

DISCLOSURE REQUIREMENTS - AN ASSESSMENT OF THE CURRENT ENVIRONMENT IN JAMAICA

This paper will address the topic of disclosure requirements in four parts:

- Disclosure in offerings of securities
- Ongoing disclosure requirements for issuers of securities
- Miscellaneous disclosure rules applicable to regulators, licensed dealers and underwriters
- Disclosure by directors and substantial shareholders of their interests in an issuer's securities

It will conclude with a brief discussion on the question of who should lead the reshaping efforts for greater public disclosure of information and transparency.

The volume of relevant legal material is substantial, and in some cases replete with detail. No attempt is made in this paper to comprehensively summarise all that material. The approach is instead to describe the general principles and trends found in the legal requirements, and to mention those details which appear to the author to be of particular significance or interest.

The matter of the legal consequences of inadequate disclosure and the dissemination of false or misleading information, is a large topic on its own, involving both statutory provisions and significant common law developments. I have treated it as beyond the scope of this paper.

1. Disclosure in offerings of securities

The role played by company law

The Companies Act is the primary source of legal requirements in relation to the disclosure that must be made where a company is offering its shares or debentures to the public for subscription (usually described as an offer for subscription), or a person is offering a company's shares or debentures for sale to the public (usually described as an offer for sale).

Jamaica's new Companies Act has not sought to alter the relevant provisions in its predecessor Act, although they have been described by a leading commentator as¹ "extremely confusing" and in need of rearrangement and coordination, having evolved haphazardly in response to dangers revealed by experience. The relevant company law requirements are therefore 40 years old, and are in fact based on the 1948 UK law.

¹ Professor Gower in his *Principles of Modern Company Law* (4th Ed. at page 350).

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The basic company law requirement is for a prospectus to be filed with and registered by the Registrar of Companies². The Third Schedule to the Companies Act sets out the mandatory information and reports that must be included in a prospectus. Most of this mandatory information is customarily contained in the "Statutory and General Information" section of the prospectus.

However, the Third Schedule of the Companies Act is in practice only part of the story, as a prospectus cannot be disseminated before the Registrar of Companies has registered it. In practice, in Jamaica this has provided a measure of control of the form and content of prospectuses over and above the Companies Act's basic requirements³. The Registrar has traditionally consulted with the Attorney General's department before registering a prospectus, and by this administrative arrangement the Hon. Ken Rattray O.J. has for several decades vetted prospectuses and advised the Registrar on them.

The result is that quite commonly an issuer or offeror may be required to amend or expand a draft prospectus for reasons which do not derive from any specific requirement in the Companies Act, to address matters which cause concern to the Registrar or her adviser. The need to coordinate the logistics of the meeting of the legal requirements with scheduling of the marketing and selling activities within the tight timeframe in which such offers take place, means that the Registrar enjoys some leverage in persuading issuers/offerors to make the amendments or additions that she requires.

The advent of the FSC- shared jurisdiction

On the other hand, the Financial Services Commission (“FSC”), rather than the Office of the Registrar of Companies, has been established as the specialist regulatory agency for protecting investors in securities. Since the amendments to the Securities Act which were made in 2001 at the time of the creation of the FSC, there is considerable jurisdictional overlapping in this area. It is very important for each of these agencies to understand and agree their respective roles in this regard, if issuers coming to the market are not to be caught in a bureaucratic quagmire.

Until there is a comprehensive overhaul of the entire system of legal requirements for public offerings of securities, the Registrar of Companies should include the FSC in the vetting process before registration of a prospectus is granted. The advent of the FSC suggests that the Registrar’s role should now be confined to ensuring that Companies Act’s requirements are complied with, and the Registrar should rely on and adopt the FSC’s recommendations in relation to any other matters arising from a prospectus delivered for registration.

² In certain situations (one important practical case is where a company changes its articles of association to cease to be a private company, and then issues shares through a private placement) a Statement in Lieu of Prospectus may be filed rather than a full prospectus. The Companies Act also sets out the required contents of a Statement in Lieu of Prospectus.

³ Though I would argue that the expectations of the market have provided the real control, as issuers generally wish their prospectuses to be well received by the market and opinion-leading commentators.

