



CONSULTATION PAPER

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

The Financial Services Commission

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PROPOSED AMENDMENTS TO THE GUIDELINES FOR ISSUERS OF SECURITIES
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ii The Proposed Amendments to The Guidelines for Issuers of Securities (Proposed Guidelines) was first released in in February 2020 and subject to a round of written consultations and virtual consultations with stakeholders. The Financial Services Commission (FSC or Commission) has reviewed these comments carefully and has amended the Proposed Guidelines in keeping with suggestions made. The Commission has also taken the opportunity to propose several additional matters for review by stakeholders. Accordingly, and subject to stakeholder request, we now enclose the proposed amendments for a second round of consultation.

iii The following amendments were made to the Proposed Guidelines after its 2020 release and are provided for easy reference (sections of the document are indicated in **bold**). It should be noted that though the below covers the major amendments, the list is not exhaustive, and stakeholders are encouraged to read the Proposed Guidelines in whole:

- Expanded the definition of Public Offering to include rights issue and any other public offering
- **Market Conditioning** - Elaborated on what the FSC considers attempts at market conditioning
- **Market Conditioning** – Amended provisions which would not be seen as facilitating market conditioning to include:
 - Treatment of regulatory disclosures
 - Further guidance around promotional activities
- **Pre-FSC Registration Stage** – Clarified the beginning of this stage
- **Pre-FSC Registration Stage** – Reduced restrictions in this phase by:
 - Removing marketing campaign restrictions
 - Allowing disclosure of a price range
- **Pre-FSC Registration Stage** – Expanded number of investors allowed to participate in a Canvassing of the Market Exercise (CME) to 20
- **Pre-FSC Registration Stage** – Added a notification requirement to the FSC for the CME
- **Pre-FSC Registration Stage** – Added requirement for a Non-Disclosure Agreement for CMEs
- **Pre-FSC Registration Stage** – Expanded disclosures allowed at CMEs to include:
 - Price range
 - Audited Financials
 - Projections which have been opined on by auditors for start ups

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- **FSC Registration Stage** – Added restrictions on trading in shares for reporting issuers
- **Post-FSC Registration Stage** – Reduced period between publication and opening date and added requirement for a minimum time for offer to remain open
- **Post-FSC Registration Stage** – Clarified disclosures which may be made during this period
- **Additional Market Disclosures** – Reduced minimum public pool to 40%
- **Additional Market Disclosures** – Introduced lockup period for investors who may benefit from lower priced pools
- **Additional Market Disclosures** – Provided clarification and expansion around reserve pool for brokers
- **Additional Market Disclosures** – Added guidance around allotment disclosures
- **Additional Market Disclosures** – Added requirement for auditor compilation of 6-month financials and audit of financials 9 months or above
- **Additional Market Disclosures** – Added a declaration from advisers

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INTRODUCTION

1. The Financial Services Commission (“FSC”) has observed promotional activities and disclosures regarding various Public Offerings (“PO”).¹ While the execution of these PO’s has 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 “market conditioning.” As a result, the FSC is proposing to amend its *Revised Guidelines for Issuers of Securities* (SR-GUID-08/05-0017).
2. The aim of these amendments is to ensure that any disclosure concerning POs and the potential issuer is:
 - a. an accurate and fair presentation of the risks as well as the returns;
 - b. not deemed as attempting to condition the market; and
 - c. not likely to be deemed as an invitation or solicitation of offers to buy unregistered securities and hence a possible breach of Section 26 of the Securities Act, 1993.
3. These amendments will govern aspects of 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

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

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;
- c. Secondary Public Offers (SPOs) these are public share sale offers by a selling shareholder,
- d. Right issues, and
- e. Any other public offering.

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and an investment adviser's representative), insider or connected person to an issuer, who conducts the following activities prior to the FSC's registration of an offering of securities 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 regarding the offering of securities
 - c. Interviews about the offering (including but not limited to via telephone, teleconferencing and electronic platforms for virtual communication or conferencing)
 - d. Placing advertisements concerning the offering with radio, print, social media or television stations; or via the Internet through the use of social media platforms
 - e. Any such activity that directly or indirectly, refers to the future performance of the issuer which may stimulate investor's interest.
5. Notwithstanding paragraph 4, the FSC will not treat the following as facilitating market conditioning:
- a. any disclosures, including projections and performance, that are the direct result of the issuer complying with its regulatory responsibilities whether in respect of the Jamaica Stock Exchange (JSE), FSC or otherwise, and disclosures to its shareholders;
 - b. Promotional activities, advertisements and disclosures that are made in the customary form and manner i.e. the issuer has previously released information of a similar type in the ordinary course of business and do not contain any projections of the issuer's performance;
 - c. The content, timing and manner of the disclosure do not suggest a selling effort of any securities, but is consistent with similar past releases;
 - d. The information is released by agents of the issuer who have periodically provided such information to the public;
 - e. The disclosure does not include any information which is not a part of the prospectus information and is not price-sensitive or expected to influence the price; or
 - f. The communication by the issuer 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.

