



# Securities Finance

in 27 jurisdictions worldwide

# 2011

Contributing editor: Mark Greene



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# Trinidad and Tobago

William David Clarke and Donna-Marie Johnson

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## Statutes and regulations

- 1 What are the relevant statutes and regulations governing securities offerings? Which regulatory authority is primarily responsible for the administration of those rules?

Securities offerings in Trinidad and Tobago are governed by the Securities Industry Act, chapter 83:02 (SIA), the Securities Industry By-Laws 1997, as amended by the Securities Industry By-Laws 2006 (collectively, the SIA By-Laws), 2005 and the Companies Act, chapter 81:01 (the Companies Act). The Trinidad and Tobago Securities and Exchange Commission (the Commission), established under the SIA, is the regulator of the entire capital market, including self-regulatory organisations such as the Trinidad and Tobago Stock Exchange (TTSE) and the Trinidad and Tobago Central Depository Limited (TTCD) (a subsidiary of the TTSE). The Commission is the regulatory authority for securities and regulates, inter alia, public offerings, disclosure and takeover bids.

## Public offerings

- 2 What regulatory or stock exchange filings must be made in connection with a public offering of securities? What information must be included in such filings or made available to potential investors?

Under the SIA an offer of securities is deemed an 'offer to the public' where the securities are offered to the public at large or to any section of the public, whether as clients of persons issuing the prospectus or in any other manner, by way of advertisement or other form of solicitation. An offer to the public does not include an offer by an offeror where:

- the offeror is not a registered issuer under the SIA;
- the offer is made to fewer than 35 persons; and
- the offer can be regarded as not being calculated to result directly or indirectly in the securities becoming available for subscription or purchase by persons other than those receiving the offer or invitation, or otherwise as being a matter of domestic concern of the person making and receiving it.

The following filings are required:

- the issuer must be registered with the Commission as a reporting issuer;
- the security must be registered with the Commission by the filing of a registration statement; and
- a prospectus in connection with the proposed offer is required to be filed with the Commission (if the securities being offered were previously issued pursuant to an exemption under the SIA a block distribution circular in lieu of a prospectus).

Trinidad and Tobago Securities Law prescribes the information that must be included in the prospectus. The prospectus must contain such information and comply with such other requirements as may be prescribed by the Commission. In addition, the prospectus is

required to contain such information as investors and their professional advisers would reasonably require and expect to find therein for the purpose of making an informed assessment of:

- the assets and liabilities, financial position, profits, losses and prospects of the issuer;
- the rights attaching to such securities; and
- the merits of investing in the securities and the extent of the risk involved in so doing.

The Commission has issued prospectus guidelines for public offerings which detail the information required to be disclosed in the prospectus (see [www.ttsec.org.tt](http://www.ttsec.org.tt)). The following are the salient guidelines:

- the prospectus must set out the critical dates for the public offering;
- the purpose of the public offering must be clearly explained;
- the prospectus must contain full details of:
  - the number and type of securities to be issued or offered;
  - classes of securities and rights attaching to the securities regarding voting, dividends, liquidation and any special rights;
  - the number of securities proposed to be issued or offered to different groups of investors;
  - where there is, or is to be, more than one class of securities of the corporation in issue, similar particulars must be given for each class; and
  - if, in conjunction with the public offering, securities of the same or another class are sold or subscribed privately, the nature of such sale or subscription and the number and characteristics of the issue concerned;
- the prospectus must also contain details about the pricing of securities and full details of:
  - the minimum subscription to be raised in order to satisfy the objectives of the public offering;
  - the estimated net cash proceeds from the public offering;
  - how the proceeds raised by the public offering will be used;
  - the time frame for the full use of the proceeds; and
  - the financial impact on the corporation or group from the use of the proceeds.

The prospectus must also contain the expenses relating to the public offering on an aggregate basis, including the aggregate remuneration paid for services of the experts and where a forecast is included it must be reviewed and reported on by an accountant.

In addition to listing the documents to be made available for inspection, the prospectus must further contain or disclose:

- information about risks associated with investing in the issuer and the group of which the issuer forms part, and where applicable, any risks associated with the assets to be acquired by means of the public offering;

- information on the issuer and its group including the history of the business or enterprise, the authorised issued and paid-up capital and changes therein since the date of incorporation, the subsidiary and associated companies, major customers and suppliers and the future plans strategies and prospects of the issuer and its group;
- information on the shareholders, directors or key management, related-party transactions or conflicts of interest, approvals, major licences and permits obtained, conditions attaching (if any) and status of compliance and information on land and buildings owned by the issuer and its group;
- specific historical financial information about the issuer;
- a directors' report with specific information; and
- instructions regarding how to apply for the securities pursuant to the prospectus and how to complete applications.