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The FSC’s current approach

The FSC’s legal jurisdiction in this area derives from section 26 of the Securities Act⁴. That section requires an issuer to apply to the FSC, within the prescribed time and in the prescribed form, for registration in respect of particular securities, before the issuer can proceed with the issue⁵. No regulations have however yet been made prescribing these two important matters.

In the meantime, the FSC published a document entitled “Guidelines for Issuers of Securities” in 2002⁶. Despite the absence of any clear legal standing, the Guidelines purport to convey “the requirements that are to be complied with to secure registration with the FSC”. The Guidelines recognise the gap in the Securities Act in relation to secondary market offerings to the public of securities which have already been issued⁷, and state that section 26 will be enhanced “in the near future” to deal with this.

The Guidelines set out the form of registration statement to be filed with the FSC, and require a prospectus “meeting specific statutory form and content requirements”⁸ to be filed along with the registration statement. The application for registration is to be made to the FSC at least 30 days before the intended commencement date of the offering. The prospectus is required to contain a specific disclaimer stating that the FSC has not approved the securities or passed upon the accuracy or adequacy of the prospectus.

In cases where shares are being issued, the Guidelines state that the Third Schedule to the Companies Act must be complied with. However, the Guidelines also state that the prospectus must disclose “all material information”, including a description of the issuer’s business, the issuer’s audited annual and unaudited interim financial statements⁹, and a Management Discussion and Analysis (“MD&A”) of the issuer’s financial condition and result of operations. The Guidelines suggest that guidance on the compilation of the MD&A may be obtained from another set of Guidelines released by the FSC¹⁰, but this is not particularly helpful because those MD&A Guidelines are specifically designed for licensed dealers in securities¹¹ and will often not be of particular relevance to issuers which are not in the business of providing financial services.

⁴ As amended in 2001.

⁵ Securities issued by the Government of Jamaica, and securities issued to licensed deposit-taking institutions in the ordinary course of the lending business, are excluded from this requirement.

⁶ SR-GUID-02/12-0005

⁷ Such offerings, if made to the public, will nevertheless have to comply with the Companies Act’s prospectus requirements, although there have been instances in Jamaica (newspaper advertisements for the sale of shares) where this has been ignored with apparent impunity.

⁸ It is not clear what these are at this time, other than those contained in the Companies Act.

⁹ There is no stated requirement as to how many years of financial statements are to be included, so one must assume that the Third Schedule of the Companies Act governs this.

¹⁰ SR-GUID-05/12-004

¹¹ They focus on liquidity, off-balance-sheet transactions, and exposures to and positions in derivatives.

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The Guidelines exempt private placements from the prospectus and registration requirements, and attempt to define a specific terms what a “private placement” is¹². For an offer to be a private placement, it must be limited to only include institutional investors and high net worth individuals¹³, and cannot be offered to more than 50 persons. No general solicitation or advertisement is permissible. The Guidelines suggest that there should be restrictions on resale, to which the investors must expressly consent, but the resale restrictions are left unspecified.

The requirements of the Jamaica Stock Exchange (“JSE”)

A third layer of jurisdiction over offerings of securities is provided by the Rules of the JSE. Most public offerings of shares by Jamaican issuers will involve a subsequent listing on the JSE¹⁴. A listing on the JSE requires compliance with the relevant JSE Rules and is at the discretion of the JSE’s Council, and the JSE thereby achieves de facto influence over the conduct and content of public offerings in Jamaica.

The JSE Rules require the prospectus to state that an application for listing on the JSE will be made, and the publication of the prospectus in a daily newspaper at least 7 days before the offer opens.

In cases where the listing is being effected by way of introduction (i.e. where the shares have already been issued) the JSE has developed issuer disclosure document of its own (a Memorandum for Listing and Abridged Statement¹⁵) which must be published in a daily newspaper no more than 7 days after the JSE approves it.

2. Ongoing disclosure requirements for issuers of securities

Limited ongoing company law requirements

The Companies Act does not require any ongoing disclosure requirements, save for rather limited annual statutory company filings¹⁶ and the annual auditing of a company's financial statements¹⁷ which must be presented to shareholders for approval and filed¹⁸ with the Registrar of Companies.

¹² This is a departure from the Companies Act's approach, which does not recognise the concept of a private placement but rather seeks to define (and regulate) offers made to the public. The Companies Act's definition, in section 55, uses general words that, despite having been the subject of considerable judicial interpretation in reported cases in other jurisdictions, remain somewhat imprecise. This has facilitated private placements of a fairly wide scope.

