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Proposed developments in regulation of the securities market

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Since the mid-nineties regulation of banks, financial institutions, and persons and companies carrying on securities business has increased. The relevant sectors have been modernized and the Jamaican economy is seeing the growth of a healthy financial industry. Regulatory changes which affect the financial industry occur almost annually with the aim of keeping pace with changes in the economy.

The securities industry is regulated by the Financial Services Commission (FSC). The broad mandate of the FSC's Securities Division is to supervise the creation of a securities market in which the public will have confidence to do business without being exposed to too many hidden risks. To this end, the FSC has recently published proposed regulations to affect the procedures for the issuance of securities in Jamaica.

Public or private placement of securities

An issuer of securities is defined in Section 2(1) of the Securities Act as "a person or company who has securities outstanding, or issues or proposes to issue, a security or securities to the public". Unfortunately the use of the word "or" in this definition results in some uncertainty and ambiguity, but it is generally considered that the Act relates only to public issues. Section 26(4) of the Securities Act provides that the following persons do not need to obtain registration in relation to any issue of their securities:

- (a) the Government of Jamaica; or
- (b) a person who issues a security to:
 - a bank,
 - a building society,
 - a licensee under the Financial Institutions Act, or

- a co-operative society, in the lawful course of business by the bank, building society, financial institution or co-operative society.

Over the years, there has been some degree of uncertainty as to what amounts to an issue to the public as distinct from a private placement. The Companies Act defines the term "public issue" and includes a requirement for a prospectus to be registered with the Companies Office in respect of these issues. There is no definition of "public issue" or "private placement" in the Securities Act, but the guidance given by the FSC is not the same as the Companies Act approach, and issuers of securities are caught between the Companies Act requirements and the FSC requirements. The FSC states in its guidelines for issuers of securities that:

"Private placements are sales of securities or other investments directly to institutional investors or high net worth individuals. Specifically, they involve the sale of securities in a restricted manner to a limited number of investors..."

These FSC Guidelines require all issuers of securities to be registered. In the case of public issues, a prospectus prepared in the required format is also to be delivered to the FSC, in addition to the requirement for registration with the Companies Office of Jamaica. To qualify for the prospectus delivery exemption, the FSC must be satisfied that the proposed private placement satisfies certain conditions as to the type of investors, the number of offerees, the method of offering, resale restrictions and liquidity limitation.

Although the FSC Guidelines now in force do not, strictly speaking, have the force of law, with its proposed regulations for exempt distributions, the FSC has demonstrated its desire to legislate its approach to the regulation of the issuing of securities. That approach seems to be that any issue of securities which does not fall within the scope of clearly identifiable exempt categories is to be treated as an issue to the public.

Exempt distributions – proposed regulation

The proposed Securities (Exempt Distributions) Regulations 2006 make provision for certain issue of securities to be exempt from registration. As presently drafted, the exemption would apply in the following circumstances:

(i) Distribution of a security to an accredited investor. Accredited investors include government and statutory bodies, banks, insurance companies, retirement schemes, pension funds, superannuation funds, directors and other officers of the issuer, unit trusts, mutual funds, non-redeemable investment funds, collective investment schemes registered with the FSC, trust companies and licensed dealer purchaser as principal or on behalf of another accredited investor, individuals whose net worth exceeds J\$50 million (\$726,000) and individuals whose gross income is in excess of J\$10 million.

(ii) Trade in security to a person purchasing as principal, if the purchaser is acquiring the securities for at least \$10 million paid in cash at the time of the purchase and the trade is in the security of a single issuer.

(iii) Trade to a person purchasing as principal highly rated debt securities. Highly rated debt securities are stated to have the following characteristics: (a) the security has been assigned a rating of BBB+ (or equivalent) by a recognized rating agency; (b) equity securities of the issuer are listed on a recognized stock exchange; (c) the issuer has existing debt or equity securities registered with the FSC and is not in default of any requirements of the FSC, or has similar status in any recognized foreign jurisdiction; and (d) the purchaser is provided access to substantially the same information concerning the issuer and its securities as would be required to be provided in a prospectus prepared in accordance with FSC requirements.

(iv) "Distribution of a security by a private issuer to a person who purchases as principal and is (a) a director, officer, founder or control person of the issuer; (b) a close business associate of a director, officer, founder or control

person of the issuer; or (c) a person associated with the issuer.”

During the consultative process, the FSC has indicated that it will give some consideration to suggestions made by industry stakeholders in respect of some of these categories. A revised draft of these regulations is therefore anticipated.