THE PUBLIC OFFERING PROCESS

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6. Like other securities regulators² 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.

THE PRE-FSC REGISTRATION STAGE

7. The Pre-FSC Registration period begins when a prospective issuer has executed an agreement with a broker pertaining to conducting a PO, and ends when the issuer or one of its agents has submitted a prospectus to the FSC.
8. At this stage, the issuer, the arranger and other agents of the issuer including other licensees should comply with certain conditions. These entities should not reveal details such as the price consideration, size, and purpose (subject to provision 4 (a) above). Disclosures made by the issuer, pursuant to its reporting obligations to the JSE, in relation to the price of an imminent offer, should be stated in the form of a range. The conditions are as follows:
- a. Besides stating that the issuer is considering or will be undertaking a PO, there should be no public statements or discussions by the issuer's executives, the arranger or other agents of the issuer about a potential PO;
 - b. Regarding an IPO, digital or traditional dissemination to the public of any statements or forward-looking information regarding the issuer's earnings, growth, valuation and prospects is strictly prohibited. Similarly, no information or forecasts on the growth or performance of the issuer's industry should be shared.
 - c. There shall be no discussions with the media or with analysts pertaining to the PO, business strategy, financial performance and outlook. An exception is given for discussions with the arranger and the underwriter in connection with the due diligence process or pursuant to a non-disclosure agreement;
 - d. Provided that the issuer or any of its agents do not make any statements relating to the upcoming PO and projections of the issuer's financial performance, the issuer may continue its normal practices³ below and this will not be considered as market conditioning by the FSC:

² These regulators are from countries such as Australia, Canada, the United States of America and the United Kingdom.

³ Normal practices refers to actions taken by a company that are consistent with the past usual day-to-day customs and procedures of a company in its business operations.

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- i. advertising its products and services,
 - ii. marketing and public relations campaigns⁴ related to the issuer, its brand or its image,
 - iii. communicating on business and financial development to its customers and suppliers,
 - iv. making public announcements regarding the issuer's financial and business development,
 - v. participating in trade shows and other public exhibitions; and
 - vi. responding to inquiries regarding the issuer.
 - e. No act should be carried out that would contribute to conditioning the public mind or arousing public interest in the PO.
9. Notwithstanding paragraph 8, the broker on the behalf of the issuer may embark on a Canvassing of the Market Exercise ("CME"), where the arranger/broker privately and confidentially engages not more than twenty (20) institutional investors⁵ per offer. The issuer may accompany the licensee. However, the issuer must not stage a CME by itself, unless the issuer is a licensee. The purpose of this exercise is to allow the broker and the issuer to identify potential key investors for the PO and to gauge market interest. The FSC will not deem a CME as market conditioning if it is completed pursuant to parts 10 to 14 of this guideline.
10. The FSC should be notified two business (2) days in advance of the commencement of the CME. This notification to the FSC must include the following:
 - a. A list of institutional investors that the company will engage in the CME. This list should include the name of the organisation. A maximum of two (2) persons may represent the institutional investor,
 - b. An estimated date when the issuer will submit a prospectus to the FSC, and
 - c. The proposed date when the CME will be undertaken
11. The information shared, whether oral or written, at the CME should not be disclosed to the general public or any individual investor. All attendees will be required to sign a non-disclosure agreement (NDA). The issuer and its broker should take reasonable steps to prevent the shared information from being imparted to non-participants. Each person making any disclosure at these meetings shall reveal his / her interest in and/or

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

⁵ An institutional investor is a legal entity that manages and invests money on the behalf of their clients and members, such as licensed securities dealers; Insurance companies; commercial banks, buildings societies; and merchant banks.

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relationship to the issuer. If the FSC becomes aware of any participant(s) violating the NDA, that participant(s) will be barred from participating in future CMEs. Please be reminded that any misconduct is likely to affect the fitness and propriety of the person.

12. While, at the CME, 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 prospectus will be submitted to the FSC and an estimated period when the PO will be open
 - e. the price range
 - f. audited financial statements
 - g. only general information about the issuers business such as a description of the business and products/services offered
 - h. only for issuers that are start-ups, realistic projections and forecasts. These projections are to be signed off or opined on by an independent auditor.