¹³ Neither of which is defined.

¹⁴ This provides the only convenient market for secondary trading in the shares (exempt from transfer tax and stamp duty), and a market-driven benchmark for pricing the trades, both of which are critical to the average investor.

¹⁵ Appendix 5 of the JSE Rules.

¹⁶ The annual company returns and Declaration of Assets.

¹⁷ Some private companies will be able to avoid this by complying with section 159 of the new Act.

¹⁸ Though not if the company is private and has no corporate shareholders - section 25(3) of the new Act.

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JSE ongoing requirements - filing and disclosure

The JSE Rules adopt a mixed approach to the matter of ongoing disclosure. Disclosure is mandatory in relation to periodic filing requirements in relation to financial operating results and certain types of board decisions. On the other hand, in relation to other eventualities the JSE Rules provide issuers with an excellent Policy Statement and largely leaves it to the issuers themselves to implement it.

For companies whose securities are listed in the JSE, the JSE Rules provide for the

release to the JSE of quarterly financial statements¹⁹ and annual audited financial statements²⁰. There is no requirement for these to be published in a daily newspaper, though in practice they often are.

The Rules provide for suspension of trading in a company's listed securities if these releases are substantially overdue ²¹, though in practice the JSE has been understandably slow to implement this drastic penal measure, since those most prejudiced by it are the investing public who have already invested in those securities.

The Rules also require an annual report to be prepared and sent to holders of the company's securities within 120 days of its financial year-end²², which must include the audited financial statements and must disclose the shareholdings in the issuer held by directors and senior management (and their connected persons).

While annual reports conventionally also include a list of the top 10 shareholders and their shareholdings ²³, a disturbing practice which has emerged is for this list to merely state an account number at a trust company as one or more of the top 10 shareholders.

The JSE would be well advised to proscribe this practice and require the ultimate beneficial owner to be disclosed.

Rule 410 requires listed companies to notify the JSE of all important developments before or concurrently with any public announcement. The JSE is also supposed to be notified at least a week before the convening of a board meeting to consider a dividend, bonus issue or rights issue, and should be notified of such decisions immediately after the board decides to proceed (ideally by 3:00pm that day).

Where the board intends to seek shareholder approval for an increase in authorised share capital, the notice of meeting must state whether or not there is a present intention to issue any of the shares.

¹⁹ Within 45 days of the end of each financial quarter.

²⁰ Within 90 days of the end of each financial year-end, and as soon as the company's board approves them.

²¹ The power to suspend for the late release of financial statements arises after 45 days for quarterly releases, and after 90 days for annual releases.

²² In practice this deadline is often not met, as Jamaica's adoption of IFRS has resulted in increasingly complex financial statements that take longer to finalize than was the case with the simpler presentation regime which existed when these JSE Rules were promulgated.

²³ This should be mandatory.

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If the increase is more than 25%, the notice of meeting must include an undertaking from the directors that the additional authorised capital will not be issued so as to change control of the company or the nature of its business without prior shareholder consent ²⁴.

The JSE Policy Statement on Timely Disclosure

The JSE Rules²⁵ contain the very fulsome and important JSE Policy Statement on Timely Disclosure, which is binding on all listed issuers by virtue of their Listing Agreement with the JSE and is essentially a self-regulatory regime.

The Policy Statement endorses the "fundamental principle" that all persons investing in securities must do so on the basis of *equal access* to information that may affect their investment decisions in relation to the securities, and promotes timely disclosure of material information concerning the business and affairs of listed companies.

The basic rule of the Policy Statement is that once material information arises, it should be immediately disclosed so that investors do not act on insufficient information. Announcements are to be factual and balanced, and unfavourable news should be disclosed as promptly and completely as favourable news. While there are sometimes practical limits on the level of detail that can be the subject of a public announcement, the principle in the Policy Statement is that disclosures must contain sufficient detail to enable the media and investors to appreciate "the true substance and importance of the

information”²⁶.

Material information is defined by the Policy Statement as any information relating to the company’s business or affairs, whether internal or external to the company itself, that would reasonably be expected to result in a significant change in the market price or value of its listed shares. While this definition is formulated as an objective standard, the Policy Statement expressly leaves it to the company to determine what is material in its own context, making the point that the company itself is in the best position to apply the definition of materiality in its own circumstances. Having said that, the Policy Statement then lists 14 specific matters which it says are likely to give rise to material information requiring disclosure.

