

JSE efforts to reduce red tape in Section 9 of the Johannesburg Stock Exchange Listing Requirements

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The Johannesburg Stock Exchange Consultation Paper

From the outside, it is worth acknowledging that the JSE Limited (the “JSE”) or any other international stock exchange for that matter, has the difficult task of balancing its regulatory objectives of protecting investors in listed companies versus ensuring that listed companies have operational flexibility to trade without having to comply with onerous listing requirements of a stock exchange.

During the month of March 2021, the Issuer Regulation Division of the JSE issued a Consultation Paper with the “aim of obtaining proposals for cutting red tape aimed at achieving a level of effective and appropriate regulation” for listed companies on the JSE Main Board and the Alternative Exchange. The Johannesburg Stock Exchange Consultation Paper was open for comments from market participants and stakeholders. It appears the proposal for amendments may have also been influenced by the JSE’s desire to perhaps align with the listing requirements of international stock exchanges as the JSE makes reference, in the paper, to the approach taken by the London Stock Exchange in their own listing requirements.

The JSE Consultation Paper proposes amendments to several provisions of the Listing Requirements to essentially keep the JSE Listing Requirements in tune with current market practices. The JSE is also “aware of the continued market noise that the Listing Requirements are too onerous”. For the purposes of this article, focus will only be on the proposals for consideration under Section 9 of the JSE Listing Requirements.

Section 9 of the JSE Listing Requirements describes how certain transaction by listed companies are categorised, sets out requirements for announcement and circulars, and whether shareholder approvals are required for certain transactions. The preamble in Section 9 states that the section “deals with transactions, principally acquisitions and disposals, by issuers and their subsidiaries”. However, there is no substantive guidance in dealing with the term “transaction” in the context of section 9 of the JSE Listing Requirements.

Section 9 of the Johannesburg Stock Exchange Listing Requirements

At present, Section 9.1(d)(i) of the JSE Listing Requirements excludes (from compliance with Section 9) transactions in the ordinary course of business by an issuer if such ordinary course of business transaction categorisation is equal to or less than 10% of the market capitalisation (as measured in terms of the JSE Listing Requirements) of the issuer at the time of the transaction.

From a business operational perspective, Section 9.1(d)(i) is problematic as if an issuer (who is involved in a low margin stock business for the sake of argument) acquires and sells stock in the ordinary course of business and such stock exceeds the 10% threshold, which arguably means such ordinary course of business transaction to acquire stock is likely to require compliance with Section 9 of the JSE Listing Requirements, which may lead to a number of onerous requirements (i.e. such as supplier terms which are confidential being disclosed and a process being followed which may not be practical from a timing perspective in instances where a supplier needs to sell stock quickly and cannot or is not prepared to wait for the approval and notification process to be followed). Not only are the same requirements onerous, they can also be time-consuming and costly.

The JSE, as recorded in Section 9.1(d) of the JSE Listing Requirements, does contemplate and welcome issuers to discuss transactions with the JSE at an early stage of a transaction for the purposes of the JSE to make a determination on whether or not a transaction is in the ordinary course of business. However, the process of approaching the JSE to make a determination may not always be possible when issuers need to move and act quickly given the realities of commercial transactions. Furthermore, issuers that have a volatile share price may be caught by the 10% limitation threshold and the same level of purchases may require approval in one month and not the next, etc. from time to time.

In the JSE Consultation Paper, the proposals from the JSE in amending Section 9 are as follows:

- 1. “Option 1: The removal of the 10% limitation when categorising a transaction which falls within the ordinary of business of an issuer, which will afford issuers more flexibility when conducting their business from a cost, timing and resources perspective.”; or
- 2. “Option 2: As an alternative, increasing the existing 10% limitation to 30%, akin to the Category 1 transaction threshold requiring shareholders’ approval. This will afford issuers more flexibility when conduction their business, but with a shareholders’ oversight limitation.”

These efforts on the part of the JSE in engaging on possible amendments to the ordinary course of business exemption in Section 9 of the JSE Listing Requirements will be welcomed by issuers seeking operational flexibility when conducting business in the ordinary course.

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