited annual financial statements must be sent to members). The audited annual financial statements of a listed company must include details of all persons with beneficial interests of 5 per cent or more of the securities of such listed company.

In terms of the Takeover Regulations, a person (which includes concert parties and related and interrelated parties) who acquires a beneficial interest of 5 per cent or any further whole multiple of 5 per cent in a regulated company (which includes public companies, state-owned companies, and, subject to certain criteria being satisfied, private companies) will be under an ongoing obligation to inform the issuer within three business days, if and when it is a party to any transaction that will

result in such acquisitions. Also, disposals of securities that result in a beneficial holder (which includes concert parties, related and inter-related parties) in a regulated company dropping below any such 5 per cent multiple threshold must also be disclosed. Upon receiving such trading disclosure, the regulated company will be required to file a copy of such disclosure with the TRP and (unless the trading disclosed involves a trading disposal of less than 1 per cent) report the information to the other holders of the relevant class of securities, and in the case of listed securities, also inform the JSE.

16 What information is a reporting company required to make available to the public?

Equity securities

An issuer whose securities are listed on the JSE must, subject to approval by the JSE, release announcements regarding price-sensitive information in certain circumstances.

A trading statement must, subject to the Listings Requirements, be published by the issuer (other than issuers who publish quarterly results) as soon as it is satisfied that a reasonable degree of certainty exists that its financial results for the period to be reported upon next will differ by at least 20 per cent from: the financial results for the previous corresponding period; or a profit forecast previously provided to the market in relation to such period. Property entities that elect to adopt distribution per listed security as their measure of financial results, however, must issue a trading statement if the financial results differ by at least 15 per cent, as opposed to the 20 per cent referred to above.

Issuers who publish quarterly results must, instead of publishing a trading statement, include a general commentary in each quarterly results announcement. The declaration of dividends, interest and other similar payments by an issuer should be announced immediately.

Interim reports must be published and distributed to shareholders after the expiry of the first six-month period of a financial year and by no later than three months after that date. In the case of issuers that report to shareholders on a quarterly basis, the quarterly reports must be published and distributed to all shareholders as soon as possible after the expiry of each quarter.

If an issuer has not distributed annual financial statements to all shareholders within three months of its financial year-end, it must publish and distribute to all holders of securities provisional annual financial statements within the three months as specified, even if the financial information is unaudited at that time.

Every issuer must, within six months after the end of each financial year and at least 15 business days before the annual general meeting, distribute to all holders of securities and submit to the JSE a notice of the annual general meeting and annual financial statements for the relevant financial year, which financial statements will have been reported on by the issuer's auditors.

All issuers are required to use their best endeavours to ensure that a minimum percentage of each class of securities (at present 20 per cent) is held by the public (the minimum liquidity free-float requirement) in order to ensure reasonable liquidity. An issuer must inform the JSE in writing, without delay, when it becomes aware that a proportion of any class of listed securities in the hands of the public has fallen below the minimum liquidity free-float requirement.

An issuer must ensure that all the necessary facilities and information are available to enable holders of securities to exercise their rights. In particular, it must inform them of the holding of meetings that they are entitled to attend, enable them to exercise their right to vote, where applicable, and release announcements and distribute circulars in terms of the Listings Requirements.

An issuer, through its sponsor, must notify the JSE of any change to the board of directors or company secretary, including the appointment of a new director or company secretary, the resignation, removal, retirement or death of a director or the company secretary, and any changes to any important functions or the executive responsibilities of a director, and any trading in securities by directors or company secretaries (or their associates).

An issuer must notify the JSE of the termination, appointment and the resignation of the auditors as well as any change of the individual auditor classified as the designated auditor. Notification must be given without delay and by no later than the end of the business day following the decision to terminate the appointment of the auditor or after receipt of the auditor's resignation.

If securities are registered in the name of a person who is not the holder of the beneficial interest, issuers must establish and maintain a register of disclosures made in terms of the Companies Act, which requires the registered holder to disclose: the identity of the person on whose behalf the security is held; the identity of each person with a beneficial interest in the security; the number and class of securities held; and the extent of the beneficial interest. The issuer must further publish the beneficial interests of directors and major shareholders in its annual financial statements. If an issuer receives a notice regarding certain share transactions (namely, affected transactions and offers), the issuer must file a copy of the notice with the TRP and must report the information to the holders of the relevant class of securities, unless the notice concerns a disposal of less than 1 per cent of the class of securities. The issuer must, within 48 hours after receipt of such notice, publish the information contained in the notice on the Stock Exchange News Service (SENS) of the JSE, but not in respect of notices that relate to a disposal of less than 1 per cent of the relevant class of securities.