The Policy Statement imposes some limits to its self-regulatory approach, as it allows the JSE to require the company to make an announcement in cases where there is rumour or speculation that, absent a clarifying response, could be prejudicial to the interests of investors. The Policy Statement also encourages a listed company’s management to consult with the JSE’s management when in doubt as to whether or not to make a particular disclosure.

²⁴ Rule 410C

²⁵ In Appendix 8.

²⁶ There may well be differing views within a company and among its advisers as to what is sufficient to meet this test.

The Policy Statement takes the position that developments may be material even prior to finalisation, and suggests that an announcement should be made once a decision to proceed with a material transaction or development has been made by the board or by senior management with the expectation that the board will concur.

A difficult issue which arises in practice is how to deal with information about possible transactions that are either being negotiated or are subject to important extraneous

conditions which could affect their outcome. The reality is that even if the disclosure makes it clear that a particular transaction is subject to due diligence or regulatory approval, the announcement often triggers false expectations among some investors, leading to premature sell or buy decisions.

Furthermore, some regulators understandably do not like regulated entities to publicly announce transactions which require regulatory approval, prior to regulatory approval being granted. This is an instance where there is a real tension between competing public interests - the investing public's interest in full and timely disclosure, and the legitimate regulatory interest in withholding information pending a decision so as not to compromise the decision-making freedom of the regulator.

The Policy Statement allows disclosure of material information to be delayed temporarily where its immediate release would "be unduly detrimental to the interests of the company". Specific examples of this are given - (i) where disclosure would prejudice the company's ability to pursue specific and limited objectives or to complete a transaction that is underway, and (ii) where disclosure would provide competitors with confidential corporate information that would be a significant benefit to them.

In any of these cases, the company is required to proceed on the principle that nondisclosure is only justified where the potential harm to the company (and therefore to its investors) may reasonable be considered to outweigh the assumed injury that delayed disclosure may cause investors. The Policy Statement says that this must be infrequent, and discourages lengthy delay since "it is unlikely that confidentiality can be maintained beyond the short term".

The FSC's continuous disclosure regime

Juxtaposed to the substantial self-regulatory elements of the JSE Rules on the matter of ongoing disclosure, is the more mandatory regime created by the Securities (Disclosure of Interest) Regulations 1999.

While the bulk of these regulations are devoted to creating a comprehensive disclosure regime in relation to commercial paper issuers (discussed below), these Regulations also contain some significant disclosure and filing provisions of general application to issuers of “traded securities”²⁷.

²⁷ This phrase is not defined.

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These Regulations require an issuer - (a) to issue a press release “forthwith” disclosing the nature and substance of any “material change in the affairs of an issuer of traded securities”, and (b) to file a report of the material change with the FSC as soon as possible thereafter²⁸.

A “material change ” is defined in the Regulations as meaning, in relation to securities, a change in the business operations or capital of the issuer that would reasonably be expected to have a significant impact on the market price or value of any securities of that issuer²⁹. The decision as whether or to a material change has occurred is left to the issuer to determine, and the Regulations do not provide the FSC with power to second guess the matter by compelling disclosure in a given case where an issuer decide that the threshold has not been met.

Where the issuer believes that the disclosure would be detrimental to its interests, the issuer may file the report of the material change with the FSC under confidential cover, giving reasons for the non-disclosure. This also applies where the material change is a decision made by an officer who believes that the issuer’s board will probably confirm it and the officer has no reason to believe that persons know of the decision and have made use of that information in trading in the securities. In either of these cases, the issuer is required to advise the FSC every 10 days thereafter that the issuer believes the report should remain confidential, until the material change has been generally disclosed.

The Regulations also have filing requirements for issuers of traded securities³⁰, requiring

them to file³¹ quarterly interim financial statements³² and annual audited financial statements³³ prepared in accordance with generally accepted accounting principles stating the comparative figures for the preceding corresponding period. An issuer who files these financial statements is required to send a copy of them to the holders of its securities³⁴. The FSC charges an ad valorem fee on the filing of these financial statements³⁵.