The issuer may also enter into a listing agreement with TTSE for listing of the securities on the TTSE. In order for securities to be traded on TTSE they must also be registered with TTCD, which maintains a register of beneficial owners.

- 3** What are the steps of the registration and filing process? May an offering commence while regulatory review is in progress? How long does it typically take for the review process to be completed?

As discussed in question 2, persons may not issue securities to the public unless a registration statement has been filed and may not distribute securities to the public unless a prospectus containing the requisite information has been filed with the Commission. Distribution of securities includes issuing previously unissued securities, selling previously issued securities from a holding that materially affects control of the issuer or reselling securities acquired pursuant to an exemption under the SIA.

A registration statement in the form prescribed in the SIA By-Laws together with a flat fee of TT\$100 and a market access fee calculated in accordance with the SIA By-Laws, a copy of the constituent documents of the company and a copy of the company's last audited financial statements, must be filed with the Commission at least 14 days prior to the date of issue of the securities. There is no approval process for the filing of a registration statement.

An issuer who wishes to distribute securities pursuant to a prospectus must file a prospectus with the Commission together with a flat fee of TT\$10,000. The prospectus is reviewed and once approved, a receipt for the prospectus is issued by the Commission. An approval is granted once the contents of the prospectus meets and complies with the guidelines issued by the Commission, the SIA By-Laws and rules. The Commission may not refuse to approve a prospectus without giving the person who filed the prospectus an opportunity to be heard. A person directly affected by a final order of the Commission may appeal the order to the Court of Appeal.

Where the offer of securities is still open and there is a material change affecting any information required by the SIA to be included in the prospectus, or a material fact occurs, the inclusion of which would have been required if such fact had arisen when the prospectus was prepared, a supplementary prospectus containing particulars of such material change or fact, as the case may be, is required to be filed with the Commission.

Albeit a registrant may solicit expressions of interest from prospective purchasers with respect to a proposed distribution (see question 4), the SIA prohibits the commencement of a distribution while the regulatory review is in progress.

The SIA does not prescribe a fixed time period for the review process. It provides that a receipt for the prospectus will be issued within a reasonable time after the date of filing of a prospectus. In practice, the review typically takes between two to four weeks from the date of filing.

- 4** What publicity restrictions apply to a public offering of securities? Are there any restrictions on the ability of the underwriters to issue research reports?

There are no publicity restrictions in the SIA that apply to the public offering of securities.

The SIA does not place restrictions on the ability of an underwriter to issue research reports.

- 5** Are there any special rules that differentiate between primary and secondary offerings? What are the liability issues for the seller of securities in a secondary offering?

The SIA does not create any distinction between, nor does it categorise, primary and secondary offerings. Accordingly, there are no special rules.

- 6** What is the typical settlement process for sales of securities in a public offering?

The typical settlement process is delivery of the security (or evidence of the purchaser's ownership of same or an interest therein) against payment through a paying agent appointed by the issuer or a recognised clearing system. Evidence of ownership is usually in the form of a certificate issued by the issuing agent or registrar for the issuer.

All new shares listed on TTSE (whether shares of a new issuer or new shares of an existing issuer) must be registered with the TTCD, which maintains a register of beneficial owners. Such registration will fully dematerialise new issues of shares where no traditional share certificates will be issued. Evidence of share ownership will be in the form of a statement that will rank *pari passu* with traditional share certificates. The intention of the TTSE in establishing the TTCD is to move to an electronic paperless system in order to reduce errors and the settlement cycle from T+5 to T+3 (ie, settling transactions within three days instead of five). Dematerialisation means the TTCD must manage the share register after the issue.

Public offerings of securities in Trinidad and Tobago are typically underwritten (typically a lead underwriter will establish a syndicate to purchase the securities for resale to the public). After the Commission approves the prospectus, subject to satisfactory pricing terms, the underwriters will commit as principals to purchase the securities at the public offering price for their own account and will earn a commission for so doing. The terms of sale and purchase are set out in an underwriting agreement.

#### Private placings

- 7** Are there specific rules for the private placing of securities? What procedures must be implemented to effect a valid private placing?

