

THE SECURITIES ACT, 1993: A SUMMARY

INTRODUCTION

The Securities Act, 1993 is to come into force on a day to be appointed by the Minister. The Act will regulate dealings in the securities of public companies and of government. One may gather from the terms of the Act the following intentions, namely:-

- (A) to control who may carry on business as security dealers and investment advisors and, in certain respects, how they may carry on business;
- (B) to control who may establish and run organized markets by means of which securities may be bought and sold and, in certain respects, how they may run those markets;
- (C) to prevent a variety of dishonest transactions affecting dealings in securities such as false trading and price rigging of securities traded on a stock exchange, dissemination of false information to influence the prices of securities and inducing dealings in securities by dishonest statements or concealing of material information;
- (D) to prevent "insiders" of companies from buying and selling the securities of those companies while they are in possession of inside information which if generally available would likely affect the price of the securities;
- (E) to oblige directors and substantial shareholders of

companies and the beneficial holders of substantial shareholdings in such companies to disclose their interests in the securities of such companies to other shareholders and potential shareholders;

(F) to control how persons may make or pursue the take-over of a public company;

(G) to control how companies, in their capacity as the issuers of securities, keep their accounts; what financial statements they should make available to the public and how those accounts and statements should be audited.

2. The Act establishes a Securities Commission (see SA sect. 4(1)) which will be the principal Government agency for working the provisions of the Act and regulations made thereunder. In order to accomplish objects (A) and (B) the Act provides for two licence/registration regimes -

(i) a licence and registration regime for security dealers and their representatives and for investment advisers and their representatives; and

(ii) a licence regime for persons who establish and run stock exchanges.

THE SECURITIES COMMISSION

3. The Commission will consist of three to seven appointees of the Minister each of whose term of appointment may be up to five years and is revocable only for cause as specified in the First

Schedule to the Act. The Commission will, inter alia -

- (a) determine licence and registration applications;
- (b) make regulations, with the approval of the Minister, to control the securities industry and monitor that licencees, registered persons and other persons subject to regulations comply with the Act, the regulations and the terms of licences;
- (c) carry out investigations in relation to the securities industry on its own initiative or as a result of reference to it by the Minister;
- (d) advise the Minister.

The Commission's powers of enforcement include powers to -

- (a) cancel or suspend licences and registration;
- (b) issue directions to a recognized stock exchange which if breached can result in fines being imposed on the stock exchange;
- (c) prohibit trading in particular securities on a recognized stock exchange;
- (d) to apply to court for an order compelling a person to comply with or enforce the business rules or listing rules of a recognized stock exchange;
- (e) appoint a manager to be responsible for the management of a recognized stock exchange or licensed dealer.

The Minister may give directions to the Commission of a general character as to policy (SA, sect. 6).

REGIME FOR STOCK EXCHANGES

4. There will be a bar against establishing or operating a stock exchange unless it is licensed by the Commission (SA, sect. 18(7)). However, the Jamaica Stock Exchange will be treated as licensed from the commencement of the Act and will remain so provided that within 6 months or any longer period allowed by the Commission it satisfies the requirements to be met by applicants for a licence to operate a stock exchange as set out in the Act (SA, sect. 18(2) - (4)).

5. Those requirements include that the company proposing to operate a stock exchange have rules which make satisfactory provision for, inter alia, -

- (a) excluding from its membership persons not of good character;
- (b) disciplining members for improper conduct in the transaction of business;
- (c) imposing obligations on listed companies which afford persons dealing in their securities proper information for determining their current value;
- (d) carrying on of the business of the stock exchange with due regard to the interests of the public.

(SA, sect. 18(5) & Second Schedule)

6. Changes in the rules of a licensed stock exchange will have to be approved by the Commission (SA, sect. 19).

The Commission may in the public interest give directions to a

licensed stock exchange with respect to the manner in which the stock exchange carries on business. The Commission may also in the public interest prohibit trading in particular securities on the stock exchange.

COMPENSATION FUND:

7. A licensed stock exchange will have to establish a compensation fund to compensate persons who suffer pecuniary loss as a result of defalcations or fraudulent misuse of securities by a member or its director or employees occurring in the course of its business as a dealer (SA, sects. 27 - 35).

DEALERS & INVESTMENT ADVISERS

Dealers

8. Dealers will be required to be in possession of a licence from the Commission and their employees and other representatives who perform the functions which constitute dealing will have to be registered by the Commission (SA, sect. 7 & 10).

9. Under transitional provisions existing dealers (i.e. those who have been dealing continuously for 12 months immediately prior to the appointed day) who apply within 60 days after the appointed day for a licence may continue to deal for 6 months after the appointed day or until the later determination of their licence application. Similarly dealers' representatives who have been continuously employed as dealers' representatives for 12 months prior to the appointed day and in respect of whom the dealers have applied for registration in the 60 day period may continue to function as

dealers representatives (SA, sect. 78). The above statement of how long an existing dealer may continue to deal or an existing dealer's representative continue to function is a generous construction of the actual wording of SA sect. 78(1). In the sub-section the period is stated as "six months beginning with [the appointed day] or until the application for a licence or registration has been granted or the application has been withdrawn, whichever is later." Is the period determined where the application is refused?

