



CONSULTATION PAPER

**PROPOSED AMENDMENTS TO THE GUIDELINES
FOR ISSUERS OF SECURITIES**

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INTRODUCTION:

1. The Financial Services Commission (“FSC”) has observed the recent promotional activities and disclosures regarding various Public Offerings (“PO”).¹ While the execution of these PO’s have generally been compliant with existing requirements of the issuer guidelines, there is a concern that some aspects of the conduct of market participants may pose risks to the integrity of the capital markets more generally, and to the public offer process, specifically. These concerns revolve around (but are not necessarily limited to) the risk of inappropriate “market conditioning.” As a result, the FSC is proposing to amend its ***Guidelines for Issuers of Securities***.² The aims of these amendments are to ensure that any disclosure concerning POs and the potential issuer are:
 - a. an accurate and fair presentation of the risks as well as the returns;
 - b. not intended to condition the market or arouse public interest in the PO and the issuer; and
 - c. not likely to be deemed as an offer or solicitation to buy unregistered securities and hence a possible breach of Section 26 of the Securities Act, 1993.
2. These amendments will govern aspects of these public disclosures such as the timing, content and the manner in which these disclosures are done. These additional provisions to the issuers’ guidelines will address the three (3) stages of the PO registration process; namely, the pre-FSC registration, the FSC registration and the post-FSC registration stages. It is envisioned that the amended guidelines will standardise the level and nature of issuer-related communications in anticipation of a PO. This will bolster consumer protection and reduce opportunities for market conditioning.

MARKET CONDITIONING:

3. The FSC broadly defines “market conditioning” as any activity that has contributed, or can reasonably be expected to contribute, to effectively preparing the public mind or arousing or diminishing public interest for the securities being offered, or affecting the price at which a security is offered or traded. An issuer or the arranger, or any agent of that issuer, (including a licensed dealer, investment adviser, dealer’s representative and an investment adviser’s representative), insider or connected person to an issuer, who

¹ The term “Public Offerings” (“PO”) in this document is used broadly to define any offer of securities to the public and includes

- a. Initial Public Offers (“IPOs”) of securities of any class;
- b. Additional Public Offers (“APOs”) of securities, for which securities in the same class have already been registered and issued by an issuer; and
- c. IPOs or APOs of securities which are listed or are proposed to be listed on a licensed exchange or are unlisted and traded in Over-The-Counter (“OTC”) markets.

² The Guidelines are meant to provide guidance on the FSC’s expectations regarding market requirements that guide its decision-making in respect of the registration of securities under Section 26 of the Securities Act.

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conducts the following activities prior to an indication of registration of an offering of securities by the FSC would be considered as attempting to condition the market as well as possibly breaching Section 26 of the Securities Act:-

- a. Mailing/distribution of offering materials;
- b. Promotional seminars;
- c. Interviews about the offering (including by telephone);
- d. Placing advertisements with radio, print, social media or television stations; and
- e. Public statements or any of the above activities that do not refer to the proposed offering but include projections of the company's financial performance which may stimulate investors' interest.

4. The FSC will not consider the following disclosures as facilitating market conditioning:

- a. Those made in customary form i.e. the company has previously released information of a similar type in the ordinary course of business;
- b. Disclosures that do not contain projections;
- c. The content, timing and distribution of the disclosure do not suggest a selling effort, but is consistent with similar past releases;
- d. The information is released by agents of the company who have periodically provided such information;
- e. The information is not a part of the prospectus information and is not price-sensitive or expected to influence the price;
- f. The communication by the company does not include any investment recommendations save and except those undertaken during the regular course of business and not relating to the subject of the proposed security to be offered.

5. Similar to other securities regulators³ around the world, the FSC has found it necessary to impose restrictions on pronouncements regarding POs and the potential issuers in order to avoid any undue conditioning of the market. These restrictions cover the three (3) stages of the PO registration process and are explained in the rest of these guidelines.

³ These regulators are from countries such as Australia, Canada, the United States of America and the United Kingdom.

