



# Securities Finance

in 18 jurisdictions worldwide

# 2014

Contributing editor: Mark Greene



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*Getting the Deal Through* is delighted to publish the eleventh edition of *Securities Finance*, a volume in our series of annual reports, which provide international analysis in key areas of law and policy for corporate counsel, cross-border legal practitioners and business people.

Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 18 jurisdictions featured.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. *Getting the Deal Through* publications are updated annually in print. Please ensure you are referring to the latest print edition or to the online version at [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com).

*Getting the Deal Through* gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We would also like to extend special thanks to contributing editor Mark Greene of Cravath, Swaine & Moore LLP for his continued assistance with this volume.

**Getting the Deal Through**

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Global Overview	3	Macedonia	67
<b>Mark Greene, Andrew Pitts and George Stephanakis</b> Cravath, Swaine & Moore LLP		<b>Elena Miceva and Dragan Dameski</b> Debarliev, Dameski & Kelesoska Attorneys at Law	
Bermuda	6	Malta	71
<b>Brian Holdipp and Jeremy Leese</b> MJM Limited		<b>Roderick Zammit Pace, Alessandra Camilleri and Christina Sillato Warrington</b> Refalo & Zammit Pace Advocates	
Brazil	11	Nigeria	77
<b>Jean Marcel Arakawa and Vanessa Fiusa</b> Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados		<b>Yinka Edu</b> Udo Udoma & Belo-Osagie	
Chile	16	South Africa	82
<b>Matías Zegers and Josefina Consiglio</b> Bahamondez, Alvarez & Zegers Ltda		<b>Ezra Davids and David Yuill</b> Bowman Gilfillan Inc	
Germany	21	Switzerland	90
<b>Andreas Fillmann and Jörg Uhlmann</b> Squire Sanders (US) LLP		<b>Jacques Iffland and Patrick Schleiffer</b> Lenz & Staehelin	
India	31	Trinidad and Tobago	95
<b>The Capital Markets Group</b> Luthra & Luthra Law Offices		<b>Luana Boyack and Frederick A Gilkes</b> Caribbean Commercial Law Chambers and Menezes Boyack Law Offices	
Ireland	39	Turkey	100
<b>Justin McKenna and David Mangan</b> Mason Hayes & Curran		<b>Umurcan Gago and Bekir Emre Haykir</b> GSG Attorneys at Law	
Japan	47	United Kingdom	107
<b>Masatsura Kadota and Shinichi Araki</b> Nagashima Ohno & Tsunematsu		<b>Padraig Cronin and Daniel Tierney</b> Slaughter and May	
Korea	52	United States	115
<b>Soonghee Lee and Seok Ho Yoo</b> Yoon & Yang LLC		<b>Mark Greene, Andrew Pitts and George Stephanakis</b> Cravath, Swaine & Moore LLP	
Luxembourg	58		
<b>Denis Van den Bulke</b> Vandenbulke			

**Publisher**Gideon Robertson  
[gideon.roberton@lbresearch.com](mailto:gideon.roberton@lbresearch.com)**Subscriptions**Rachel Nurse  
[subscriptions@gettingthedealthrough.com](mailto:subscriptions@gettingthedealthrough.com)**Business development managers**George Ingledew  
[george.ingledew@lbresearch.com](mailto:george.ingledew@lbresearch.com)Alan Lee  
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# Bermuda

**Brian Holdipp and Jeremy Leese**

MJM Limited

## 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?

Given the size and nature of the Bermuda securities market, Bermuda does not have an overarching statutory framework governing this area as do other jurisdictions. The statutes and regulations most relevant to securities offerings in Bermuda are the Companies Act 1981 (the Companies Act) and the Listing Regulations of the Bermuda Stock Exchange (the Listing Regulations).

The Listing Regulations, which reflect accepted international standards, apply to all proposed issuers (local and international) and prescribe the requirements for obtaining and maintaining a listing of securities on the Bermuda Stock Exchange (the BSX). The BSX is the world's largest offshore, fully electronic securities market offering a full range of listing and trading opportunities for international and domestic issuers of equity, debt, depository receipts, insurance securitisation and derivative warrants. The Listing Regulations have been made by the BSX pursuant to the authority vested in it under The Bermuda Stock Exchange Company Act 1992 and are interpreted, administered and enforced by the BSX.