The regulation of commercial paper

The Securities (Disclosure of Interest) Regulations 1999 are for the most part devoted to prescribing disclosure requirements for issuers of commercial paper. Commercial paper is defined as securities comprising debt obligations repayable within a year of their issue date³⁶.

²⁸ Para. 3

²⁹ The Regulations track the JSE's Policy Statement in this regard.

³⁰ Para. 4

³¹ The Regulations do not say who these filings are to be made with.

³² Within 45 days of each financial quarter.

³³ Within 90 days of each financial year-end.

³⁴ Para. 5(1). Note that there is a wrong reference in this provision to regulation 3 (it should read regulation 4).

³⁵ Para. 23

³⁶ Excluding debt obligations arising from the sale of goods or services.

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Commercial paper cannot be issued by a company unless the issuer, and any guarantor of the obligations, has delivered an Information Memorandum to the FSC and to every person who subscribes for the paper or is solicited by the company to invest in it³⁷. The Information Memorandum is required to contain the comprehensive and detailed information specified in the lists of provisions contained in paras. 14 and 15 of the Regulations, and must also meet other specific authorisation requirements³⁸.

The FSC is obliged to make the Information Memorandum available to the public, both for inspection and to make copies³⁹. The FSC also charges an ad valorem fee for the filing of an Information Memorandum⁴⁰.

The Information Memorandum must be displayed in a “conspicuous place” at the issuer’s place of business and also at the place of business of each licensed dealer in the paper, and they must make it available to investors.

Issuers and guarantors of outstanding commercial paper have to file with the FSC quarterly unaudited and annual audited financial statements, within the usual 45- and 90-day deadlines⁴¹. The quarterly filings must however also contain a certificate signed by two officers authorised by the board for this purpose, stating that to the best of their knowledge and belief the financial statements accurately reflect the financial status of the issuer or guarantor (as the case may be).

The Regulations also have the unprecedented requirement that issuers and guarantors of outstanding commercial paper must also file monthly statements⁴² of their outstanding financial liabilities (quantifying and setting out separately the balances for commercial paper liabilities, guarantee liabilities, balances owing to licensed lending institutions, and any other financial liabilities).

The monthly filings must also contain a certificate signed by two officers authorised by the board for this purpose, stating that to the best of their knowledge and belief these statements accurately state the financial liabilities of the issuer or guarantor (as the case may be), stating the purposes of any incremental borrowings or guarantees since the last monthly filing, and stating whether or not any guarantor of the issuer’s commercial paper has been called on to pay under the guarantee (and, if so, whether it has paid under the guarantee and whether it has been repaid by the issuer).

The FSC must make these annual, quarterly and monthly filings available to the public, both for inspection and to make copies.

37 If the company makes the offering through a licensed dealer(s) in securities, the requirement is to deliver the Information Memorandum to the FSC and the licensed dealer(s).

38 Including a certified extract of the borrowing resolution (para. 12c), a certified extract of the provisions in its constitutional instruments that govern borrowing (para. 14(2)b), and a legal opinion which is only valid for 6 months - para. 13(2).

39 At the public's cost - regulation 16.

40 Para. 23

41 Para. 18

42 Within 30 days of each month-end.

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The disclosure regime for commercial paper is very detailed and relatively onerous⁴³, and in the writer's view has been a factor behind the disappearance of a market in short term private debt since the mid-1990s when that market flourished in unregulated abandon⁴⁴.

While the situation which prevailed in the mid-1990s was untenable and dangerous, the marked decline in this important component of Jamaica's capital market is not a welcome development.

In the writer's view, the FSC should revisit these Regulations with a view to - (a) making exceptions for private placements, and (b) trimming the disclosure requirements so that they bear logical proportion to the less onerous requirements which currently apply to public offerings of longer term (and therefore higher risk) capital such as bonds and (even riskier) equity.

3. Miscellaneous disclosure rules applicable to regulators, licensed dealers and underwriters

Disclosure by Regulators

Reference was made earlier to the tension that can arise between the public interest in full

and timely disclosure to investors, and the competing public interest that regulators should be able to deal in confidence with their regulated entities so as to encourage honest and transparent disclosure to them of all pertinent issues.

Generally speaking, in our law the latter interest trumps the former⁴⁵.

Therefore, while the financial statements of many types licensed-taking entities are required to be publicised in one manner or another⁴⁶, the employees and officers of the regulator of deposit-taking entities (the Bank of Jamaica) are under a strict statutory obligation of confidentiality in relation to information coming to them in the course of carrying out their regulatory functions ⁴⁷.