Issuers must comply with the specific requirements concerning corporate governance and must disclose their compliance with these requirements in their annual report. Additionally, issuers are annually required to confirm that they comply with the corporate governance requirements under the South African Code of Corporate Practices and Conduct as set out in the fourth King Report on Corporate Governance, and to explain how they complied.

Issuers must comply with certain disclosure requirements and obtain shareholder approval for material transactions concluded by the issuer or its material subsidiaries. These disclosure requirements increase depending on the size of the transaction and large transactions require shareholder approval.

Debt securities

An issuer of debt securities is required to publish on SENS any information material to its financial or trading position.

Anti-manipulation rules

17 What are the main rules prohibiting manipulative practices in securities offerings and secondary market transactions?

Financial Markets Act

The Financial Markets Act prohibits insider trading. It stipulates that an insider (as defined) who knows that he or she has inside information (as defined) and who deals directly or indirectly or through an agent for his or her own account in the securities listed on a regulated market, to which the inside information relates or that are likely to be affected by it, commits an offence. Further, an insider, who knows that he or she has inside information and deals, directly or indirectly, for any other person in securities listed on a regulated market to which the inside information relates or that is likely to be affected by it, commits an offence. An insider who knows that he or she has inside information and who discloses the inside information to another person, commits an offence. Finally, it is an offence to encourage or cause another person to deal or discourage or stop another person from dealing in the securities listed on a regulated market to which the inside information relates or that are likely to be affected by it.

The Financial Markets Act also sets out prohibited trading practices. It provides that no persons may, either for their own account or on behalf of another person, directly or indirectly use or knowingly participate in the use of, any practice that creates (or is likely to have the effect of creating) a false or deceptive appearance of the trading activity in connection with that security; or that creates an artificial price for that security. No person may place an order to buy or sell listed securities that, to his or her knowledge, will, if executed, have the effect of creating a false or deceptive appearance of the trading activity in connection with a security; or creating an artificial price for that security. The section sets out a non-exhaustive list of certain transactions that are deemed to be false or deceptive trading practices and are thus prohibited. The section expressly provides that the employment of price-stabilising mechanisms regulated by the Listings Requirements or the JSE Equities and Directives Rules (the JSE Rules) does not constitute a practice that creates an artificial price for securities that are subject to such price-stabilising mechanisms, and therefore does not constitute insider trading.

The Financial Markets Act prohibits the making of false, misleading or deceptive statements, promises and forecasts. It states that no person may, directly or indirectly, make or publish in respect of listed securities or in respect of the past or future performance of a public company (which does not have to be listed) any statement, promise or forecast that is:

- at the time and in the light of the circumstances in which it is made, false or misleading or deceptive in respect of any material fact and that the person knows, or ought reasonably to know, is false, misleading or deceptive; or
- by reason of the omission of a material fact is rendered false, misleading, or deceptive and that the person knows or ought reasonably to know, is rendered false, misleading or deceptive by reason of the omission of that fact.

A person who has made such a statement unaware that it was false, misleading or deceptive, and who becomes aware of this, must publish a full and frank correction without delay. Failure to do so results in an offence being committed.

JSE Rules

The JSE Rules state that every transaction in equity securities entered into by a JSE member (a broker) must be concluded on the specific condition that the transaction is entered into subject to the provisions of the Financial Markets Act and JSE Rules.

The 'market conduct' provisions of the JSE Rules prohibit manipulative or deceptive trading practices. Prohibited practices include those that create a false or deceptive appearance of trading activity or an artificial price for an equity security. Specific practices are mentioned in the JSE Rules that require approving for entering on the JSE equities trading system, including:

- an order to buy or sell an equity security with the knowledge that an opposite order or orders of substantially the same size at substantially the same time and at substantially the same price, have been or will be entered by or for the same or different persons with the intention of creating a false or misleading appearance of active public trading in connection with, or an artificial market price for, such equity security;
- orders to buy any equity security at successively higher prices or orders to sell any equity security at successively lower prices for the purpose of unduly or improperly influencing the market price of such equity security;
- an order at or near the close of the market, the primary purpose of which is to change or maintain the closing price of such equity security;
- an order to buy or sell any equity security during an auction call period and cancelling such order immediately before the auction matching, for the purpose of creating or inducing a false or deceptive appearance of demand for or supply of such equity security;
- an order to buy or sell an equity security that involves no change in the beneficial ownership of that equity security;
- effecting or assisting in effecting a market corner;
- maintaining the price of an equity security at a level that is artificial;
- employing any device, scheme or artifice to defraud any other person as a result of a transaction effected through the JSE equities trading system; and
- engaging in any act, practice or course of business in respect of trading in equity securities that is deceptive or that is likely to have such an effect.