The principal regulatory body in Bermuda is the Bermuda Monetary Authority (the BMA). The BMA has supervisory jurisdiction over the BSX. However, the BMA does not have a general supervisory jurisdiction over the conduct of securities offerings.

Where a Bermuda company applies for its shares to be listed on a stock exchange outside of Bermuda, such a company must abide by the rules and regulations of that stock exchange.

## 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?

The offering of shares to the public is regulated by the Companies Act 1981, specifically, in part III and section 25 thereof. For the purposes of the prospectus provisions, the term 'shares' includes:

- debentures, debenture stock, bonds and any other securities of a company whether or not secured;
- units or sub-units of a unit trust; and
- warrants to be issued by the company conferring an option to acquire shares of such company.

There is a general prohibition contained in section 26 (1) of the Companies Act on a company offering shares to the public unless prior to such an offer it publishes in writing a prospectus, and prior to, or as soon as reasonably practicable after the publication of such a prospectus, it is filed with the Registrar of Companies.

Exceptions to this requirement arise where:

- the shares are listed on an appointed stock exchange, or an application has been made for the shares to be so listed, and the rules of the exchange do not require the company to publish and file a prospectus at such time or in such circumstances;
- the company is subject to the regulations of a competent regulatory authority and such rules or regulations do not require the company to publish and file a prospectus at such time (except where such exemption is given by reason of the offer being made only to persons who are resident outside the jurisdiction of the authority); or
- an appointed stock exchange or any competent regulatory authority has received or otherwise accepted a prospectus or other document in connection with the offer of shares to the public.

The information required to be in or attached to the prospectus is as follows:

- the names, descriptions and addresses of the promoters, officers or proposed officers;
- the business or proposed business of the company;
- the minimum subscription, which, in the opinion of the promoters, directors or provisional directors, must be raised by the issue;
- the rights or restrictions attaching the shares that are being offered;
- all commissions payable on the sale of shares referred to in the prospectus and the net amount receivable by the company in respect of these sales;
- the name and address of any person who owns five per cent or more of the shares of the company (applicable in the case of local companies only);
- any shareholding in the company of an officer of the company;
- a report by the auditors of the company prepared in such a manner and containing such information and copies of such documents as shall be required by rules made under the Companies Act; and
- the date and time of the opening and closing of subscription lists.

Where a company is not required by the Companies Act to publish and file a prospectus, the prospectus contents requirements do not apply.

At present, there are over forty 'appointed stock exchanges' for purposes of the Companies Act. Examples are the ASX Limited, the BSX, the Stock Exchange of Hong Kong Ltd, the London Stock Exchange, the New York Stock Exchange Inc and the Sao Paulo Stock Exchange. Competent regulatory authorities include, for example, the Australian Securities and Investment Commission, the BMA, the Securities and Exchange Commission of Brazil, the Financial Services Authority, the Hong Kong Securities and Futures Commission and the United States Securities and Exchange Commission.

In addition, it is possible to apply to the Minister of Economic Development to seek direction that part III (or any provision of part III) and section 25 of the Companies Act shall not apply to a proposed offer of shares. The direction would typically be issued if the applicant provides substantial justification for receiving such, for example, in circumstances where the offer is being made exclusively to sophisticated investors such as qualified institutional buyers as defined in Rule 144A under the United States Securities Act of 1933 (the Securities Act) or institutional accredited investors within the meaning of Rule 501 (a) (1), (2) or (7) of the Securities Act or any person who is an authorised person within the meaning of the United Kingdom Financial Services and Markets Act 2000.

- 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?

A company that is offering its shares to the public must publish a prospectus prior to such an offer and prior to, or as soon as reasonably practicable after the publication of such a prospectus, file it with the Registrar of Companies, unless otherwise exempt under the Companies Act from the requirement to do so. There is no approval process involved in connection with the filing of a prospectus.

Where an issuer (local and international) seeks to obtain a listing of its equity or debt securities on the BSX, it must comply with the application procedures in the relevant Listing Regulations. New applicants must be sponsored by a BSX-approved trading member or listing sponsor. In addition to ensuring that the issuer receives fair and impartial guidance and advice and acting as the primary channel of communication with the BSX during the application process, the listing sponsor must ensure that the formal application letter, various supporting documents, prospectus and appropriate fees are duly lodged with the BSX.

