



FINANCIAL SERVICES
COMMISSION

Consultation Paper
on a proposed
Private Placement Regime

MAY 2014

FINANCIAL SERVICES COMMISSION
#34, WARRENS INDUSTRIAL PARK
WARRENS ST. MICHAEL, BARBADOS



Consultation Paper on the establishment of a private placement regime for the purpose of promoting such conditions in the capital market, as to ensure the orderly growth and development of the market

The Financial Services Commission (Commission), as the regulator of non-banking financial services in Barbados, proposes to introduce a private placement regime which will exempt issues of securities by way of private placements, from certain provisions of the Securities Act, Cap 318A (Securities Act). The Commission has determined that it would be desirable to obtain the industry's views prior to establishing the regime.

This paper outlines the rationale for the regime, the proposed exemptions, the required documentation in respect of the regime, and the criteria which must be met by issuers in order to claim the exemption. It is followed by a series of questions on which the Commission would appreciate your feedback, so that informed decisions on the regime can be taken.

How to submit comments

The Commission invites you to submit your views and comments on the paper no later than **Monday, June 2, 2014**. These comments should be submitted to the Commission:

- Via email to info@fsc.gov.bb; or
- Via fax to **421-2146**; or
- In writing addressed to:
ATTN: Manager, Securities Division
The Financial Services Commission
#34 Warrens Industrial Park
Warrens
St. Michael

INTRODUCTION

1 The Commission's mandate

The Commission's mandate as established through the Securities Act includes facilitating such conditions that would encourage the orderly development of Barbados' capital market. This involves an on-going evaluation of the capital market with the purpose of determining those practices and requirements which should be modernised to reflect the existing environment, whilst ensuring that regulation of the market remains robust and protects the investors. The regime being proposed for private placement transactions is intended to achieve this objective.

2 The existing legislative requirements and regulatory environment

The Securities Act, prescribes that no person may offer securities to the public without being registered in accordance with the Act. Similarly the securities of the issuer must be registered. The term "offer to the public" as defined in the Act is wide and captures those transactions which appear to be more of a "domestic concern" of the entity issuing the security i.e. it is an issue to a very limited group or a single investor with little or no opportunity for the public at large to participate.

The Commission notes that there are a number of entities that have issued securities by private placement, registered in accordance with the Securities Act and complied with the requisite on-going reporting and filing obligations. Such entities customarily issue securities including promissory notes and bonds to fewer than fifty (50) persons, and in a number of cases, the issuance is to one person. It is also noted that the investors in the securities are considered to be sophisticated and/or institutional investors.

3 Rationale for the exemption regime

The Commission recognises that the existing legislative requirements impose on such issuers, a level of reporting and disclosure that is incommensurate with the level of risk to the capital market and investors at large. In addition, the Commission notes the treatment and practices in other jurisdictions regarding private placement transactions and recognises that the establishment of an exemption regime related to private placement transactions would bring the capital market more in line with international practices in this area.

4 Establishment of the regime

The exemptions associated with the proposed regime would be facilitated pursuant to section 127A(1) of the Securities Act which provides that the Minister of Finance may exempt a class or individual entities from all or some of the requirements under the Securities Act. In order to obtain an exemption order it must be shown that the exemptions would not prejudice public interest or that of the investing public, or undermine the efficacy and effectiveness of regulation of the entity or entities to which the exemption(s) have been given. The Commission has sought to create a regime which would ensure that these principles would be achieved.

Consultation on this regime would provide valuable feedback to the Commission to ensure that the regime reflects the realities and views of the industry. At the end of the consultation, further amendments may be made to the information outlined below, including the declaration. The Commission will release its responses to the comments from the industry and the amendments to the proposal. The final proposal will be forwarded to the Minister of Finance for his consideration and determination.

Interpretation

Wherever the words “securities”, “public company” and “issuer” appear in this paper, they carry the meaning outlined in the Securities Act.

Qualifying Entities

- 1 It is proposed that the exemption regime will be available to an entity that is issuing or proposes to issue or offer securities, in accordance with the conditions and criteria outlined in the exemption regime.
- 2 The regime will not apply to public companies or entities who do not otherwise meet the criteria for the regime. Such entities will be required to comply with the registration and other requirements of the Securities Act that are applicable to issuers.

Proposed Exemptions

- 3 Qualifying entities would be exempted from each of the requirements outlined in Table 1 below.

Table 1: Proposed Exemptions

Item	Legislative reference	Description of section/regulation
i	s58(2) Securities Act	Registration as a reporting issuer
ii	s59(1) Securities Act	Registration of a security
iii	s 60(1) and (2) Securities Act and sections 54 and 55 of the Securities Regulations	Filing and distribution of annual report and financial statements
iv	s60(3) Securities	Disclosure and notification of material changes
v	part VI of the Securities Act and part VI of the Securities Regulations	Provisions related to distributions
vi	Part VII of the Regulations	Provisions related to financial statements
vii	s57 of the Securities Regulations	Filing of materials provided to securities holders
viii	Part IX of the Securities Act	In so far as it relates to issuers.

Implications of the exemptions

- 4 The exemption from the aforementioned legislative provisions means that an issuer will not be required to file and disclose documentation about the issuer, including details about its shareholders, directors and financial condition.