There are no special statutory provisions or rules governing a private offering of securities to fewer than 35 persons. The issuer is not required to register as a reporting issuer or file a registration statement with respect to the security. It should be noted however, that the Commission has adopted the position that a reporting issuer is required to file a registration statement with respect to all of its securities even in the case of an offering to fewer than 35 persons.

In the case of an offer to 35 or more persons, the SIA does provide for a number of exemptions from the prospectus requirements with respect to the distribution of securities in certain specified circumstances.

Securities may be distributed to the public without the need to file a prospectus with the Commission provided that the issuer is entitled to rely on an exemption under the SIA, namely, a distribution to fewer than 50 purchasers each of whom is defined as a 'sophisticated purchaser' under the SIA; and where a 'limited offering' is made within such time as may be prescribed by the Commission to not more than 35 purchasers.

In appropriate cases the Commission may grant special exemptions from the requirements to register the security and to file a prospectus upon the application of interested parties (for example, the Commission has in the past granted exemptions to development or management companies incorporated as part of residential development schemes).

For the purpose of questions 7, 8 and 9, such distributions are also treated as private placements.

- 8** What information must be made available to potential investors in connection with a private placing of securities?

There is no specific provision in the SIA. However, the Commission as a matter of policy requires that details of the security being distributed as a private placement and the legal documents constituting such security must be made available to prospective investors. In practice, issuers will provide an information memorandum containing details about the issuer and its business, its shareholders and directors, the terms and conditions of the security, risk factors and such other information as is considered necessary or appropriate for compliance with common law disclosure obligations, or to enable investors to make an informed decision on the investment.

- 9** Do restrictions apply to the transferability of securities acquired in a private placing? And are any mechanisms used to enhance the liquidity of securities sold in a private placing?

If a person distributes securities relying on an exemption from the prospectus requirement, the securities will not be freely transferable on the secondary market.

In the case of a 'limited offering', the issuer or selling security holder is required to obtain an agreement from each purchaser that is filed with the Commission, under which such purchaser agrees to file, or causes to be filed with the Commission, a prospectus with respect to the securities, if a sale of securities purchased by him results in there being more than 35 owners of the distributed securities within two years of the completion of the distribution or such other time as the Commission prescribes.

Under the SIA the Commission may prescribe that such statement, as it thinks fit, shall be printed on a certificate for a security sold pursuant to the applicable exemption. In the case of a distribution to fewer than 50 purchasers, each of whom is a 'sophisticated purchaser' as defined in the SIA, it is normal to print on a certificate for a security sold pursuant to such a placement that a transfer of the security is limited to sophisticated purchasers.

The SIA does not provide for mechanisms to enhance the liquidity of securities sold in a private placing.

### Offshore offerings

- 10** What specific domestic rules apply to offerings of securities outside your jurisdiction made by an issuer domiciled in your jurisdiction?

The same rules apply to the issue by a Trinidad and Tobago issuer of securities locally or abroad whether through a public offering or a private placement.

### Particular financings

- 11** What special considerations apply to offerings of exchangeable or convertible securities, warrants or depositary shares or rights offerings?

Issuers may offer exchangeable or convertible securities and warrants. In relation to depositary receipts, the Commission has proposed draft by-laws intended to be passed shortly, for the issuing of Trinidad and Tobago depositary receipts (TTDR) (see 'Update and trends'). The offering and distribution of exchangeable or convertible

securities, warrants and rights offerings are regulated by the relevant provisions of the SIA, the Companies Act and the constating documents of the issuer.

### Underwriting arrangements

- 12** What types of underwriting arrangements are commonly used?

There are two types of underwriting arrangements commonly used: agency or best efforts arrangements (where underwriters agree to use their best efforts to sell the securities on behalf of the issuer) and underwritten arrangements. There is one type of underwritten arrangement, namely, a 'bought deal arrangement', where the underwriter's task is to purchase securities from the issuer at closing, then resell them to the purchaser.

- 13** What does the underwriting agreement typically provide with respect to indemnity, force majeure clauses, success fees and over-allotment options?

### Indemnity

The underwriting agreement typically contains provisions with respect to indemnity and termination rights. Underwriters are generally indemnified against any losses they may incur in connection with performing their underwriting services.