The FSC has also published proposed regulations to stipulate certain procedures and requirements for registration of prospectuses in public issue of securities. These proposed regulations are also under consideration and there may be some revisions before it is finally passed into law. One of the key concerns in this regard centres around the dual requirement which these regulations will impose on issuers to satisfy more stringent requirements imposed by the FSC in addition to the requirements under the Companies Act. It is hoped that ultimately this regulatory duplication will be removed. In any event, it is quite evident that the FSC intends to ensure that it carries out even more meaningful regulation of the issue of securities in Jamaica.

Financial and corporate

Recommended firms

Tier 1

DunnCox
Hart Muirhead Fatta
Myers Fletcher & Gordon

Tier 2

Livingston Alexander & Levy
Nunes Scholefield DeLeon & Co
Patterson Mair Hamilton

The Jamaican legal market is still at a crossroads. There has been slight increase in the number of transactions, but the pace is still too slow for some tastes, and according to lawyers there are no real signs of a real shift in the market.

Tourism still drives the country's economy, and in 2007 Jamaica hosted the ICC Cricket World Cup, which was a bonus for the sector. The number of Spanish real-estate developers that are involved in building hotels and resorts is another interesting feature. “They have invested heavily in that sector, and have helped our economy,” said one lawyer. The government has also been spending a lot of money developing motorways to connect the different parts of the island, particularly in the last three years.

But tourism is a traditional staple of the Jamaican market, and a country can only have so many roads. The economy needs to find

new and sustainable ways of attracting foreign income. 2007 is an election year, and the business community is hoping that the post-election market will grow at a steadier pace.

DunnCox

DunnCox has had another solid year, despite a sedate 2007 owing to the parliamentary elections due in the second-half of the year. The 18-partner firm is one of Jamaica's leading practices as well as one of the largest. Since its formation in 1942, it has established a “brilliant” reputation according to competitors, and is seen as a benchmark for how a successful Caribbean firm operates.

The “hugely experienced” Christopher Bovell and the “talented” Donovan Walker acted for Credit Suisse, the initial purchasers, in the securitization of the National Commercial Bank of Jamaica's payment rights. The deal included the issuance of \$50 million floating-rate notes by a special-purpose vehicle. One of the firm's other highlights was its advice to the Japan Bank for International Cooperation in Marubeni Caribbean Holding's acquisition of Mirant's shares in Jamaica Public Service Company.

Elsewhere, DunnCox represented First Global Bank in a \$30 million syndicated loan to Air Jamaica. Senior partner Bovell also helped Alcoa, an aluminium producer, set up an agreement with Government of Jamaica for the expansion of the Jamalco Alumina Refinery which is estimated to cost \$1.2 billion.

With tourism still a thriving industry in the island, the firm has also been busy with a number of property financing projects related to the constructions of hotels and, in some cases, motorways.

Leading lawyers

Christopher Bovell
Donovan Walker

Myers Fletcher & Gordon

Myers Fletcher & Gordon casts its net wide, with corporate clients in the telecoms, shipping, tourism, shipping, pharmaceutical and energy sectors, among others. Consisting of just over 50 lawyers, the firm has a strong base in Jamaica, and is the preferred choice for the big international clients, because of its impressive track record.

Some of its regular clients include the National Commercial Bank, MJB Airports, Bear Sterns, Tavistock, Citibank, Johnson & Johnson, HSBC, Novartis and Nestlé. During the recently concluded ICC Cricket World Cup in the West Indies, the firm's partner Derek Jones was a senior counsel on behalf on

the event. Myers Fletcher & Gordon also has an office in London and is part of the Lex Mundi network.

Leading lawyers

Barbara Alexander
Lance Hylton
Noel Levy

Hart Muirhead Fatta

Hart Muirhead Fatta maintains its top-tier position after good feedback from its peers. Mark Golding, known as a specialist in commercial matters, and Patrick McDonald, whose forte is capital markets, come highly recommended. Recent highlights include advising Supreme Ventures on its initial public offering and listing on the Jamaica Stock Exchange.

Leading lawyers

Mark Golding
Patrick McDonald

Other notable firms

Livingston, Alexander & Levy came into existence when Theodore Charles Levy joined the partnership in 1930. The firm now has more than 20 lawyers and focuses on corporate and commercial work. Its clients include financial institutions, insurance companies, private lenders and statutory agencies. It is also well regarded for its expertise in the petroleum and tourism industry.

Like most of the active Jamaican firms, Nunes Scholefield DeLeon & Co also has a rich history going back to the first half of the 20th century. The 10-partner firm is known for its banking, insurance, and M&A work. Anthony Jenkinson, its managing partner, is a veteran on the Jamaican market and a popular lawyer.

Patterson Mair Hamilton retains its tier-two position after its competitors and clients praised its “hardworking partners”. “It is doing well, and we do see them on the market quite often,” said one competitor.