EXPLANATORY MEMORANDUM

SECURITIES BILL 2018

JULY 2018

1.0 INTRODUCTION

Since 2001, the eight member countries of the Eastern Caribbean Currency Union ("ECCU") operate as a single jurisdiction with respect to their domestic securities markets. This was accomplished by the passage of common securities legislation (the Securities Act 2001 and accompanying regulations and rules) and the creation of common institutions (such as a regional government debt market mechanism, a single stock exchange and related institutions). The Eastern Caribbean Securities Regulatory Commission (the "Commission" or "ECSRC") which is responsible for the regulation and supervision of this regional securities market, the Eastern Caribbean Securities Market.

In April 2004, the ECSRC submitted a request for consideration for ordinary membership in the International Organisation of Securities Commissions (IOSCO). As a prerequisite for membership, applicants must sign the IOSCO Multilateral Memorandum of Understanding (MMoU) Concerning Consultation and Cooperation and the Exchange of Information.

The IOSCO MMoU represents a common understanding among its signatories on consultation, cooperation and exchange of information for enforcement purposes in securities and derivatives markets. It is the belief within the regulatory community that the perceived vulnerability of investors to market abuse and their limited capacity to take corrective measures warrant the need for access to a mechanism for cooperation and dispute resolution. Additionally, given the potential complexity of securities instruments and markets and the propensity for fraud, strong enforcement of securities laws is required. It has also been established that market instability can originate in another sector or jurisdiction and for this reason, effective regulation depends on cooperation between and among international and domestic regulators. The timeliness of responding to requests for assistance from other securities regulators is of critical importance.

Membership in IOSCO is integral to the sub-region's mandate to promote financial stability within its economic space and to project a global image of the ECCU financial sector as stable, transparent and well regulated. IOSCO Membership would:

(i) demonstrate the sub-region's commitment to accepted standards of market integrity and investor protection, which would ultimately redound to the benefit of the ECCU region through increased participation by foreign investors in the economies of the ECCU member countries.

(ii) offer opportunities to network and benefit from the transfer of technical expertise from more experienced regulators and assist the jurisdiction in achieving the quality of regulation believed to be necessary to enhance the integrity and development of the Eastern Caribbean Securities Market (ECSM).

(iii) provide an opportunity for the ECCU jurisdiction to maintain a good reputation in the international community and thereby avoid international isolation.

(iv) strengthen the ECSRC's ability to not only cooperate with international securities regulators, but also to foster enhanced relationships and cooperation with its regional and international counterpart regulators.

The ECSRC is a member of the regional Caribbean Group of Securities Regulators (CGSR). One of the main objectives for the establishment of the CGSR was to provide a forum to discuss issues facing Caribbean securities and financial markets and to promote cooperation among regional regulators. Most of the members of CGSR who are also members of the CARICOM grouping have obtained IOSCO membership, namely The Bahamas, Barbados, Bermuda, British Virgin Islands, Cayman Islands, Jamaica and Trinidad and Tobago while others, including the ECCU are pursuing IOSCO membership. Additionally, the stock exchanges in The Bahamas, Bermuda and the Cayman Islands are affiliate members of IOSCO. ECSE affiliate membership in IOSCO will provide significant benefits, particularly as it relates to the development of the capital markets in the ECCU, including the Regional Government Securities Market (RGSM) by providing international recognition to the jurisdiction and both the ECSM and RGSM and thereby facilitate access to the markets by residents of Canada including the ECCU diaspora.

It is noteworthy that prior to obtaining IOSCO membership, some of these territories (Bahamas, Bermuda, British Virgin Islands and Cayman Islands) maintained and since then have continued to operate vibrant and thriving offshore financial services sectors. The legislative changes required in order for the ECCU jurisdiction to obtain membership in IOSCO, once approved and

enacted, could enhance the region's prospects to compete with these established markets in offshore financial services. The new legislation will promote confidence in the region's financial services sector through increased transparency and sound and effective regulation, which would boost confidence in and integrity of the ECCU financial market.

Since its initial submission in 2004, IOSCO's Standing Committee on Enforcement and the Exchange of Information (SC4) continues to assess the ECSRC's preparedness for IOSCO membership continues. The main challenge in completing the application process arises from the ECSRC's inability to sign the IOSCO MMoU. This challenge arises from a number of legislative hindrances in the Securities Act 2001 (current Act). In March 2015, to advance the application process, the Commission sought and received assistance of the International Monetary Fund (IMF) to review the ECSM legislative framework to:

(i) identify the main obstacles to the ECSRC's eligibility for IOSCO membership;
(ii) ensure consistency with the IOSCO Objectives and Principles of Securities Regulation (the "IOSCO Principles" or "Principles"); and
(iii) meet the needs of investors and users of capital within the jurisdiction.

The IMF review, which commenced in 2015, took on board deficiencies identified by the Commission and comments and concerns received from market participants and other interested parties. This review followed an earlier assessment, undertaken in 2009 by a Consultant engaged by the Caribbean Regional Technical Assistance Centre (CARTAC) to review the ECSM legislative framework and propose draft recommendations for amendments to the Act, the Regulations and the Rules to address the issues identified and to ensure that the legislation would be consistent with international best practices. The Consultant's general conclusion was that "*when compared to the expectations of the IOSCO Principles regarding the legislative framework for securities regulation, the current body of law, regulation and rules in the ECCU is fairly complete and meets most of the high-level standards set out in the Principles. However, there are a few significant gaps – the most important of which relates to the scope of the Commission's authority.*" The Consultant recommended that even before any changes are to be

introduced to bring the regime up to international best practices,[1] the overall legal framework needed a thorough editing (or redrafting) to ensure consistency and clarity throughout. The Commission never implemented the recommendations from the 2009 legislative review.

