

Barbados

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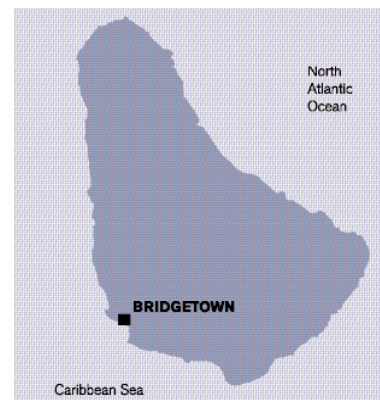
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The regulation of bond issues under the new securities legislation of Barbados

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In an effort to provide for enhanced regulation of the securities market in Barbados, the Securities Act 2001 was enacted (the Act). This Act repealed the former Securities Exchange Act Cap 318A.

The Securities Commission (the Commission) was established under the Act for the purpose of overseeing, monitoring, regulating and advising on matters relating to the securities market in Barbados.

In general there are four main regulatory requirements to be satisfied for the issue of bonds under the Act: (i) registration of the securities; (ii) registration of the issuer; (iii) registration of the underwriter (or other participant); and (iv) filing of the prospectus or report on exemption.

Registration of securities

Under the Act, any security offered to the public or listed with any self-regulatory organization must be registered with the Commission by filing a registration statement. This statement must be signed by the principal executive officer of the issuer and by at least two members of the board of directors of the issuer.

Security is defined as meaning any document evidencing ownership or any interest in the capital or debt, property, profits, earnings or royalties of any enterprise or proposed enterprise, including any bond or debenture. Thus the definition of securities explicitly includes bonds.

Under the Act, an offer to the public means any offer to the public at large or to any section of the public, whether selected as clients of persons issuing the prospectus or in any other manner by way of advertisement or other form of solicitation.

It is quite common in Barbados for the bonds to be issued solely to financial institutions. The question often arises whether such a limited issue is an offer to the public for the purposes of the Act. It is submitted however that the reference to an offer to any section of the public seems to contemplate a general offer directed to a particular category or portion of the public. Therefore, an offer targeted at financial institutions and similar entities would be considered an offer to the public. Thus, in most cases, the bonds being offered must be registered with the Commission.

Registration of the issuer

Any person who proposes to issue securities to the public must also register as a reporting issuer. The issuer is therefore required to file a registration statement with



the Commission in the prescribed form. It is noted that the Act provides that all public companies are required to register as reporting issuers.

Registration of the underwriter

The persons engaging in the activities of investment adviser, dealer, trader, underwriter and securities company must be registered and/or licensed in accordance with the provisions of the Act.

In cases where the bond issue is underwritten, the underwriter is required to register as an underwriter with the Commission. The Act defines an underwriter as a person who: (i) as a principal agrees to purchase a security for the purpose of distribution; (ii) as an agent, offers for sale or sells a security in connection with a distribution; or (iii) participates directly or indirectly in a distribution referred to in (i) or (ii).

For a company to qualify for registration as an underwriter it must: (i) either be incorporated in Barbados or in a member state of the Caribbean Community and registered in Barbados as an external company under the Companies Act; (ii) not have an undischarged receiving or bankruptcy order against it; and (iii) either be a financial institution under the Financial Institutions Act or meet the capital requirements of Bds\$5 million (\$2.5 million).

Filing the prospectus or report on exemption

The Act provides that, unless an exemption applies, no person can distribute securities, or offer to sell securities in connection with a distribution, unless the offer is made by means of either a prospectus, a block distribution circular, or an advertisement. In each case the document should identify the securities distributed and should contain whatever information the Commission permits or may prescribe.

Under the Act, a distribution in relation to securities includes an offer to sell securities. An offer to sell includes an attempt or offer to dispose of, and a solicitation of an offer to buy, securities.

The Act does provide for certain exemptions from the filing requirements. One of the most commonly used is the sophisticated purchaser exemption. A sophisticated purchaser is defined as: (i) a person who participates as principal in any trade for which the consideration is no less than \$100,000; or (ii) a person who has access to substantially the same information concerning the issuer that is required in the prospectus and who is able to evaluate a security as an investment on the basis of the information provided to him by the seller by virtue of his net worth, and on the basis of advice available to him by his investment adviser who receives no remuneration from the issuer in connection with the distribution; or (c) an officer or director of the issuer or his spouse, parent, brother, sister or child.

According to the Act, the requirements for the filing of a prospectus or block distribution circular do not apply in relation to a distribution to less than 50 sophisticated purchasers if notified in writing to the Commission by announcement of its completion, and if no selling or promotional expenses are paid or incurred in the distribution except for professional services or services performed by an issuer.

Most financial institutions would fall within the definition of a sophisticated purchaser and this exemption is used quite often in the case of an offer that is limited to such entities.

To use this exemption, a report is filed with the Commission which, at present, must contain a summary of the details of the bond issue and all relevant details that would support the assertion that the bonds qualify for the particular exemption.

Corporate and commercial

Recommended firms

Chancery Chambers

Clarke Gittens & Farmer

Carrington & Sealy

Cottle Catford & Co

George Walton Payne & Co

Hanschell & Company

Lex Caribbean

Yearwood & Boyce

Chancery Chambers

Chancery Chambers is a firm of one partner and four associates, and is renowned in Barbados for its strength in international work. Trevor Carmichael is recommended by his peers for his overseas practice, and Andrew Ferreira is singled out by his peers as a rising young lawyer.

Leading lawyers

Trevor Carmichael

Andrew Ferreira

Clarke Gittens & Farmer

The Barbados member of the international law group Lex Mundi, Clarke Gittens & Farmer was formed in 2002 by the merger of Clarke & Co and the practices of two former partners of Evelyn, Gittens & Farmer.

The firm of 13 lawyers has a strong reputation in commercial law, and offers advice on banking, securities, insolvency and mergers and acquisitions, to international and domestic corporate and private clients. Alfred H Clarke QC is recommended by his peers.

Leading lawyer

Alfred H Clarke QC

Other firms

Carrington & Sealy is respected by its peers, particularly for its work in the domestic market, and can list First Caribbean Bank among its clients. Adrian Cummings is a name that crops up regularly among the island's leading lawyers.

Cottle Catford & Co is a firm respected in the market, in particular for its offshore expertise. The firm has acted for many of the leading banks and corporations on the island, and acted recently for the RBTT Financial Group in Trinidad. Leading lawyer Philip Nicholls used to be involved with the Canada Barbados Business Association, a group designed to put Canadian business people in touch with Barbadians involved in offshore work. As a result he is recommended by his peers for his significant work in bringing Canadian interests to the island.

George Walton Payne & Co enjoys a good reputation domestically for corporate and commercial work, with George Payne recommended by his peers. The firm is growing, having appointed two new partners at the beginning of 2004, and is beginning to gain recognition from its peers for Andrew Thornhill's offshore work.

Hanschell & Company is a firm with a long family tradition in Barbados, and is run by John and Carol Hanschell. The firm's three-lawyer team offers a diverse range of corporate legal advice, and has for a long time represented two international banks and their financial corporations.

Lex Caribbean was founded in 1997 in Barbados, and has since opened offices in Trinidad & Tobago, the British Virgin Islands and Jamaica. The firm has 15 partners across its network, with the Barbados office recently strengthened by the addition of partner Garth Patterson. The firm in Barbados offers domestic and international advice on capital markets, restructuring and insolvency, and general corporate and commercial matters.

Yearwood & Boyce is one of the oldest law firms in Barbados, and both Peter Symmonds and Andrew Brewster are mentioned by their peers as strong practitioners.