JOHANNESBURG STOCK EXCHANGE

25 May 2012,

Mr. T. Mufamadi
Member of Parliament – S T on Finance
Care of Mr. A. Wicomb
Parliament of South Africa

By e-mail: awicomb@parliament.gov.za

Dear Sirs,

COMMENTS ON THE FINANCIAL MARKETS BILL

1. We refer to the Financial Markets Bill (**"FMB"**) that has been published for final comments. We thank you for the opportunity to comment on this important piece of legislation and herewith furnish you with our further comments and suggested amendments to the FMB for your consideration.

The functions of a Self Regulatory Organisation ("SRO")

2. It is a matter of utmost importance to correctly define the duties and functions of a SRO in the FMB as this has to be clearly distinguished and differentiated from *"securities services"* that are provided by authorised users of SROs. Put differently, SROs do not provide securities services nor should they be allowed to provide securities services as SROs exercise regulatory duties and functions as contemplated in the FMB.

3. The exchange chapter of the FMB correctly reflects this principle and our understanding was that this fundamental principle should be equally applicable to the CSD and Clearing House chapters. This is however not the case and the CSD section (section 29(1)(s) and (t)) and the Clearing House Section in section 49(1)(e) still refer to a SRO that *"...may provide securities services to the extent necessary to perform the* (regulatory) *functions.."* of a SRO.

4. Furthermore, neither a CSD nor a Clearing House is capable of performing *"securities services"* as defined in section 1 of the FMB. The only securities services that could conceivably be performed by a CSD are custody and administration or settlement. Both these services are however defined in such a manner that CSDs and Clearing Houses are precluded from performing these services as custody and administration may only be performed by a participant or nominee and settlement services may only be performed by a participant, an authorised user or a clearing member.

5. In addition hereto, the FMB clearly states in sections 29(1)(v) and 49(1)(f) that a CSD and Clearing House may do all things that are necessary for, incidental or conducive to the proper operation of a CSD

and Clearing House. There is therefore no need to enable a CSD or Clearing House to provide "*securities services*" to enable them to fulfill their regulatory duties and responsibilities as all SROs are already empowered and, in fact, obliged to do all things necessary to ensure that they comply with their regulatory obligations.

6. We therefore request that the CSD and Clearing House chapters be amended to be consistent with the exchange chapter and that sections 29(1)(s), (t) and (u) and section 49(1)(e) be deleted and the primary licensed duties, functions and obligations of a CSD relating to the holding of uncertificated securities, the making of entries in an uncertificated securities register and the settlement of transactions in such securities be appropriately defined in section 29.

Chapter X – Market Abuse

Sections 82 (1) and (2):

7. We would like to draw your attention to the fact that (in line with the corresponding section of the SSA) actual knowledge by the offender is an element of the offense. It may constitute a complete defence against the charges preferred against a person if he alleges that he did not have knowledge, i.e *"I did not know"* that, for example, his actions were deceptive.

8. We are of the view that it may be appropriate and desirable to hold a person liable if the weight of the evidence shows that (apart from his denial) he either knew, or that he reasonably ought to have known that his actions were deceptive. Knowledge of the unlawful action equates to intent in the form of *dolus directus* in that the offender subjectively realised or appreciated the fact that his actions were deceptive, the JSE is of the view that a person who reasonably ought to have known, i.e, he was negligent, should also be guilty of an offence.

9. The JSE therefore requests that you consider an amendment to section 82(1)(a) to include *"reasonably ought to have known"* as a part of this offence.

10. The JSE is also of the view that the ambit of this definition should be expanded to also include instances where a false or deceptive appearance of the demand for, or supply of trading activity has been created. The unlawful conduct would therefore not be limited to actual trading activity but would appropriately be extended to also include the unlawful entering of bids and offers in respect of transactions in securities.

