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The Regulation of Bond Issues under the new Securities Legislation of Barbados

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 This Act repealed the former Securities Exchange Act, Cap. 318A.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).

In order 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 BBD 5 million (\$2.5 million).

Filing of the prospectus or report on exemption

The Act provides that unless an exemption applies, no person shall 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 which is limited to such entities.

In order 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 which would support the assertion that the bonds qualify for the particular exemption.