Takeover Regulations

The Takeover Regulations, which apply in a takeover situation, impose diverse duties of disclosure on the board of directors of offeror and offeree companies. In addition, the Takeover Regulations impose a duty on such boards and their respective advisers, including financial advisers, to act in the best interests of the holders of the securities involved in an affected transaction and a duty on each director of an offeror and of the offeree company to ensure, so far as he or she is reasonably able, that the Takeover Regulations are complied with in the conduct of an affected transaction. This is explained more fully in the South Africa chapter of *Getting the Deal Through – Private Mergers & Acquisitions 2018*.

Update and trends

New competing exchanges have been introduced on the market.

Settlements have moved to a three-day settlement cycle from a five-day settlement cycle on the JSE's electronic settlement system (ie, Strate).

Price stabilisation

18 What measures are permitted in your jurisdiction to support the price of securities in connection with an offering?

Overallotment, with or without greenshoe options, is, in terms of the Listings Requirements (including the Debt Listings Requirements), a permissible means of stabilising the prices of listed securities. The Listings Requirements limit the period during which the overallotment and ancillary transactions may take place.

In the case of securities (including debt securities) listed or to be listed on the JSE, there are comprehensive regulations dealing with, inter alia:

- the size of the overallotment (which may not exceed 15 per cent of the issue size);
- the stabilisation period (which will end 30 calendar days after the relevant listing or sale date in the case of pre-listing trading);
- disclosure requirements of the stabilisation (in announcements and circulars, including whether there is a greenshoe and the access of the issuer to the stabilising manager's register);
- pricing restrictions;
- the strict requirements and criteria for appointment as a stabilising manager and the obligation to maintain a register of all transactions effected by it in the course of the stabilising action, including net tangible assets of not less than 2 billion rand in jurisdictions acceptable to the JSE; and
- the requirement that the stabilising manager has a scrip lending agreement with a CSDP (to be approved by the JSE).

Liabilities and enforcement

19 What are the most common bases of liability for a securities transaction?

Prospectus liability

The Companies Act imposes liability for untrue statements in a prospectus on certain groups of people. These people are liable to pay compensation to all persons who have acquired shares on the faith of the prospectus for the loss or damage they may have sustained by reason of any untrue statement.

It is important to note that certain sections of the Companies Act regarding offers to the public impose strict statutory liability in respect of prospectuses and infringement of these sections can constitute both a criminal and a civil offence.

In summary, if there is a material misstatement or omission (whether fraudulent or not), the promoters, directors and other people responsible for the prospectus (including selling shareholders) may incur civil and criminal liability both under the Companies Act and the common law.

Insider trading civil liability

Civil liability that results from insider trading is governed by the Financial Markets Act. In terms of these provisions, the insider may be liable to pay to the FSB an administrative sanction not exceeding any profits or losses made as a result of such dealing, a penalty for compensatory and punitive purposes, interest and costs of suit.

Offences under the Financial Markets Act

In terms of the Financial Markets Act, any person who commits an offence in relation to insider trading, prohibited trading practices or the making of false, misleading or deceptive statements, promises and forecasts, is liable on conviction to a fine not exceeding 50 million rand or to imprisonment for a period not exceeding 10 years, or both.

20 What are the main mechanisms for seeking remedies and sanctions for improper securities activities?

Remedies are generally sought through the courts or regulators such as the FSB and the TRP. The remedies available can be obtained either through criminal, administrative or civil litigation.

The FSB was established in terms of the Financial Services Board Act 1990 as an enforcement committee to discipline certain professionals operating in the securities industry. After consideration of a matter referred to the enforcement committee, an administrative penalty can be imposed on a person who provides securities services, or the committee may require such person to pay to the FSB a compensatory amount.

The Directorate of Market Abuse (DMA) is empowered in terms of the Financial Markets Act to investigate cases of insider trading, prohibited trading practices, and the making of false, misleading or deceptive statements, promises or forecasts in respect of listed securities. The DMA can refer cases of insider trading to the enforcement committee of the FSB, which has the power to impose administrative penalties on an offender. The DMA may also hand the matter over to the prosecuting authorities for consideration or take civil action against an alleged offender.

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