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30 August 2016

Mr Yl Carrim  
The Chairperson  
Standing Committee on Finance  
Parliament

Per e-mail: [awicomb@parliament.gov.za](mailto:awicomb@parliament.gov.za)

Dear Honorable Chairperson,

## **Johannesburg Stock Exchange: Submission to Parliament - Financial Sector Regulation Bill**

### **1. Introduction**

- 1.1. We refer to the revised version of the Financial Sector Regulation Bill ("FSRB"), the consequential amendments to the Financial Markets Act ("FMA") and the comments matrix, published by National Treasury on 21 July 2016. We refer also to our written and oral submissions to the Committee in November 2015, and our letters dated 26 April 2016 and 15 August 2016.
- 1.2. As set out in our letter dated 15 August 2016, we have reached consensus with National Treasury on the majority of the issues raised in our written and oral submissions to the Standing Committee on Finance ("the Committee") in November 2015. We are currently confirming the content of our aide memoire of the meeting with representatives of National Treasury, the South African Reserve Bank ("SARB") and the Financial Services Board on 10 August 2016 with the attendees at that meeting and will provide it to the Committee as soon as we have finalised it.
- 1.3. Our three primary residual issues of concern are set out in this submission. Our secondary issues of concern and editorial comments to improve the quality of the FSRB and the consequential amendments to the FMA are set out in Annexure A. For ease of reading, the extract from the relevant legislation set out in the column titled 'Section' in Annexure A reflects the wording of the legislation after the inclusion of the proposed amendments.

### **2. Exemption from licensing as a market infrastructure**

- 2.1. The JSE remains concerned that the Authority and Prudential Authority, together with the SARB, will have the ability to exempt an external market infrastructure from the licensing provisions of the FMA, despite such power itself being contrary to the purpose of the FMA and its licensing provisions, and detrimental to the objects of both the FMA and the FSRB. Our legal view on this issue is attached to this submission as Annexure B.

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Non-Executive Directors: N Nyembezi-Heita (Chairman), AD Botha, Dr M Jordaan, Dr SP Kana, DM Lawrence, Dr MA Matooane, AM Mazwai, NP Mnxasana, NG Payne

Alternate Directors: JH Burke, LV Parsons

Group Company Secretary: GA Brookes

- 2.2. The FMA provides, in section 6(3)(m), for the exemption of any person or category of persons from the provisions of a section of the FMA, which could include the requirement to be licensed, and proposed section 49A(1) read with amended section 6(3)(m) expressly provides for the exemption of an external central counterparty from the requirement to be licensed. However, the policy rationale or the necessity for the provision of an exemption from the need to licence a market infrastructure and for the criteria for assessing whether a market infrastructure should be either licensed or exempted from licensing has not been incorporated in the FMA.
- 2.3. Whilst the JSE remains strongly of the view that exemptions from licensing for market infrastructures operating in South Africa should not be permitted as a matter of policy, for the reasons set out in Annexure B, if the Committee deems it necessary to provide for such exemptions in the FMA as a matter of policy, we believe that exemptions should only be enabled within a sound policy framework which is established from the outset and to which reference is made in the FMA.
- 2.4. We submit that the granting of an exemption from licensing for market infrastructures will not meet the criteria for exemptions set out in section 6(3)(m)(i) of the FMA in relation to the public interest and the objects of the Act and we do not believe that the additional specific criteria for exemption from licensing for external market infrastructure set out in new proposed section 6(3)(m)(iii) adequately reflects the most important policy considerations to be taken into account if exemptions from licensing are to be considered. The most important policy considerations should be the extent of the impact of the activities of the external market infrastructure on the South African financial system and whether there is no reason for there to be any regulation of the external market infrastructure by the South African regulators.

