

PRESS RELEASE

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“No substantive change in Information Sharing procedures resulting from draft securities legislation”

Earlier this week the Securities Commission of The Bahamas (the Commission) issued a press release advising the public that it had become a Signatory ‘B’ to the Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and Exchange of Information (MMOU). The MMOU was established by the International Organization of Securities Commissions (IOSCO). The public was further advised that the Commission had signed the MMOU as a Signatory ‘B’ because the current information-sharing provisions in Bahamian securities legislation do not comply with some of the terms of the MMOU. By signing the MMOU as a Signatory ‘B’, the Commission has undertaken to make the necessary legislative changes to enable it to meet all of the terms of the MMOU.

The provisions of the draft Securities Industry Act and Regulations (the draft securities legislation), released for public consultation on May 11, 2009, reflect the provisions necessary to enable the Commission to become a Signatory ‘A’ to the MMOU. The Commission therefore anticipates that once the draft securities legislation is brought into force the Commission’s change in status to a Signatory ‘A’ would be imminent. The information in this article provides a general analysis of the differences between the present and proposed provisions and what the impact would be in practical terms.

In October 2002, IOSCO adopted the MMOU as the model for international co-operation. The MMOU establishes standards to be applied by IOSCO Members when making or responding to requests for information. At the April 2005 Annual Conference of IOSCO a timetable was agreed for all member regulators, not already signatories to the MMOU, to meet the standards of the model by January 1, 2010. The draft securities legislation gives the Commission authority to share information with both domestic and foreign regulatory authorities consistent with international best practices.

The Commission is authorized under the draft legislation to exercise **any** of its powers, at the request of another domestic regulatory authority (such as the Central Bank of The Bahamas, the Office of the Registrar of Insurance or the Compliance Commission) and may, on its own initiative, provide any such domestic regulatory authority with information the Commission has obtained in the course of carrying out its activities. This assistance may be provided to the domestic regulatory authority to assist in the performance of its function. While the existing legislation enables information-sharing amongst

domestic regulatory authorities, the draft legislation broadens the Commission's authority to exercise any of its powers available under the legislation.

The scope of the Commission's authority to share information with foreign regulators is limited to providing assistance with the supervisory, investigative and enforcement functions of the regulator as they relate to securities and capital market matters. A comparative analysis of the existing legislative provisions on information sharing shows that essentially the standards applied now are not that different to those proposed in the draft securities legislation. Pursuant to the existing Securities Industry Act, 1999:

- (i) The Commission can provide information to foreign regulators;
- (ii) Certain factors, such as the seriousness of the matter and the existence of parallel offences in the Bahamas, may be taken into account when determining whether information should be shared with a requesting authority;
- (iii) The following pre-conditions have to be met; (a) an undertaking of confidentiality is executed by the foreign regulator before the information is provided; or (b) the Commission satisfies itself that the laws of information sharing in the requesting jurisdiction are comparable to those in the Bahamas; and (c) the Commission satisfies itself that the request relates to the functions of the overseas regulatory authority;
- (iv) The Commission may apply to the Court for an Order requiring that a registrant or licensee disclose the information requested by a foreign regulator; and
- (v) The consent of the Commission must be obtained before the information can be shared with a third party.

It is submitted that each of the above requirements substantively exists in the provisions of the draft securities legislation. However, the Commission notes that the key differences in the new legislation are as follows:

- (a) Various issues relating to the Commission's inability to access information from its registrants and licensees will have been addressed;
- (b) Deficiencies in the record-keeping requirements of licensees and registrants of the Commission will be clarified ;
- (c) The Commission's authority to assist a foreign regulator, who is an MMOU signatory, without the foreign regulator having to execute an undertaking concerning confidentiality and onward disclosure before the Commission acts on the request, will be clarified;
- (d) Restrictions on the use of information received from the Commission imposed on foreign regulators in practice, including various restrictions applied to providing consent for onward disclosure of information for use in securities related criminal investigations and proceedings in the requesting state, will no longer exist; and
- (e) The obligation of the Commission to maintain the confidentiality of requests for assistance made to the Commission by foreign authorities will be statutorily established.

Many of the proposed changes will require that participants in the industry are meeting international standards for record keeping and that the Commission has access to that information as presently exists

in other international financial centres. Such changes are being made primarily to ensure that the Commission is properly 'armed' to carry out its statutory mandate, a secondary result of these amendments however is that in doing so, we are able to meet the fundamental requirements of securities regulation and thus the standards of information sharing established by IOSCO.

Further many of the changes identified above relate directly to information-sharing procedures and will consist mainly of clarifications to the process presently applied by the Commission. One change is that MMOU signatories will not be required to execute an undertaking prior to the Commission addressing each one of their requests as their status as signatories addresses this issue. This again is not a substantive change as the terms of the existing undertaking are set out in the MMOU and signatories thereto are required to meet the standards therein for each and every request that they make. Should they not do so then there are various processes by which the Commission can assert its right to deal with that Member as a non-signatory.

Another substantive change is the Commission's obligation to maintain the confidentiality of the request made by an MMOU signatory. This new provision would mean that (a) the Commission could not, as it presently does, provide the background information of a request to the person from whom the information is being requested; (b) licensees, registrants or any person requested to provide information on account holders would be bound not to divulge the existence of the request with their clients; and (c) any objections to providing the information to the Commission would have to be made without the person from whom the information is requested being aware of the background information related to the request or any input from the person in respect of the information is sought.

A first look at these information-sharing provisions would indicate that the changes made are voluminous because of the increased provisions. Considering the proposed provisions from the perspective of substance and content, however, it is clear that the amendments proposed provide clarity to the vague provisions that presently exist in the Securities Industry Act, 1999. The proposed amendments required to the securities legislation as a result of the Commission seeking to become a Signatory 'A' of the MMOU will therefore result in requests for information-sharing being addressed in a transparent environment, in which licensees and registrants of the Commission will fully understand their rights and obligations as well as those of the Commission.

The Commission looks forward to engaging its constituents on their input and comments in relation to these provisions and any other matter that might arise from the proposed provisions in the draft securities legislation. There is a 45-day consultation period with respect to this document with the deadline for comments being June 24, 2009. The Commission welcomes comments on the draft Securities Legislation which may be posted directly in the SIA/SIR Comment Forum using: <http://stats.scb.gov.bs/sia2009/> or posted or emailed to the Commission at **Email: sia2008@scb.gov.bs**.

The commission intends to issue further articles during the next few weeks in relation to other aspects of the draft legislation.