The FSC's employees and officers are under a similar statutory obligation of confidentiality in relation to its licensed dealers and investment advisers⁴⁸.

⁴³ The disclosure regime should recognise that it is uneconomic for an issuer to incur substantial issue costs in preparing a comprehensive Information Memorandum to raise capital that must be repaid within a year.

⁴⁴ Except, of course, GOJ Treasury Bills and BOJ repos, which do not have to comply with the commercial paper regulations because they only apply to companies.

⁴⁵ This is justifiable public policy, given the proven need for effective regulatory supervision of the financial sector and the enormous potential costs to society of ineffective regulatory oversight due to an inadequate or inaccurate flow of information to regulators from their licensees.

⁴⁶ Surely the law should be amended to require similar public disclosure of the financial statements of licensed dealers in securities, which now collectively manage more of the nation's savings than deposit-taking institutions.

⁴⁷ Section 34D of the Bank of Jamaica Act

⁴⁸ Section 59B of the Securities Act

Disclosure by licensed dealers to clients

Licensed dealers are also required to maintain standards in relation to ensuring that no

trade is conducted on the dealer's behalf, or on behalf of selected clients, when the dealer has material information that has not yet been made public⁴⁹.

Where licensed dealers or investment advisers (or their representatives) are making a written communication in which they expressly or impliedly make a recommendation with respect to securities, they must include a concise statement of the nature of their interest in the securities or in the acquisition or disposal of those securities (or the interest of any of their associated person) ⁵¹.

Licensed dealers are required to inform clients beforehand, in cases where the licensed dealers are dealing in securities as principals rather than as agents⁵².

Disclosure by underwriters

A person who subscribes for or purchases securities for the purpose of offering them for sale to the public, must not make a recommendation with respect to those securities unless he has informed all persons to whom the recommendation is made that he has acquired the securities for that purpose⁵³.

If an underwritten offering is not fully taken up, the underwriter who has to take up the shortfall cannot make an offer to sell⁵⁴ or a recommendation with respect to those securities for 90 days after the offer closes, without also stating that he has acquired the securities as an underwriter due to the offer not being fully taken up.

4. Disclosure by directors and substantial shareholders of their interests in an issuer's securities

The company law position

The new Companies Act⁵⁵ creates a complex set of rules relating to disclosure of directors' interests in a company's shares and debentures, which apply to all companies

(private and public).

A director must notify the company in writing - (i) if he becomes, or ceases to be, interested in shares or debentures of the company, its subsidiary or holding company, or

49 Securities (Conduct of Business) Regulations 1999, para. 9(1)(b)

50 “in type no less legible than that used in the remainder of the communication”

51 Section 39 of the Securities Act

52 Section 40 of the Securities Act

53 Section 39(4) of the Securities Act

54 This on-sale restriction does not apply if it is effected in the ordinary course of trading over a recognised stock exchange.

55 Section 196, in tandem with the Fourteenth Schedule

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any subsidiary of its holding company, (ii) if he enters into a contract to sell any such shares or debentures, (iii) if he assigns a right granted to him by the company to subscribe for shares or debentures, or (iv) if any of the said affiliates of the company grants him a right to subscribe for shares or debentures, or if he exercises or assigns such a right. His notice must state the number or amount, and the class of the share and debentures involved.

If a person becomes a director of a company at a time when he is interested in shares or debentures of the company, its subsidiary or holding company, or a subsidiary of its holding company, he must notify the company in writing of his said interest (and the number of shares or amount of debentures in which he has an interest). This notice must be given within 5 days after he has knowledge of his interest⁵⁶.

The Fourteenth Schedule to the new Act defines in very wide terms when a person is deemed to have an interest in shares or debentures, and also imposes some additional requirement relating to these obligations. For example, if a director is buying or selling shares or debentures, the price will normally have to be disclosed in his notice to the

company.

The disclosure obligation under section 196 applies to “shadow directors” in the same manner as it applies to directors.

Confused overlap with the Securities Act

The rules in section 196 do not apply to directors of companies licensed under the Securities Act and to whom sections 54 and 55 of the Securities Act apply⁵⁷. Since sections 54 and 55 of the Securities Act apply to directors of issuers of securities (and not to companies licensed under that Act, as such), section 196(7), which was intended to avoid an overlap between the two different disclosure regimes in the two statutes, is unhelpfully worded.