### Termination rights

Underwriters usually retain the right to terminate an underwriting agreement in the following circumstances:

- an investigation or order that prevents or restricts the distribution of the offered securities or trading in the securities of the issuer;
- new legislation or any occurrence of national or international consequence that in the judgement of the underwriters, will or will likely have a material adverse affect on either the financial markets or the issuer's markets;
- the state of the financial markets is such that in the judgement of the underwriters the offered securities cannot be profitably marketed; and
- the occurrence of a material change (ie, any change in the issuer's business, operations or capital that would reasonably be expected to have a significant effect on the market price or value of the issuer's securities) or a change in a material fact that, in the judgement of the underwriters, will materially and adversely affect the market price or value of the offered securities.

### Success fees and over-allotment options

Success fees and over-allotment options are not typically included in the underwriting agreements with which we are familiar.

- 14** What additional regulations apply to underwriting arrangements?

The Commission has established guidelines on capital requirements for underwriters and issuers of asset-backed securities registered under the SIA.

### Ongoing reporting obligations

- 15** In which instances does an issuer of securities become subject to ongoing reporting obligations?

An issuer of securities becomes subject to ongoing reporting obligations when it becomes a public company as defined under the Companies Act and a reporting issuer under the SIA.

The Companies Act defines a public company as a company any of whose shares or debentures are or were part of a distribution to the public, ie, when in respect of the share or debenture, inter alia, there has been under the laws of Trinidad and Tobago or any other

### Update and trends

The Securities (No. 2) Bill 2010 (the Proposed Securities Act) has been prepared and is currently before the Parliament of Trinidad and Tobago. The purpose of the the Proposed Securities Act is to provide protection to investors from unfair, improper or fraudulent practices; foster fair and efficient capital markets and confidence in the capital markets in Trinidad and Tobago and to reduce systemic risk; to cooperate with other jurisdictions in the development of fair and efficient capital markets; and for other related matters. This bill when passed and brought into force will repeal the existing SIA and will bring the securities regulatory regime to the level of best international practice, giving the Commission the ability to adapt to the evolving financial landscape.

The proposed Securities Act will effectively increase the powers of the regulator and provide for greater transparency through increased disclosure obligations, while providing enhanced enforcement tools in the form of increased penalties, disgorgement (the repayment of ill-gotten gains) and the ability of investors to take civil action against

reporting issuers for misrepresentations. The Proposed Securities Act will advance accountability and integrity by requiring that persons entrusted with fiduciary responsibility, such as directors and senior officers of public companies, are held responsible for a reporting issuer's failure to comply with its disclosure obligations.

The Proposed Securities Act will also strengthen the capacity to regulate cross-border financial activity by providing the Commission with the power to cooperate with regulatory authorities at local, regional and international levels in investigations and in connection with prosecutions. This will strengthen the Commission's ability to effectively prosecute all violations of its securities laws whether by local or international market actors.

In keeping with the standards of international practice, the Proposed Securities Act will also require insiders to report their ownership of and transactions in securities of issuers of which they are insiders. This public reporting will provide valuable information to the market and minimise the possibilities of insider abuse.

jurisdiction a filing of a prospectus, statement in lieu of prospectus, registration statement, stock exchange take over bid circular or similar instrument; or the share or debenture is listed for trading on any stock exchange wherever situated.

**16** What information is a reporting company required to make available to the public?

#### Under the SIA

A reporting issuer is required within four months after the end of its financial year to:

- file with the Commission a copy of its annual report containing the information prescribed by the Commission and any other information that is not of a type prohibited by by-law;
- send to each of its security holders such financial statements as the Commission may prescribe; and
- file such other reports in such form as may be prescribed.

In addition, where a material change occurs in the affairs of a reporting issuer, it is required to file with the Commission as soon as practicable, but no later than seven days after the change occurs, and to issue a press release authorised by a senior officer, disclosing the nature and substance of the change.

Further, a reporting issuer is required to:

- file an interim financial statement for the periods prescribed in the SIA By-Laws with the Commission within 60 days of the date on which it is prepared;
- file annually a comparative financial statement relating to periods prescribed under the SIA By-Laws; and
- provide the Commission, on or before the time periods defined in the SIA, with a notice of any a change in the ending date of a financial year and the reason therefor.