THE PRE-FSC REGISTRATION STAGE

6. The Pre-FSC Registration period begins when a company starts discussion with a broker pertaining to conducting a PO, and ends when the company has submitted a draft prospectus to the FSC.
7. At this stage, the issuer, the arranger and other agents of the issuer including a licensed dealer and its representatives should comply with the following:
 - a. There should be no public statements or discussions by the company's executives, the arranger or other agents of the issuer about a potential PO;
 - b. No new or significantly expanded marketing and public relations campaigns ⁴ related to the company, its brand or its image should be launched;
 - c. Digital or traditional dissemination to the public of any statements or forward-looking information regarding the company's earnings, growth, valuation and prospects is strictly prohibited. Similarly, no information or forecasts on the growth or performance of the company's industry should be shared.
 - d. Whether intentional or unintentional, no public relations and marketing campaigns shall have the effect of arousing interest in the company's shares or promoting public interest in the company;
 - e. There shall be no discussions with the media or with securities analysts pertaining to the PO, business strategy, financial performance and outlook. An exception is given for discussions with the arranger in connection with the due diligence process or pursuant to a non-disclosure agreement;
 - f. Provided that the company does not make any statements relating to the upcoming PO and projections of the company's financial performance, the company may continue its normal practices of
 - i. advertising its products and services,
 - ii. communicating on business and financial development to its customers and suppliers,
 - iii. making public announcements regarding the company's financial and business development,
 - iv. participating in trade shows and other public exhibitions, and
 - v. responding to inquiries regarding the company.
 - g. No act should be carried out that would result in creating publicity that may contribute to conditioning the public mind or arousing public interest in the PO.

⁴ Public relation and marketing campaigns comprise traditional media (such as print and electronic), face to face, online marketing and advertisement including digital methods.

8. Notwithstanding paragraph 7, the company may embark on a Canvassing of the Market Exercise ("CME"), where the issuer and its agents privately and confidentially engage not more than ten (10) large institutional investors. The purpose of this exercise is to allow the company to identify potential key partners for the PO.
9. The FSC should be notified in advance of the commencement of the CME. This notification to the FSC must include the following:
 - a. A list of large institutional investors that the company will engage in the CME,
 - b. An estimated date when the company will submit a draft prospectus to the FSC,
 - c. The proposed date when the CME will be undertaken, and
 - d. Information on what will be disclosed to these institutional investors;
10. The information shared at the CME should not be disclosed to the general public or any individual investor. Each person making any disclosure at these meetings shall disclose his/her interest in and/or relationship to the issuer.
11. While, at the CME, the price or a price range of the PO must not be disclosed and no purchasing of shares are allowed. The following information can be divulged:
 - a. The name and address of the issuer;
 - b. The size of the PO;
 - c. the title and amounts of securities being offered;
 - d. The tentative date or a date range of the PO, including the date when the draft prospectus will be submitted to the FSC and an estimated period when the PO will be open;
 - e. a brief description of the general type of business of the issuer, limited to information such as the general type of products it sells;
 - f. Only factual information about the company and the PO can be shared;
 - g. No financial information and financial performance about the company should be shared; and
 - h. No forward-looking information about the company or its projected financial performance should be revealed.
12. After the CME is completed and the company has concluded its draft prospectus, the company should file its draft prospectus with the FSC. At this time, the broker-dealers, involved with the PO, should file with the FSC copies of the pre-registration communication.

THE FSC REGISTRATION STAGE (SILENT PERIOD)

13. The registration stage, also termed as the “silent period”, begins when a company submits a prospectus and a registration statement to the FSC for review and ends when the FSC provides a non-objection in relation to the PO of securities (under Section 26 of the Securities Act) and registers the issuer with respect to those securities.
14. During this period, all CME should cease. The company, its agent as well as any dealer, investment adviser, dealer’s representative and an investment adviser’s representative who are knowledgeable of the company filing a prospectus to the FSC should not inform any member of the public of the filing of the prospectus or the upcoming PO. Likewise, any key partners or any of the institutional investors, who participated in the CME, must not disclose to the public any information pertaining to the upcoming PO or the filing of the prospectus.