The nature and extent of the supporting documents differs, based on the type of issuer and security that is being sought to be listed and includes, among other things, certified copies of the issuer's incorporation certificate and constitutional documents, audited annual report and accounts for each year up to three years preceding the application (depending on the type of security that is being sought to be listed), all board resolutions and shareholder resolutions (if necessary) authorising the securities, a copy of the document of title to be used in respect of the securities to be listed or a copy of the trust deed or other document securing or constituting the debt securities. In the case of a secondary listing, one of the supporting documents must be evidence that the issuer is listed on another stock exchange recognised for this purpose by the BSX.

A draft prospectus, including the required financial information and containing such particulars and information as is necessary to enable an investor to make an informed assessment of the issuer and the rights attaching to the securities, must be submitted in sufficient time for the BSX to review it before the proposed publication date. The prospectus may not be dated and issued in final form until the BSX has confirmed that it has no further comments and it must then be distributed to the public. The BSX undertakes to provide a response within seven days from the date of submission of the complete listing application. Usually, it takes about three weeks to complete the entire approval process from the date of submission of the complete listing application.

- 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?

Other than the requirement that a company (that is not otherwise exempt therefrom) publish in writing a prospectus before offering shares to the public (such an offer being one that is capable of

acceptance), there are no publicity restrictions contained in the Companies Act applicable to the public offering of securities.

There are no restrictions on the ability of the underwriter to issue research reports contained in the Companies Act.

- 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 Companies Act does not categorise primary and secondary offerings of equity securities. See question 2 for the prospectus filing requirements relating to a public offer of shares.

The Listing Regulations provide that securities may be brought to listing on the BSX by way of an offer for subscription to the public by an issuer (an offer for subscription) and by an offer for sale by or on behalf of the holder of securities already in issue (an offer for sale). An offer for subscription would be akin to a primary offering and an offer for sale, to a secondary offering. In principle, both are subject to the same requirements. The Listing Regulations do not differentiate between them.

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

The BSX employs a fully automated electronic trading system (Bermuda Electronic Securities Trading or BEST) based on a central limit order book, which allows trading members to trade both equity and fixed income securities on an equal, real-time 'first come, first served' basis, making trading efficient, time sensitive and cost effective. Through the Bermuda Securities Depository, the rules of operation for which are set out in the Bermuda Securities Depository Regulations, shares can be dematerialised, eliminating the need for physical settlement. Once a trade is executed, trade information is disseminated electronically to key financial information providers, including Bloomberg and Reuters, for worldwide distribution.

### Private placings

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

The Listing Regulations make provision for the sale of securities by an issuer to persons selected by the issuer otherwise than by way of an offer to the public (ie, placing). In the case of an application made by a listed issuer for a further issue of equity securities of a class that is already listed, and that are to be brought to listing by way of a placing of 20 per cent or less of the existing issued share capital of the issuer, a prospectus is not required.

See question 3 for the rules and procedures applicable to bringing securities to listing on the BSX by way of placing.

There are no specific rules or procedures delineated in the Companies Act to effect a valid private placement of securities.

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

See question 7.

- 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?

Aside from restrictions on transfer to a shareholder who is not Bermudian under the Companies Act, in the case of the securities of a local issuer, the Listing Regulations do not impose any restrictions specifically related to the transferability of securities acquired in a private placing. Commonly, any additional restrictions on transfer would be set out in the bye-laws. The Companies Act contains no

restrictions on transfer of specific application to securities acquired in a private placing.

In terms of exchange control, permission is required from the BMA pursuant to the provisions of the Exchange Control Act 1972 for the issue and transfer of securities by Bermuda companies, other than in cases where the BMA has granted a general permission. On 1 June 2005, the BMA granted a general permission for the issue and subsequent transfer of any equity securities of a Bermuda company listed on an 'appointed stock exchange' (as defined in the Companies Act) from or to a non-resident of Bermuda, for so long as any equity securities of such company remain so listed. The BSX is an appointed stock exchange. See question 2 for examples of other appointed stock exchanges.

There are no liquidity enhancing mechanisms contained in the Companies Act.