Section 82 (3)(a):

11. Section 82(3)(a) contains an exception to the definition of offences as stated in the other subsections of section 82(3). In summary, all the offences defined in section 82(3) have an unlawful intent at the root of the offensive trading practices, for example, *"false or deceptive appearance of public trading"*, *"an artificial market price"* and *"...to defraud..."*.

12. Section 82(3)(a) amounts to a deeming provision and stipulates that, regardless of the intent or motive of the parties to the transaction, the transactions mentioned in (a) are unlawful, prohibited and constitute an offence.

13. We reiterate our objection, in principle, to the contents of this section as there are many examples and instances of transactions that are lawful, that have been concluded for lawful purposes, that have been concluded in the absence of any intention or motive to create artificial prices, to defraud or to achieve any of the other unlawful objectives mention in section 82(3) yet these transactions will now, as a result of the strict liability envisaged by this deeming provision, be prohibited and criminalised. For example, a transaction between a subsidiary and its holding company and unintentional matches of orders for the benefit of the same couterparty on the central order book would constitute unlawful conduct and a criminal offense as a result of the deeming provision of this section

14. We therefore request the inclusion of the unlawful intent element defined by subsections (i) and (ii) of section 82 (3)(b) as elements of the unlawful conduct prohibited by section 82(3)(a). The FMB should prohibit and punish unlawful conduct and the identity of the parties should not be the deciding factor to determine whether the conduct is permissible. This is already achieved by subsections (3)(b) – (i).

15. The extended definition of *"beneficial ownership"* in section 82(3)(a) is also problematic as it is contrary to the well established meaning of this term in South African law. A beneficial owner denotes the person in whom, between himself and the registered shareholder the benefits of the bundle of rights constituting the share vests. It would be more appropriate to rather specifically define, for the purposes of this section, what exactly is meant and what would constitute "*...no change in the beneficial ownership of that security...*" We therefore suggest that this term should be specifically defined in this section.

16. The JSE is also of the view that the existing wording of section 82 may lead to confusion as a result of the wording of section 82(3). It is unclear from the existing wording whether the legislator has intended to ensure that the examples of conduct mentioned in subsection (3) in itself satisfy all the elements of the offense defined in subsection 82(1)(a) or whether, in addition to these requirements, the external effect of these actions, as contemplated in (i) and (ii) of this subsection, also have to be proven. We therefore request that this section be amended to ensure that the intention of the legislator is clear, unambiguous and apparent from the wording used in these provisions.

Section 84(1):

17. The JSE is of the view that this section contains an unnecessary and perhaps unlawful duplication of the penalties that may be imposed as a result of breaches of the FMB. The Financial Institutions (Protection of Funds) Act already provides for the imposition of a penalty for punitive and compensation purposes and an offender cannot be punished twice for the same offence.

18. We therefore suggest that section 84(1) be amended to read as follows:

> ***"Any person who contravenes section 80(1), (2), (3), (4) or (5) of this Act is, in addition to any administrative sanction or cost order that may be imposed, also liable to pay to the board a penalty for punitive and compensatory purposes, in the sum determined in the discretion of the enforcement committee, as contemplated in section 6D of the Financial Institution (Protection of Funds) Act."***

19. We also wish to point out a consequential amendment to the FI Act as point 2 of the amendment on page 71 of the FMB should refer to Chapter X and not Chapter IX.

Editorial comments

20. Section 34(2)(r) should read *"...must provide that no participant may open a securities account or a central securities account* ***for*** *a person whom the participant believes..."*.

21. The wording of section 103(2)(b) can be improved as this section is not automatically read with subsection 2(a). As it currently reads it states that if you read section 102(3), (4), (5) and (6) you must construe all references to section 80 of the Companies Act in those sections as a reference to section 129 but that is only the case for the purpose of 2(a). We therefore suggest the following insertion:

    "For the purpose of 2(a,) any reference to section 80..."

22. Consequential amendment to Insolvency Act on page 73 – 35A(1)(a) – should refer to an exchange as defined in section 1 and licensed under section 8 of the FMA (not section 11).

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