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## BOARD NOTICES RAADSKENNISGEWINGS

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### BOARD NOTICE 68 OF 2014

### FINANCIAL SERVICES BOARD

### FINANCIAL MARKETS ACT, 2012 (ACT NO. 19 OF 2012)

### DIRECTIVE AND GUIDELINE NO. 1 OF 2014

### DIRECTIVE AND GUIDELINE REGARDING INFRASTRUCTURES PROVIDED BY COMPANIES FACILITATING TRADING IN THEIR OWN SECURITIES

I, Dube Phineas Tshidi, the Registrar of Securities Services, hereby issue under section 6(3)(k) and section 6(4)(a) of the Financial Markets Act, 2012 (Act No. 19 of 2012), this directive and guideline as it relates to infrastructures provided by companies to facilitate trading in their own securities.

#### Definition

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

#### Legal and policy framework

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

4. A person who maintains or provides an infrastructure which meets the three requirements set out in the definition, accordingly operates an exchange, regardless of whether the infrastructure is provided for transactions in only one security.

#### **Licensing of exchanges**

5. The Act clearly sets out the measures required to ensure fair, efficient and transparent markets. Non-compliance with any one of these requirements could have an adverse effect on investor protection and the market.
6. Section 7(1) of the Act provides that all exchanges must be licensed under the Act. In terms of section 109(c) of the Act a person who acts as an exchange without being licensed as such commits an offence and is liable on conviction to a fine not exceeding R10 million or to imprisonment for a period not exceeding five years, or to both such fine and such imprisonment.
7. Sections 7 to 17 of the Act set out the main requirements that applicants for an exchange licence must meet. Amongst others, the exchange (applicant) must have made arrangements for the efficient and effective surveillance of all transactions effected through the exchange and for the supervision of authorised users so as to identify possible market abuse and ensure compliance with the exchange rules and exchange directives.

#### **Infrastructures carrying on the business of an exchange without a licence**

8. A number of issuers currently provide infrastructures conforming to the definition of an exchange in terms of which the issuer facilitates trade in its own securities through an exchange platform.
9. The Registrar of Securities Services ("the Registrar"), as the custodian of the Act<sup>1</sup>, cannot allow exchange infrastructures to operate illegally nor can a proliferation of illegal exchanges be allowed. The situation is exacerbated if the infrastructures/

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<sup>1</sup> Sections 6(2) and (3) of the Act.

persons selling securities in the secondary market do not comply with the disclosure requirements as outlined in the Companies Act, 2008 (Act No. 71 of 2008).

10. The affairs of all unlicensed exchanges must urgently be regularised, either by these exchanges ceasing the illegal unlicensed exchange activities, or by obtaining the requisite licence to operate an exchange or by obtaining the appropriate exemption.

## Exemptions

11. Section 6(3)(m) of the Act provides that:

*“(3) In performing those functions the registrar-*

*....*

- (m) may exempt any person or category of persons from the provisions of a section of this Act if the registrar is satisfied that-*
  - (i) the application of said section will cause the applicant or clients of the applicant financial or other hardship or prejudice; and*
  - (ii) the granting of the exemption will not-*
    - (aa) conflict with the public interest; or*
    - (bb) frustrate the achievement of the objects of this Act;”*

12. The objects of the Act are in turn defined in the Act as, to:

- “(a) ensure that the South African financial markets are fair, efficient and transparent;*
- (b) increase confidence in the South African financial markets by-*
  - (i) requiring that securities services be provided in a fair, efficient and transparent manner;*
  - and*
  - (ii) contributing to the maintenance of a stable financial market environment;*
- (c) promote the protection of regulated persons, clients and investors;*
- (d) reduce systemic risk; and*
- (e) promote the international and domestic competitiveness of the South African financial markets and of securities services in the Republic.”*

13. The Registrar may therefore, in terms of Section 6(3)(m) of the Act, consider a temporary, or a permanent exemption from the provisions of a section of the Act if he is satisfied that the requirements mentioned in paragraphs 11 and 12 above have been met.

14. An applicant for an exemption must motivate why it believes that it has met all the requirements for an exemption as mentioned in paragraphs 11 and 12 above. In addition, the applicant should also motivate why it believes that the Registrar should

exercise his discretion to grant the requested exemption should the Registrar be satisfied that these requirements have been met.

15. To assist applicants, the Registrar has published a standard form containing minimum information to enable the Registrar to consider such applications. This document is available at [www.fsb.co.za](http://www.fsb.co.za) under Capital Markets.<sup>2</sup>

#### **Way forward**

16. Any person wishing to apply for a licence to operate an exchange or for an exemption from a section of the Act, can make such application to Mr Norman Muller, Head, Capital Markets Department by email to [norman.muller@fsb.co.za](mailto:norman.muller@fsb.co.za) or via facsimile to 012 346 6533.
17. Persons currently providing an exchange infrastructure without the requisite licence, or applicable exemption, are doing so in contravention of the Act and must as such take the necessary steps to ensure compliance with the provisions of the Act.

#### **Commencement**

18. This Directive and Guideline comes in effect on the date of publication.

  
DP TSHIDI

**Registrar of Securities Services**