10. Qualifications for licensing as a dealer in the case of a company are -

- (a) incorporation in Jamaica (or a prescribed Caricom member state) and control by Jamaican citizens habitually resident in Jamaica;
- (b) that none of its directors or shareholders has been convicted of any offence involving dishonesty or is an undischarged bankrupt) and that at least one of its directors is licensed to deal or give investment advice;
- (c) satisfaction of such solvency and liquidity requirements as the Commission may specify in relation to the company (SA, sect. 9(3)(a)).

An individual applying for a licence to deal need only satisfy the Commission that he is a fit and proper person, i.e., that he is not an undischarged bankrupt and has not been convicted of an offence involving dishonesty (SA, sect. 9(3)(b)).

The Commission may not require that an individual applying for

a dealer's licence satisfy any solvency or liquidity requirements. Neither a company nor an individual applying for a dealer's licence need satisfy the Commission as to competence. It is a question whether the Commission can take account of facts going to an applicant's ability or willingness to perform the duties of a dealer if those facts do not relate to any of the specified criteria. Be it noted that SA, sect. 9(3) is worded as if the Commission is bound to grant a licence if it is satisfied that the specified criteria are met.

11. The licence application process requires that the Commission give an applicant an opportunity to be heard contra if the Commission intends to refuse to grant a licence or to grant a licence subject to conditions. Appeal against the Commission's refusal of a licence or decision to impose conditions on the grant of a licence may be made to a Judge in Chambers (SA, sect. 11).

12. "Deal" in relation to securities and "dealer" are widely defined but an "exempt dealer" is not required to be licensed.

"Exempt dealer" includes a manager of a unit trust scheme, an investment adviser whose dealing is incidental to managing portfolios of securities for clients, banks or Financial Institutions Act licensees (whose main business is not dealing and who deal by way of certain transactions), and persons or categories of persons exempted by the Minister by order (SA, sect. 2(3)).

Investment Advisers

13. "Investment adviser" for the purposes of the Act does not

include a bank, insurance company, lawyer or accountant giving advice as an incident to practice, a dealer giving advice as an incident to dealing, and a newspaper proprietor or a publisher or a writer in relation to investment advice, analyses or reports in publications distributed to purchasers and subscribers for value.

14. A person carrying on an investment advice business also has to be licensed (SA, sect. 8) unless by definition (see SA, sect. 2(2)) such a person is not an investment adviser. There is no provision for a company to apply for a licence to carry on an investment advice business . An individual may apply however and the Commission is bound to grant an application if the Commission is satisfied that the individual is a "fit and proper person".

Representatives of investment advisers have to be registered by the Commission in a process similar to that applicable to dealers' representatives (See SA, sect. 10).

15. Certain aspects of how dealers do business will be controlled. For example, Dealers may have to keep credit to clients within limits set by the Commission. The Commission is empowered to make regulations providing for the maximum credit which dealers may extend to client when purchasing securities for clients. Breach of such regulations is a ground for cancellation of a dealer's licence (SA, sect. 42).

Dealers will have to keep a record of the securities in which they have an interest and the record has to be produced to the Commission on request. Dealers' representatives will be similarly

obliged. (Similar provisions apply to investment advisers and their representatives) (SA, sect. 14).

15. Certain fiduciary obligations are emphasized or imposed by the Act. These include obligations -

- (a) to issue a contract note in respect of a sale or purchase of securities; (SA, sect. 38);
- (b) not to deal in securities as a principal with a non-dealer without first disclosing the fact that it is acting as a principal and not as an agent (SA, sect. 40);
- (c) not to send out circulars or other written communications recommending any securities or class of securities in which it has an interest without including in the communication a statement about its or any associate's interest in the securities (SA, sect. 39);
- (d) to give priority to its clients orders over its own interest or that of an associated person in respect of a purchase or sale of quoted securities (SA, sect. 41);
- (e) to keep a bank account designated as a trust account into which it must put money held in trust for a client and any money received from a client and not to make withdrawals from the account except to pay the person titled or someone else at his direction or for purposes which the Commission will prescribe (SA, sect. 36).

FRAUDULENT CONDUCT AFFECTING TRADING

16. Sections 44 to 49 prohibits or renders unlawful a variety of fraudulent conduct affecting the price of securities or inducing transactions in securities including the following:-

- (a) doing anything intended or likely to create a false or misleading appearance of active trading in any securities on a recognised stock exchange or affecting the market price of securities by means of purchases or sales of such securities which do not involve a change in their beneficial ownership or by means of any other fictitious device (SA, sect. 44);
- (b) making a statement or disseminating information that is materially false or misleading intending to induce a sale or purchase of securities or to affect the price of securities if at the time one is either reckless as to the truth of the statement or information or knows or ought reasonably to have known that the statement or information was materially false or misleading (SA, sect. 46).
- (c) fraudulent inducement to deal in securities by way of a number of types of transactions (SA, sect. 47)

INSIDER TRADING

17. Section 51 of the Act prohibits dealings in securities by

insiders in possession of inside information which is price sensitive. A person who is or during the preceding twelve months has been associated with a company and by reason of that association is in possession of information which is -

(a) not generally available;

(b) if generally available would likely materially affect the price of securities of the company -

may not deal in the securities of the company (SA, sect. 51(1) & (2).