THE POST- FSC REGISTRATION STAGE

15. The post filing stage begins when the FSC provides a non-objection in relation to the PO of securities and registers the issuer with respect to those securities, pursuant to Section 26 of the Securities Act.
16. The amount allocated for the General Public (non-reserve group of investors) should not be less than 60% of the offer.
17. All reserve pools for shares in a PO should be at the same price with the exception for pools for employees and associated persons as described in section 3 of the Securities Act.
18. There should be no reserve pool for the Broker or its clients, as the broker would be in possession of inside information on the issuer prior to the prospectus being made public.
19. If the issuer decides to reserve shares in lieu of broker fees, the agreement should be sent to the FSC with the registration document and the prospectus.
20. After the FSC issues a non-objection letter and registers the issuer with respect to those securities, the company, its arranger and agents involved in the PO, shall cause the prospectus to be published and disseminated to the public. The public will then have fourteen (14) days to consume and ruminate on the information before the opening date of the PO.

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21. During this stage, the issuer, the arranger and any agents of the issuer as well as any dealer, investment adviser, dealer representative or investment adviser representative should conform to the following:
- a. No act, whether intentional or unintentional, shall be done that would result in creating any publicity or promotion that overstates or understates the features of the PO and/or the issuer and therefore may contribute to conditioning the public mind or arousing (or diminishing) public interest in the PO;
 - b. In the case of an APO of securities in the same class as securities already registered and issued, any person who holds an interest in, or who proposes to acquire an interest in, such securities shall refrain from any act that would result in creating publicity that may (i) “contribute to conditioning the public mind or arousing or diminishing public interest” in the APO; or (ii) otherwise affect the price of outstanding securities, outside of normal market practices;
 - c. There should be no public discussions involving any forward-looking information about the company or its projected financial performance and growth;
 - d. Communication to the public should be limited to factual information including the price as outlined in the final prospectus and should not include any projections;
 - e. All forms of marketing and public relations campaigns should include an advisory to remind the public that there are risks involved and directs potential investors to read the relevant section in the prospectus and where the a copy of the prospectus may be ascertained or viewed.
 - f. Only licensed securities dealers, licensed investment advisers and their representatives should give advice to the public. When giving advice, they should indicate that they are licensed by the FSC and disclose their interest in the PO, if any.

FUTURE DEVELOPMENTS & SANCTIONS

22. The FSC will be seeking to amend the securities legislation in order to include provisions that will comprise the abovementioned restrictions on the making of specified disclosures at the various stages of the PO registration process.
23. Disclosures made outside of the permitted parameters, may be considered market conditioning and may result in the FSC taking remedial actions which include but are not limited to the following-
- a. While the application for registration must be received by the FSC a minimum of 30 days prior to the intended commencement date of the issue or resale to the public, the FSC may extend this period by 30 days (or such further period as deemed necessary) in order to allow the FSC sufficient time to assess the information to ensure that proper risk disclosure is conveyed fairly

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and comprehensively to all potential investors;

- b. The FSC may conduct such investigations as are permitted under Section 67F of the Act, and upon the conclusion of these investigations, take such remedial action as are permitted under the Act; and
- c. The FSC may take any other remedial action available under the statutes administered by the FSC.

24. Further, during the course of any investigations under paragraph 23 (b) above, the FSC reserves the right to exercise any discretion permitted under section 26 of the Act in relation to the registration of any security being offered, or underwritten by any person subject to such investigations

COMMENTS

25. The FSC invites comments on any and all aspects of this paper. Comments should be submitted in hard copy or via email, on or before March 5, 2021. Comments may be submitted to:

The Senior Director, Securities
Financial Services Commission
39-43 Barbados Avenue
Kingston 5

Or by email to:

securities@fscjamaica.org