#### The Companies Act

A public company is required to:

- keep a register showing the required particulars with respect to any interest in shares in, or debentures of, the company or any affiliate or associate of the company that is vested in a director and to notify the Commission of any entry therein or change thereof;
- keep a register showing the names of its 'substantial shareholders' (ie, persons entitled to exercise at least 10 per cent of the unrestricted voting rights at a general meeting of a company) and to notify the Commission of every entry therein and every change thereof;
- place before its shareholders at every annual meeting comparative financial statements for the periods prescribed in the Com-

panies Act and to deliver same to the registrar of companies (registrar) not less than 21 days before each annual meeting (or forthwith where a resolution is signed by the board in lieu of an annual meeting, and in any event not later than 15 months after the last date when the last preceding annual meeting should have been held or a resolution in lieu of meeting should have been signed) and to notify the registrar and the Commission of any error or misstatement of which it becomes aware in relation to any comparative financial statements filed with the Commission; and

- notify the Commission of and advertise in a daily newspaper the record date fixed for determination of the shareholder who are entitled to receive notices of meetings not less than seven days before the record date so fixed.

#### Under the TTSE Rules

Effective 28 April 2010, all publicly listed companies are required to provide to the TTSE within prescribed time frames:

- quarterly financial statements;
- audited annual financial statements;
- annual report;
- communication of information relating to all dividend payments, profit announcements, rights or bonus issues, acquisition or sale of assets, significant changes in share ownership or control and any other information necessary to enable share/stockholders to appraise the position of the company; and
- reports on trading by directors and senior officers.

#### Anti-manipulation rules

**17** What are the main rules prohibiting manipulative practices in securities offerings and secondary market transactions?

The SIA prohibits the following manipulative practices:

- a person may not, directly or indirectly, effect a series of transactions in any security or any securities market thereby creating actual or apparent active trading in such security, for the purpose of inducing the purchase or sale of security by others;
- a member of a self-regulatory organisation or dealer or person selling or offering for sale, or purchasing or offering to purchase, any security in consideration or anticipation of any reward or benefit or otherwise, is prohibited from inducing the purchase or sale of such security or any securities market by the circulation or dissemination, in the ordinary course of business, of information to the effect that the price of any such security will or is likely to rise or fall because of market operations by any one or more persons, conducted for the purpose of raising or depressing the price of such security; and

- a person is prohibited, directly or indirectly, in connection with the purchase or sale of any security from:
  - employing any device, scheme or artifice with the intention to defraud;
  - engaging in any act, practice or course of business that operates or would operate as a fraud or deceit on any person; and
  - making any untrue statement of a material fact or omitting to state a material fact with the intention to mislead.

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#### Price stabilisation

- 18** What measures are permitted in your jurisdiction to support the price of securities in connection with an offering?

At present there are no provisions in the SIA that deal with price stabilisation in connection with an offering. It is to be noted, however, that rule 405 of the Trinidad and Tobago Stock Exchange Rules, empowers the market official to suspend dealing in a security if the offer price rises or the bid price falls more than a prescribed percentage above or below the closing price of the previous business day.

The market official may also suspend dealing in any security if the buying or selling price changes abruptly without due apparent reason.

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#### Liabilities and enforcement

- 19** What are the most common bases of liability for a securities transaction?

##### Criminal liability

Any person who knowingly or recklessly makes a misrepresentation in a prospectus is guilty of an indictable offence and is liable to a fine of TT\$100,000 and to imprisonment for two years.

##### Civil liability

###### Statutory (under the SIA)

A person who, on the faith of a prospectus, subscribes for or purchases any securities may bring an action for loss or damage sustained by reason of any untrue statement in the prospectus, or by reason of the wilful non-disclosure in the prospectus of any matter of which the designated person had knowledge and that he knew to be material. The designated persons against whom an action may be brought are:

- a director of the issuer at the time of the prospectus;
- a person who authorised or caused himself to be named, and is named, in the prospectus as a director or as having agreed to become a director, either immediately or after an interval;
- a person who was involved in the incorporation of the issuer; and
- a person who authorised or caused the issue of the prospectus.

A security holder may maintain an action against an issuer that has allotted securities under a prospectus for rescission of the allotment and the repayment to him of the whole or part of the issue price that has been paid in respect of the security, if:

- the prospectus contained a material statement, promise or forecast that was intentionally false, deceptive or misleading; or
- the prospectus did not contain a statement, report or account required under the SIA or the by-laws.

###### Common law

A purchaser of securities may also have a right of action for breach of contract against any person whose misrepresentation induced the purchase, whether the misrepresentation was made in the prospectus or otherwise.

- 20** What are the main mechanisms for seeking remedies and sanctions for improper securities activities?

The main mechanisms for seeking remedies and sanctions for improper securities activities are administrative proceedings, initiated by the Commission. Criminal prosecution is rare. See question 19.



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