18. A person who is associated with one company and is in possession of price sensitive inside information relating to an actual or expected transaction involving that company and another company or involving either company and the securities of the other company may not deal in the securities of either company.

19. Who may be regarded as associated with a company for purposes of section 51 ? The situation is not clear. Section 3, "for the purposes of the Act", sets out what persons shall be treated as being associated with a given person. By that section we would have to include an individual who is a director or manager or a person who has control of the company or any partner or immediate relative of such director, manager or person in control. (This is a major drafting error because the first rank of "insiders" ought to be directors employees and substantial shareholders of the

relevant company and this first rank is not normally extended to connected persons). Within section 51 there is wording which despite a drafting error shows an intent to widen the group so as to also include any person who occupies a position giving him access to inside information as a result of a professional or business relationship existing between such a person (or his employer or a company of which he is an officer) and the relevant company or another person who is associated with that company.

20. An outsider is also subject to the prohibition of dealing in securities while in possession of price sensitive inside information if -

- (a) he got the information from an insider and is aware or ought reasonably to have been aware that the insider is prohibited from dealing; and
- (b) he had an arrangement with the insider for the supply of that type of information with a view to either or both of them dealing in securities .

(SA, sect. 51(3))

21. A person prohibited from dealing in certain securities on account of an insider situation is also prohibited from -

- (a) procuring any other person to deal in the securities; or
- (b) communicating the inside information to any other person if the securities are quoted securities and he knows or ought reasonably to know that the other person will use

the information for trading in the securities.

(SA, sect. 51(4) & (5))

22. If an officer of a company is prohibited from dealing as an insider in any securities the company is also prohibited from dealing in those securities. This prohibition does not apply to -

(a) a transaction if the company's decision to be involved in the transaction is taken on its behalf by another officer who is prevented from being privy to the information or being advised by anyone who is;

(b) a transaction by the company in another company's securities by reason only that the officer gets the information in the course of performance of duties for his company.

23. A licensed dealer in possession of price sensitive inside information about securities of a company is not prevented from conducting a transaction in those securities if he deals as an agent on specific instructions to effect the transaction and never gave advice to the client in relation to the securities of the company of that class.

24. Contravention of the insider trading prohibitions renders an individual liable to fine or imprisonment and a company liable to fine on conviction (SA, sect. 52). The convicted person is also liable in a civil action to compensate a person for loss suffered on a purchase or sale of securities as a result of the contravention (SA, sect. 53).

DISCLOSURE OF INTERESTS

25. Sections 54 to 59 contain provisions apparently intended to make transparent the interests of directors and of substantial shareholders in the securities of a company.

Directors

26. Directors of a company will have to notify the company of their interests in securities of the company or any related company (SA, sect. 54(1)). They will also have to notify the company of -
termination of interests in such securities;
contracts to sell such securities;
assignments of rights held by them or their family to
subscribe for securities of the company;
acquisition of a right to subscribe for the securities of
a related company.

If a company's securities are traded on the stock exchange it will be obliged to notify the stock exchange of a director's notification and the stock exchange may publish the information it receives (SA, sect. 54(5)).

27. For the purposes of the obligation imposed on directors if a spouse or infant child of the director has an interest in the securities of the company the director is treated as having an interest. Having an interest in the securities of a company can include -

- having control of directors of the company
- having control of 1/10 of the voting power at any general

meeting of the company

- having a contract to purchase the securities
- having a right to control the exercise of voting rights attached to the securities.

(See SA sects. 55 & 56).

28. A company will be obliged to keep a register of directors' interests in its securities. (SA, sect. 57)

Beneficial Holders of Substantial Interests

29. When the Act comes into force a person who is "interested" in 1/10 or more of the total number of issued voting shares of a company or 1/10 or more of the voting rights attached to the voting shares will have to notify the company of his interest within 5 days. When his interest drops below that threshold he must notify the company within 14 days of the change and the number of shares affected.

30. A company can require a person it believes to be "interested" in a substantial shareholding in the company but whose interest is not fully reflected in the company's share register to disclose the interest and any other person who may be a beneficial owner of such shares. The company can also require a member to disclose any agreement by which another person controls the exercise of voting rights in the shares (See SA sect. 59).

TAKE-OVERS

31. The Commission will have power to prescribe take-over rules governing how a person may pursue a take-over of a public company.

COMPANIES' FINANCIAL INFORMATION

32. The Commission will have power to make regulations controlling how companies as issuers of securities keep their accounts, what financial statements are to be filed and prescribing audit requirements with respect thereto. (See SA, sect. 76(c) and (e)).

GENERAL

33. The Act has a relatively large number of drafting errors some of which may not be capable of being dealt with under the Law Revision Act procedures but may require amendments to the Act. It is not certain that the Ministry of Finance appreciates this.

DGE/DC&O
NOVEMBER 19, 1993

