

Regulatory exchange

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Reporting requirements in respect of over-the-counter (OTC) derivatives in terms of the Financial Markets Act, 2012

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The Financial Markets Act (the Act), No.19 of 2012, includes new provisions relating to increased regulation and reporting requirements in respect of OTC derivatives.

Background

The Financial Markets Act, 2012, came into effect on 3 June 2013. It replaces the Securities Services Act, No.36 of 2004 (the SSA) in its entirety. Many of the provisions of the Act are similar to the provisions contained in the SSA.

The introduction of the new law is meant to bring South Africa in line with international norms and standards. In order to ensure that the market has adequate time to adapt to and comply with the new requirements, the regulations and rules that will give substance to the Act will become fully operational following a transitional period.

The Act is expected to have a significant impact on the South

African securities services industry.

The Act contains a number of new provisions, especially those relating to increased regulation and regulatory oversight, and reporting requirements in respect of over-the-counter (OTC) derivatives which we have highlighted below:

Regulation and supervision of financial markets

The Act provides that the Financial Services Board (FSB) is the registrar of Security Services and is responsible for the supervision and enforcement of compliance with this Act.

The Act enables the FSB to prescribe fees for self-regulatory organisations (SROs) and approve listing requirements and liquidation orders. It also provides for the rules with which SROs must comply, and also strengthens the governance requirements for SROs.

Custody and administration of securities

The Act seeks to improve investor protection and reduce systemic risk by increasing the scope of regulation for unlisted securities to include OTC derivatives.

A central securities depository must be licenced and a juristic person may apply for a central securities depository licence. The registrar grants the licence subject to various requirements stated in the Act. The central securities depositories may not

be operated in another country without prior written approval from the registrar.

Uncertificated securities

Certificated securities may be converted to uncertificated securities, and an issuer may issue uncertificated securities despite any contrary provisions in other law or the memorandum of incorporation of the issuer.

An issuer of uncertificated securities must:

- record in the securities register the total number and nominal value of each kind of security
- maintain separate records for each central securities depository holding uncertificated securities, and
- record the name of the central securities depository or its wholly owned subsidiary.

Transfer of uncertificated securities or interest in uncertificated securities

The transfer of uncertificated securities or of an interest in uncertificated securities can be made in accordance with this Act, the rules of the central securities depository and the Companies Act.



Clearing house

The Act allows for the establishment of an independent clearing house as a stand-alone SRO, aimed at promoting the central clearing of OTC derivatives.

Licensing of clearing house

The registrar may grant a clearing house licence to any juristic person who applies, provided the applicant complies with the requirements of this Act.

The clearing house licence must specify the following:

- functions to be performed by the clearing house and the securities of which the functions will be performed
- terms and conditions of the licence
- details of the registered office for the clearing house as well as where the operations will be taking place, and
- the insurance, guarantee, compensation fund or other warranty.

Requirements applicable to applicant for clearing house licence and licenced clearing house

An applicant for a clearing house licence and licenced clearing house must:

- have sufficient assets and resources with appropriate experience
- ensure governance arrangements that are clear and transparent, that promote the safety

and efficiency of the clearing house

- demonstrate that the fit and proper requirements are met, and
- implement an effective and reliable infrastructure to facilitate the clearing of the securities.

Functions of the licenced clearing house

A licenced clearing house must conduct its business in a fair and transparent manner with due regard to the rights of clearing members and their clients.

Requirements of an independent licenced clearing house:

- provision of infrastructure for the clearing of securities
- inform the registrar of any known or suspected matters that may pose systematic risk to the financial markets
- disclosure of information on the exposures that a clearing member underwrites with clearing house
- issue and enforce clearing house rules
- supervise compliance and report any non-compliance
- disclose fees and charges charged to clearing members, and
- notify the registrar of any insolvency proceedings commenced or commenced against clearing house.

A mutual independent clearing house may require clearing

members to contribute funds for the purpose of carrying on the business of the clearing house.

Trade repositories

The Act seeks to enhance transparency with respect to OTC derivatives by providing for the establishment of a trade repository to which all trades in these instruments will be reported and monitored.

Additional disclosures

A juristic person may apply for a trade repository licence for one or more types of unlisted securities.

The Act sets out the specific requirements applicable to the applicant for trade repository licence and licenced trade repository.

Conclusion

The introduction of the Financial Markets Act is meant to bring South Africa in line with international norms and standards. The Act is expected to provide a framework for regulating OTC derivatives in South Africa; a key G20 Commitment.



Should you wish to discuss how we can help you, please call your regular contact or, alternatively:

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