13. The issuer, its broker and underwriter should make all efforts to ensure that both oral and written communications at a CME do not include any material misstatements or omissions at the time the communication is made.

14. After the CME is completed and the issuer has concluded its prospectus, the issuer should file its prospectus with the FSC. At this time, the broker-dealers, involved with the PO, should file with the FSC copies of the communication materials shared during the CME.

THE FSC REGISTRATION STAGE (SILENT PERIOD)

15. The registration stage, also termed as the “silent period”, begins when an issuer 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.

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16. During this period, all CME activities should cease. The issuer, its agent as well as any dealer, investment adviser, dealer's representative and an investment adviser's representative who are knowledgeable of the issuer 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. For Reporting Issuers, all parties involved in the CME will be prohibited from conducting trades involving the issuer's shares until the silent period ends.

THE POST- FSC REGISTRATION STAGE

17. The post registration 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.
18. After the FSC issues a non-objection letter and registers the issuer with respect to those securities, the issuer, its arranger or agents involved in the PO, shall cause the prospectus to be published and disseminated to the public. The opening date of the PO shall be at least seven (7) days from the publication of the prospectus and the PO should remain open for at least three (3) business days. The public should be informed that applications for the PO can be submitted to the broker and other selling licensees before the opening date.
19. During this stage, the issuer, (including any connected / associated person or employees) 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 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 as well as make any representations that cannot be substantiated.
 - b. In the case of a PO of securities of a reporting issuer, any person including associated/connected person and employees of the issuer, who holds an interest in, or who proposes to acquire an interest in such securities, is reminded of the provisions of the Securities Act and its attendant regulations, particularly section 39 of the Securities Act.
 - c. There should be no virtual or face to face public discussions, including investor discussions and seminars, involving the issuer and its representatives relating to any forward-looking information

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about the issuer or its projected financial performance and growth, other than the information contained in the prospectus and any disclosure obligations.

- d. Any media communication, including traditional, digital or online advertisement to the public should be limited to factual information and information in the final prospectus.
- e. All forms of public relations and marketing campaigns should include an advisory to remind the public that there are risks involved and direct potential investors to read the relevant section in the prospectus and where a copy of the prospectus may be obtained 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.

ADDITIONAL MARKET DISCLOSURES

- 20. The pool for the General Public (non-reserve group of investors) should not be less than 40% of public offers. For POs of securities greater than J\$2 billion the issuer may apply to the FSC in writing for approval of an exception⁶.
- 21. All pools for shares in a PO should be at the same price except for pools for employees and associated persons of the issuer, as described in section 3 of the Securities Act. A lockup period of three (3) months will apply to any persons participating at a preferential price.
- 22. There should be no reserve pool for the Lead Broker(s) or its clients. However, if the issuer is a broker, the broker can create a pool for its clients, employees, and associated persons. A broker may participate as a Key/Strategic partner in a PO. Also, an issuer may decide to reserve shares in lieu of broker fees, and then the agreement disclosing full particulars of the broker fee arrangement should be sent to the FSC with the registration document and the prospectus. Additionally, the particulars of the agreement must be included in the prospectus.
- 23. The basis of allotment should be sufficiently detailed that prospective investors can understand the methodology that will be used to allocate the offered shares. In the event of an oversubscription in the reserve pool, the oversubscribed amount cannot be transferred from the general pool until applications in general pool are satisfied.

⁶ The FSC reserves the right to make amendments to this amount from time to time as market conditions may dictate.

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24. Where the directors exercise discretion in the allotment process, this should be fully disclosed in the post allocation disclosure.
25. The basis of allotment report must disclose the amount of shares allotted to each pool.
26. For IPOs, an interim 6-month report which forms a part of a prospectus is to be compiled by an external auditor; and any 9-month report included as a part of the said prospectus must be audited.
27. Advisers to the issuer are required to submit a declaration with the initial submission of a prospectus indicating agreement with the submission.
28. Issuers of bond securities will be expected to include in their bond securities prospectuses, credit ratings provided by FSC recognised credit rating agencies. Ratings issued by recognised rating agencies may be a reliable source of information for the average investor in fixed income markets as they provide a methodical assessment of the relative creditworthiness of credit instruments and issuers.

FUTURE DEVELOPMENTS & SANCTIONS

29. 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 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
 - c. The FSC may take any other remedial action available under the statutes administered by the FSC.

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30. Further, during the course of any investigation under paragraph 29 (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

31. 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 April 8, 2022. Comments may be submitted to:

The Senior Director, Securities
Financial Services Commission
39-43 Barbados Avenue
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Or by email to:

securities@fscjamaica.org