### **3. The provision of securities services by market Infrastructures (“MIs”)**

- 3.1. In terms of the provisions of the FMA, MIs fulfil licensed duties and functions (Section 10 – exchanges, section 30 - CSDs and section 50 - clearing houses) and these MIs authorise their users, clearing members and participants to provide securities services, as defined, in terms of the rules of the MI. It is an integral part of the MI’s licensed duties and functions, as set out in the FMA, to supervise and regulate the securities services provided by these authorised participants.
- 3.2. In terms of the regulatory framework presently in place under the FMA, it is not permissible for MIs themselves to provide securities services, primarily as a result of the insoluble conflict of interests that could result if they were to do so. The proposed amended sections 5(1)(c) and 5(2) are intended to refer to market infrastructures when they refer to “functions and duties” and to securities services providers when they refer to “securities services” by the use of the phrase “as the case may be”. However, given that section 49A(1) states, inter alia, that an external central counterparty must be licensed to provide “services” as prescribed in section 5(1)(c) and (2), it is implied that an external central counterparty may provide “securities services” and the JSE believes that were an external MI permitted to provide securities services as is proposed and would be prescribed by the Minister in terms of these sections, such would be inconsistent with the provisions applicable to local MIs and would result in unfairness to licenced domestic MIs by virtue of the creation of an anti-competitive environment and as such be prejudicial to the interests of the public.
- 3.3. Neither the FSRB nor the FMA contain any licensing requirements in respect of external MIs other than external CCPs and trade repositories. This may be just an oversight, as it is unlikely to be the intention that these external MIs may operate in the South African market without being licensed to do so. The JSE is respectfully of the view that the operation of external MIs is an important matter of public policy that should be dealt with specifically in the FMA, as the superordinate statute. The implementation of the public policy encapsulated in the FMA, such as the detailed regulation of the duties and functions performed by these external MIs, should be dealt with in the Regulations adopted by the Minister.

#### 4. Concurrence of the SARB on licence cancellations

- 4.1. The JSE recognises the SARB's interest in financial stability and the reduction of systemic risk, which would include an interest in any action taken in relation to a systemically important financial institution or a systemically important financial institution within a financial conglomerate ("SIFI") regarding suspending, varying, amending or cancelling a licence issued to that financial institution. However, the JSE remains concerned that the application of the provision in the FSRB which gives effect to the Reserve Bank's interest in licence matters may be contrary to the achievement of other important objects of the FMA which a market infrastructure such as the JSE is obliged to promote at all times.
- 4.2. Section 31 of the FSRB states that the SARB must concur before any party can give effect to a decision to, *inter alia*, suspend, vary amend or cancel a licence issued to a financial institution that is a SIFI. This implies, for example, that if an exchange or a clearing house has authorized a SIFI to perform certain securities services and the SIFI no longer meets the authorisation criteria, the exchange or clearing house may not take any action in relation to the SIFI's authorisation status unless the SARB concurs with such action. The JSE raised its concern regarding this provision in our comments on a draft version of the FSRB and suggested that the provision should instead require consultation with the SARB but the provision in the current version of the FSRB still requires concurrence.
- 4.3. The JSE is the licensing authority for its authorised users which includes its trading members and clearing members, some of whom will be regarded as SIFIs. A situation could arise in which an authorised user which is a SIFI no longer meets the JSE's authorisation criteria due to financial difficulties or serious conduct breaches. The rules of the JSE, in support of the objects of the FMA, require the JSE to act in such instances to protect investors and the integrity of the market. Such action may require the JSE to suspend, vary, amend or cancel the authorisation of the relevant authorised user and the JSE would find itself in an untenable situation if it is obliged to take such action to protect investors and the integrity of the market but it is unable to do so because the SARB does not concur with the JSE's decision.
- 4.4. The JSE believes that this issue requires further consideration in order to achieve the important financial stability objectives of the SARB and the FSRB whilst also achieving the other important objectives of the FMA in relation to investor protection and market integrity. National Treasury and the SARB have advised that if the JSE wishes to pursue discussions on this issue, that we should raise our concerns with the Governor. We have not yet had an opportunity to initiate any discussions on the issue with the Governor but we intend to do so shortly. The outcome of those discussions will determine whether our concerns regarding the application of section 31 of the FSRB have been allayed or whether we require the Committee to consider the appropriateness of the current provision.

#### 5. Presentation to the Committee

The JSE respectfully requests an opportunity to present our primary issues of concerns to the Committee and to respond to any questions the Committee may have regarding our submission.

Yours sincerely

**Anne Clayton**

Head of Public Policy

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