To make some sense out of this, the word “and” in section 196(7) may have to be construed disjunctively, so as to avoid the unintended consequence that section 196(7) only applies to public companies which are also licensees under the Securities Act (a rather elite group). In any event, it is hoped that this matter will be corrected by an early amendment to the new Act.

The securities law position

The provisions in the Securities Act on these matters are limited to issuers⁵⁸.

⁵⁶ Fourteenth Schedule, paragraph 12, new Companies Act

⁵⁷ section 196(7)

⁵⁸ And therefore do not apply to private companies.

A director of an issuer must notify the issuer within 14 days of the director becoming interested in the securities of the issuer or any associated person (giving particulars of the numbers of securities).

Similar notification is required where the director ceases to be interested in those securities, or contracts to buy or sell those securities, or is granted the right to subscribe for shares in the issuer's holding company, subsidiary or sister subsidiary⁵⁹.

Once a person becomes interested in at least 10% of the issuer's voting shares, or if a person has such a position and then either further increases it or reduces it, the person must notify the issuer within 14 days of the change (stating the number of shares involved)⁶⁰.

In the above cases, the issuer must inform the recognised stock exchange no later than the next day after being notified, and the recognised stock exchange may publish the information⁶¹.

Who should lead the reshaping efforts for greater public disclosure of information and transparency?

This question, asked of me by the organisers of this seminar, is premised on the assumption that there need to be reshaped efforts for greater public disclosure of information and transparency.

In my view, however, the priority at this time should be a comprehensive review of the Jamaica's laws relating to disclosure in the context of securities, seeking to achieve :

- A. The elimination of the confusing overlaps of different rules governing the same subject matter;
- B. The development of a body of laws governing disclosure, rooted in the reality of our current stage of development as a society and an economy, which seeks to introduce a coherent balance between the interests of encouraging the growth and development of the capital markets and the securities industry on the one hand, and educating and protecting the investing public on the other hand; and
- C. The drafting of that body of laws in a form and language that is sufficiently

simple, clear and straightforward as to be readily comprehensible to the average Jamaican businessman and investor.

But to revert to the question posed, while it is true that we are emerging from an era when companies (even public ones) felt that investors should just trust them without seeking to know too much about their businesses, it is clear that there have been substantial

⁵⁹ Section 54 of the Securities Act

⁶⁰ Section 58 of the Securities Act

⁶¹ Section 54(5) of the Securities Act

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improvements in recent years in developing a culture of greater public disclosure of information and transparency:

* The adoption of IFRS in Jamaica requires companies to produce annual and interim financial statements that provide greater disclosure and transparency with respect to important aspects of their operations.

* The thrust⁶² towards bringing corporate governance into the centre of board responsibilities is also making Jamaican company directors more sensitive to the need for adequate disclosure and transparency in dealing with investors in a company's securities.

* The FSC appears determined to promote public awareness through seminars such as this, thereby helping to develop a culture of adequate disclosure and transparency.

* The growth in Jamaica of a vibrant business media, both print and electronic, with journalists positioned along a continuum of financial sophistication, is also forcing entrepreneurs and boards to revisit outdated philosophies.

* The recently-formed Jamaica Security Dealers Association will further encourage participants in the securities industry to strive towards best practices in these

areas.

I therefore believe that the future is bright and we are witnessing the nascent evolution of a Jamaican culture of adequate disclosure and transparency. All components in the society with an interest in the securities industry seem to be playing their part to push us in the right direction. The industry is young, and the will is there to see it flourish into something we can be proud of. I therefore favour ongoing dialogue and constructive action that encourages the consolidation of these trends, rather than coercive measures designed to force changes of habits and attitudes.

Mark J. Golding

November 6, 2004

Author's Note - The above review is prepared for a presentation at a seminar scheduled for November, 2004 arranged by Jamaica's Financial Services Commission. It is not, and should not be treated as, a comprehensive description or analysis of the laws of Jamaica in relation to disclosure of information. An attempt to summarise the detailed legal provisions would have made this paper excessively prolix, and some legal precision will inevitably have been lost or ignored.

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⁶² Being lead by the PSOJ, with the support of the financial regulators