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### Offshore offerings

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

There are no specific domestic rules that apply in these circumstances. The Companies Act makes no distinction between offerings of securities within or outside of Bermuda by an issuer domiciled in Bermuda.

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### Particular financings

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

No special considerations apply to offerings of exchangeable or convertible securities, warrants or rights offerings. Such offerings are subject to the relevant provisions of the Companies Act and, where such securities or depositary receipts of an international issuer are to be listed on the BSX, the Listing Regulations relevant thereto.

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### Underwriting arrangements

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

As most of the larger public offerings by Bermuda companies are in relation to offerings on overseas exchanges, such as New York or London, underwriting agreements tend to follow the practices adopted in such countries. In a London Stock Exchange offering, one may see a book-building underwriting (book building is a process for offering shares under which potential investors are given the opportunity to bid for shares before the size and price of the offer are set and before the offer is underwritten and the underwriter's commitment does not occur until after completion of the book-building period, often two to three weeks), and NYSE offerings generally comprise a syndicate of underwriters led by one or more managing underwriters, who typically agree (on a several, not joint and several basis) to purchase the securities three business days after the pricing date. Even if an underwritten offer is to be undertaken on the BSX, the underwriters themselves are likely to be based overseas and a foreign law governed underwriting agreement, following the norms of their domestic market, would most probably be adopted, subject to Bermuda law compliance.

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

As mentioned above, as most underwriting agreements will be governed by foreign law, their contents will be dictated by the norms of their market practice, subject to Bermuda law compliance. There is very little in Bermuda law that should prevent the usual provisions

of, for example, an underwriting agreement governed by English or New York law being in compliance with, and enforceable under, Bermuda law.

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

When the Companies Act contained the common law concept of 'financial assistance', it often caused problems with regard to the payment of underwriter's fees by the listing entity (being, as it was, settling a liability in connection with the acquisition of its shares), and necessitated a 'whitewash' of such fees as permitted by such statute. However, this provision was deleted from the Companies Act in 2011, thus removing concerns in this regard. Otherwise, as mentioned above, Bermuda has 'light touch' regulation with regard to underwriting arrangements, most of which are governed by foreign law.

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### Ongoing reporting obligations

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

Where there is a continuous offer of shares to the public and where the particulars in a prospectus cease in a material respect to be accurate, the Companies Act stipulates that the company must publish and file supplementary particulars. This requirement can be satisfied by issuing and filing a new prospectus. A supplement, amended pages or enclosures to be included with the original prospectus are usually acceptable as well.

Once the securities of a company have been listed on the BSX, the issuer must comply with the continuing reporting obligations contained in the Listing Regulations. These generally, and separately from compliance with all the specific requirements set out therein for particular types of issuer, require the issuer to keep the BSX, members of the issuer and other holders of its listed securities informed of any information relating to the issuer or its group that:

- is necessary to enable them and the public to appraise the financial position of the issuer and the group;
- is necessary to avoid the establishment of a false market in its securities; and
- might reasonably be expected materially to affect market activity in and the price of its securities.

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

The nature and extent of the information a reporting company is required to make available to the public differs based on the type of issuer and security that is listed. Such requirements are set out in the relevant Listing Regulations.

The BSX does not require that significant shareholders be disclosed.

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### Anti-manipulation rules

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

For a Bermuda company whose securities are listed on the BSX and that does not have a primary listing of its securities elsewhere (and so is not subject to the rules of another stock exchange in this regard), such an issuer must adopt by board resolution and enforce an internal code of dealing for directors and executive officers, which proscribes their ability to trade on the basis of unpublished price sensitive information. The code must, as a minimum, prohibit the directors and executive officers from dealing in the issuer's listed securities for the period from when they become aware of the interim and full year results until those results are announced (see also question 20).

Otherwise, Bermuda companies whose securities are listed on exchanges overseas, and their directors, officers and shareholders, need to be mindful of the offences (such as market abuse, misleading statements, market manipulation and insider dealing in the UK) applicable under statute and stock exchange rules in such jurisdictions.

