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INDUSTRY CIRCULAR
PRIVATE PLACEMENTS¹

INTRODUCTION

1 The Commission's mandate

1.1 The Commission's mandate as established through the Securities Act Cap. 318A (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 modernized to reflect the existing environment, whilst ensuring that regulation of the market remains robust and protects the investors. The publication of this circular outlining the treatment of private placements in the context of the regulatory regime is undertaken in accordance with this objective.

2 The existing legislative requirements and regulatory environment

2.1 The Securities Act, prescribes that no person may offer securities to the public without being registered in accordance with the legislation. Similarly the securities of the issuer must be registered. The term "offer to the public" as defined in the Securities Act has been previously interpreted to capture a range of transactions, including those which are more of a "domestic concern" of the entity issuing the security i.e. it is an issue to a very limited

¹ *Note that this regime is not applicable to funds and other collective investment schemes. Such entities must be licensed under the Mutual Funds Act, Cap. 320B.*

group or a single investor with little or no opportunity for the traditional public at large or a section of that public to participate.

2.2 The Commission notes that a number of entities that have issued securities which can reasonably be considered private placements sought to comply with the Securities Act and registration and reporting thereunder. The Commission,

- (a) cognizant of the need to adopt a regulatory approach which is more in keeping with the nature of such private offers;
- (b) taking into consideration the comments provided by the industry in response to its consultation paper on the establishment of a private placement regime; and
- (c) in recognition of internationally accepted treatment in respect of private placement transactions;

has determined that, with immediate effect, certain offers/distribution of securities will not be treated as offers to the public for the purposes of the Securities Act.

2.3 In developing the regime, the Commission found a number of the comments from the industry in respect of the private placement regime consultation to be noteworthy and of substantial merit and took the same into consideration. Reference should be made to the post-consultation document which outlines the various points made and the Commission's responses in respect of the same.

2.4 The Commission sought to address the comments provided in the consultation when developing the new regime which is outlined below. The regime demonstrates the revised scope of "public" as it relates to private placements; references the various types of issuers and investors to which the regime relates; and provides for an effective and clear system for dealing with private placements.

2.5 The Securities Act provides that the Commission may formulate principles for the guidance of the securities industry. The new regime has been formulated in accordance with this power whilst changes to the legislation are being considered.

3 New Regime

Registration not required

- i. Issuers of securities which are offered or distributed through a private placement as defined below, would not be construed as making an offer or distribution of securities to the public, and would not be required to register as reporting issuers under the Securities Act.

Similarly, registration of their securities would not be required. Accordingly, compliance with filing and disclosure requirements applicable to reporting issuers will not be required.

Filing of post-distribution report required

- ii. Issuers of securities are still required to file a report with the Commission in accordance with section 69(12) of the Securities Act within 10 days of the completion of a sale. Further information on the content of that report is outlined in **section 5** of this circular.

Eligible entities registered as reporting issuers may de-register

- iii. Issuers whose issuance or distribution of securities falls within the terms for a private placement, and who are registered as reporting issuers may apply for an order declaring that they are no longer a reporting issuer.

4 Factors to be considered in respect of a private placement transaction

4.1 In determining whether or not an offer/distribution is not an offer or distribution to the public, an issuer should consider whether the offer can (a) result directly or indirectly, in the securities becoming available for subscription or purchase by persons other than those receiving the offer or invitation; or (b) is a domestic concern of the persons making and receiving the offer.

4.2 The factors to be considered in this regard include whether:

- 1. the offer/distribution is:
 - i. a “limited offering” as that term is defined under the Securities Act, and the constituent documents of the offer/distribution contain provisions restricting the aggregate number of security holders of the issue to thirty-five (35) persons or less not including senior officers and employees or former senior officers and employees of the issuer and its affiliates;
 - ii. a limited offering to an issuer’s own or an associate’s own issue to its employees in accordance with the terms of the Securities Act;
 - iii. a limited offering to a person who is:
 - (a) a shareholder of the issuer;
 - (b) a senior officer or partner of the issuer;
 - (c) a relative or partner of the person referred to in (b);

- (d) a person directly involved in the business of the issuer; or
 - (e) an associate in respect of paragraphs (a), (b) and (c) of the term “associate” as it is defined by the Securities Act; or
- iv. made to fewer than 50 purchasers each of whom is a sophisticated purchaser² and the constituent documents of the offer/distribution contain provisions restricting the aggregate number of security holders of the issue to fifty (50) sophisticated purchasers or less not including senior officers and employees or former senior officers and employees of the issuer and its affiliates;
2. the offer/distribution qualifies for the exemption from the prospectus requirements applicable in respect of items 4.2(1) (i), (ii) and (iv) above;
3. the offer/distribution is made by a person:
- i. who is not a reporting issuer/public company in Barbados³;
 - ii. whose securities, other than non-voting debt securities are:
 - (a) subject to restriction on transfer; and
 - (b) beneficially owned by no more than thirty-five persons, not including senior officers and employees or former senior officers and employees of the issuer;and
 - iii. except in the case of securities companies and dealers, a person who does not raise, or propose to raise, money in the securities market on a frequent basis; and
4. the offer/distribution is being made to persons who have access to the kind of information that would have been disclosed if the registration of the offer was required.

5 Contents of the post-distribution report

In order to promote consistency in the information filed by issuers, the following information about the desired content of the post-distribution report is provided.

² As defined by the Securities Act

³ Provided that the person is an issuer of securities listed on an internationally recognised stock exchange and/or is registered with an internationally recognised securities regulator. Generally, regulators which are members of IOSCO and their exchanges will be considered as internationally recognised securities regulators and exchanges.

5.1 The report should contain information about the issuer; the security to which the report relates; and the applicable prospectus exemption. This includes the following:

1. the full and true name of the issuer e.g. as outlined in its constituent documents;
2. the issuer's principal physical and postal address; website; contact numbers; email addresses;
3. the issuer's address for service of process in Barbados (where the issuer is not incorporated in Barbados);
4. the name, address and contact information of the person who is responsible for filing the report;
5. the names and contact information of the service providers in respect of the distribution e.g. underwriter, securities company, trustee, paying agent, registrar;
6. the prospectus exemption(s) applied in respect of the distribution;
7. the total number of investors, names and addresses of the investors;
8. description of the security including the type, amount, currency, face value; yield; interest rate; interest payment dates; tenor; issue date; maturity date; issue price per security; offer period and aggregate sale price. In respect of a securitized instrument with multiple cash flows; identify the terms associated with each tranche i.e. amount, issue date, maturity date; yield; maturity value, sale price, amount;
9. supporting documentation i.e. the executed documents constituting the securities that were distributed.

5.2 The report should be dated and appropriately signed.

In the case of a company by:

- the principal executive officer; or
- an authorised senior officer of the issuer and two directors.

In the case of a government entity by:

- the underwriter; or
- its designated agent.