- 5 The legislation requires this type information to be filed with the Commission, but some of the information e.g. the details contained in a filed registration statement is also available for inspection by the public in accordance with the Securities Act. The exemption regime recognises that private placement transactions are generally domestic, private concerns, not involving the general public. The exemptions from the provisions e.g. sections 58(2) and 59(1) which facilitate public access to an issuer's information therefore match the private nature of the transaction.
- 6 The information regarding an issuer must still be disclosed to the Commission however, as part of the requirements to qualify for the exemptions in order to ensure appropriate regulatory oversight.
- 7 The other provisions which require disclosure of material changes and financial information to investors and the Commission are included in the exemptions, as it is recognised that the typical investor in private placement transactions is not usually in need of the same level of protection as a retail investor. The need for such information to be filed with the Commission, or for the Commission to ensure that the issuer discloses such information is reduced. The onus is therefore placed on the investing party to ensure that it is able to access the type of information that it requires to make decisions.

Exemption Criteria & Conditions

- 8 In order to be exempted from the provisions outlined in Table 1, the below criteria must be satisfied. These reflect key features of typical private placement transactions e.g. limited number of investors, sophisticated investors, and limited scope for the public at large to participate in the offer. It also incorporates the prospectus exemption provisions in the legislation.

Criteria to be satisfied

1. The offer must:
 - i. be made to less than fifty (50) persons;
 - ii. the investors must be sophisticated investors (as that term is defined by the Securities Act); and
 - iii. qualify for one of the exemptions from the prospectus requirements under section 69 of the Securities Act.
2. The offer document(s) must:
 - i. state clearly that (a) the offer is not an offer to the public at large and (b) the offer document must not be distributed to any other person; and
 - ii. be individually addressed to the specific offeree(s) and only that offeree must be capable of accepting the offer.

3. The issuing entity must submit the documentation and information necessary to demonstrate that the offer is a private placement of securities and that the entity qualifies for the exemption. The requisite documentation and information is outlined in section 4 below.

Required Documentation and Information

- 9 The entity issuing the securities would be required to submit the documents outlined below to the Commission. These requirements are in place to, among other things, ensure that all pertinent information required in support of the exemption have been met, is submitted to the Commission. The declaration ensures that the Commission is able to obtain key information about the issuer.

Required documentation

1. Written correspondence referencing the Order and requesting the exemptions;
2. A declaration signed by a director and principle executive officer of the entity (where the entity is a company), or signed by the entity, in the case of individuals. The purpose of the declaration would be to provide the requisite information in support of the exemption and also provide confirmation that the entity will comply with the conditions of the Order. The general content of the declaration would be provided by the Commission for the entity's guidance, however the Commission may require additional information depending on the particular circumstances of the offer. An example of the type of information that would be required is content of the declaration is outlined in **Appendix 1**;
3. Copies of the offering/transaction document(s); and
4. Cheque or bank draft in the amount of BDS\$750 for filing documentation in support of the request for the exemption in accordance with the Securities (Amendment) Regulations, 2010.

Conditions

- 10 The conditions which will be attached to the order are intended to ensure that the transaction maintains its private nature and that changes which impact the issuer's continued qualification for the exemptions are promptly disclosed to the Commission. If the conditions are not met, the issuer may be required to register as a reporting issuer and comply with all the attendant requirements under the Securities Act.
- 11 It is proposed that condition 3 will be an on-going obligation for the issuer to provide information. This would be important in circumstances where for example, the Commission receives information, other than from the issuer, which suggests that the issuer may not be acting in accordance with the terms of the exemption order.

Conditions:

1. there must be no public advertisement regarding the offer;
2. if there is a material change with respect to the issuing entity which would affect the exemption e.g. if the entity proposes to or issues to the public, the Commission must be notified within 24 hours of the date of the change, this includes a decision to implement the change; and
3. the entity must provide the Commission with information requested e.g. regarding the issuer and/or the offer and the offeree(s) within the timeline specified by the Commission.

Timing of the submission

- 12 The exemption regime requires coordination with the Ministry of Finance. Entities seeking exemption from the requirements should therefore submit the request and full documentation no less than one month before the securities are to be issued.

APPENDIX 1

Exemption declaration content

It is anticipated that the declaration document will include the following:

1. Name, physical and postal address of the issuing entity;
2. In the case of a company, the name and address of each beneficial owner and director and other senior office (in respect of accompany);
3. Type and value of the security or securities;
4. Purpose of the issuance;
5. Name of the prospective or existing investors;
6. Confirmation that the number of investors will not exceed 50 persons;
7. Exemption specific declarations e.g. in respect of an exemption related to a sophisticated investors:
 - confirmation that each investor is of sufficiently high net worth to satisfy the minimum requirement under that section
 - each investor is an institutional sophisticated investor or has access to the investment advisers or the same information about the issuer
8. Confirmation that the entity is not a public company; has not issued securities to the public at large; or does not intend to issue securities to the public at large;
9. Confirmation that the entity will comply with the conditions of the order;
10. Any other information that the entity considers relevant to illustrate that the entity qualifies for the exemption; and
11. Declaration that the information provided in the declaration is accurate and complete.

CONSULTATION QUESTIONS

1. Are there other categories of investors to whom the regime should apply? If it is proposed that other categories should apply, please provide the characteristics of the investors, the reason why these persons should be included and other similar regimes which include such persons.
2. Is the requirement that the investor must be a sophisticated investor as defined by the Securities Act sufficient or should a separate requirement be applied to ensure that the investors are also high net worth persons? Please provide an explanation of your response. If an additional requirement is supported, what would be an appropriate limit?