**Price stabilisation**

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

Stabilising activities in connection with a securities offering are often employed with regard to Bermuda companies (always subject to the rules of the stock exchange on which its securities are listed, which is often overseas), provided that persons initiating stabilising bids do so with reference to the market price for the security and such bids do not exceed either the independent bid or the offering price of the securities in question, thereby artificially inflating the price of such securities by creating a false market. Another method sometimes seen that helps to reduce price volatility is to limit or even prevent the sale of securities by the management and key employees of the issuer participating in the offer for a defined period, so as to stop the ‘dumping’ of securities, which could cause prices to plummet.

**Liabilities and enforcement**

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

Care must be taken to avoid committing the offences discussed in question 17 when engaging in securities transactions. In addition, any person who makes or authorises the making of an untrue statement in a prospectus in respect of an offering of securities in a Bermuda company faces criminal liability, unless he or she proves either that the statement was immaterial or that at the time he or she made the statement he or she had reasonable grounds to believe it was true. Criminal penalties including imprisonment and fines can be imposed.

The Companies Act provides that certain persons are liable to pay compensation to all persons who subscribe for any shares on the faith of the prospectus for any loss or damage they may have sustained by reason of any untrue statement included therein.

Those persons are:

- every person who is an officer of the company at the time of the issue of the prospectus;
- every person who has authorised him or herself to be named and is named in the prospectus as an officer or as having agreed to become an officer of the company either immediately or after an interval of time;

**Update and trends**

While Bermuda continually seeks to remain apace with international corporate legal and regulatory trends there are no proposals to change the regulatory or statutory framework governing securities transactions at this time.

- every person being a promoter of the company;
- every person who has authorised the issue to the public of the prospectus.

No person is liable under this provision of the Companies Act if he or she proves:

- that having consented to become an officer, he or she withdrew his or her consent before the issue of the prospectus and that it was issued without his or her authority or consent;
- that the prospectus was issued without the officer’s knowledge or consent, and that on becoming aware of the issue he or she forthwith gave reasonable public notice that it was issued without his or her knowledge or consent;
- that, after the issue of the prospectus and before the allotment thereunder, he or she, on becoming aware of any untrue statement therein, withdrew his or her consent and gave reasonable public notice of the withdrawal and the reason; or
- that, as regards every untrue statement, he or she reasonably relied on the authority of an expert or public official (or an extract of a report or valuation of an expert or copy of or extract from a public official document).

A person referred to as an expert in a prospectus is not liable for any untrue statement if it was not made by him or her or that as regards any untrue statement made by him or her, he or she had reasonable grounds to believe and did believe it was true. An expert will also not be liable for an untrue statement if, upon becoming aware that it was untrue before the issue of the prospectus he or she had given reasonable public notice of his or her disassociation from the prospectus and the reasons.

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

It is possible for a person who purchased securities to pursue civil litigation on the grounds of breach of contract against any person whose misrepresentation induced the purchase.

The BSX can suspend trading in a company’s securities where it fails, in a manner that the BSX considers material, to comply with its obligations under the Listing Regulations. The Listing Regulations



**Brian Holdipp**  
**Jeremy Leese**

**bholdipp@mjm.bm**  
**jleese@mjm.bm**

Thistle House  
4 Burnaby Street  
Hamilton HM 11  
Bermuda

Tel: +1 441 292 1345  
Fax: +1 441 292 0756  
www.mjm.bm

require that all shares are issued in a fair and open manner and that all shareholders must be treated equally. Further, instead of, or as well as, a suspension of trading, the BSX can censure an issuer or its directors, or both, and publish the fact that it has done so.

In addition to the criminal sanctions arising under the Companies Act (see question 19), the Criminal Code Act 1907 contains measures to regulate insider trading and market manipulation. The offence of 'misleading statements or practices' carries a maximum penalty on conviction on indictment of a fine of B\$100,000 or five years' imprisonment, or both. The offence can only be committed in Bermuda.

The offence of 'market manipulation' can be committed without any requirement that the relevant 'course of conduct' involves the use of non-market information and there is no requirement that the course of conduct would give a regular user of the market a false or misleading impression. The offence can only be committed in Bermuda and has identical penalties as for 'misleading statements or practices'.

The offence of 'insider trading' may only take place in the course of a transaction on a recognised stock exchange and does not extend to transactions where one of the parties is dealing through a professional intermediary or in 'over the counter markets'. The maximum penalty on conviction on indictment is a fine of B\$175,000 or seven years' imprisonment, or both.

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