In 2016, as part of the technical assistance provided by the IMF, a team from Monetary and Capital Markets Department identified the obstacles hindering the ECSRC attaining membership in IOSCO and signing the IOSCO MMoU. The team recommended a number of changes to improve the 2001 Act in line with international best practices.

The proposed Securities Bill 2018 (new Bill) addresses the issues identified from both reviews and is a complete revision of the 2001 Act, to be consistent with international best practices for securities legislation. As part of the redrafting process for the new Bill, the securities legislation currently in force in the jurisdictions of The Bahamas, Trinidad and Tobago together with the annotated Securities Act containing the recommendations from the 2009 consultancy were reviewed and now form the basis of the new Bill.

2.0 SUMMARY OF PARTS

The provisions in the draft Securities Bill are set out in sixteen (16) Parts. The following is a summary of the provisions in each Part of the Bill.

Part I – Preliminary: This Part includes short title, interpretations of relevant terms in the Securities Bill and provisions relating to the establishment and powers of the Commission.

Part II – Licensing of Marketplaces and Ancillary Facilities: This Part constitutes the provisions in Part II (Securities Exchanges) and Part III (Clearing Agencies and Securities Registries) of the current Act. Additionally, it contains provisions for the regulation and supervision of alternative trading systems and other types of electronic trading platforms that

[1]It should be noted that the concept of "international best practices" is subjective. There is no single standard for international best practices on most topics covered by securities regulation. The IOSCO Objectives and Principles of Securities Regulation (the "IOSCO Principles") state that the appropriate practices for a country depend on the state of development of its capital markets, the particulars of its legal system and other domestic factors.

have emerged from the increased use of the internet and information technology in capital market activities.

Part III - Licensing of Intermediaries and Others: This Part outlines the categories of market intermediaries that must be licenced to participate in the ECSM and the conditions that are to be satisfied for the grant of a licence by the Commission.

Part IV - Conduct of Business by Licensees: This Part contains provisions regarding the expected standards of conduct of licensed intermediaries in undertaking securities business. The provisions also place the responsibility on the licensee, for breaches of these standards by persons acting on its behalf in the conduct of securities business. This Part also requires licensees to keep and maintain books and records, adequate financial resources and to contribute to a contingency fund established by a licenced securities exchange or clearing facility.

Part V - Distributions of Securities: This Part sets out provisions requiring that the offer and sale of securities must be via a prospectus filed with the Commission. The permissible activities to be conducted prior to and during a distribution of securities are also included. A list of exemptions from the requirements to file a prospectus have also been included, but this list is not exhaustive.

Part VI - Continuing Obligations of Reporting Issuers: This Part addresses the continuing obligations of reporting issuers. This includes the requirement to file financial statements and annual reports, the notification of material changes and the adoption of proper accounting and auditing standards. This Part also addresses exemptions for certain foreign issuers in relation to satisfying the requirements under this Part.

Part VII - Governance of Reporting Issuers: This Part briefly sets out governance arrangements to which reporting issuers must adhere.

Part VIII - Takeover Bids: This Part allows for the prescribing of the requirements to regulate corporate takeovers.

Part IX - Disclosure of Shareholdings of Directors, Officers and Significant Security Holders: This Part provides for the notification to the relevant parties (Commission, securities exchange) of the interests of directors, officers and significant security holders as well as any changes to their interests in a reporting issuer.

Part X - Uncertificated Securities: This Part makes provision for the transfer of securities in a dematerialized environment.

Part XI - Market Misconduct: This Part prohibits various types of misconduct such as market manipulation, misleading conduct, insider trading, front running and other fraudulent and deceptive conduct. Under section 99(1) of the Bill, a person who contravenes a provision under this Part commits an offence and is liable on summary conviction to a fine not exceeding $500,000 in the case of an individual and $1,000,000 in the case of a company. This Part also sets out defence mechanisms for alleged offences committed under this Part.

Part XII - Listing and Trading Foreign Securities Licensing and Exchange Membership of Foreign Market Participants: This Part provides for the prescribing of requirements for the listing and trading of foreign securities, licensing and exchange membership of foreign persons.

Part XIII - Investigations, Inspections and Enforcement: This Part contains four Divisions dealing with investigations, inspections, assistance to domestic and foreign regulatory authorities and enforcement.

Part XIV - Civil Liability for Misrepresentation: The provisions in this Part of the Bill set out the cause of action for misrepresentations in prospectuses and lists the parties that are potentially liable for these misrepresentations. The parties liable are the issuers, the underwriter, the directors, the Chief Executive Officer of the issuer, any expert who consented to the use of their expert opinion in the prospectus and anyone who signed the opinion.

Part XV - General Provisions: This Part addresses administrative procedures and other matters not addressed elsewhere in the Act.

Part XVI - Transitional Provisions and Repeal

3.0 THE ACT

PART I - PRELIMINARY

1. **Purpose Clause** – the Bill amends the Purpose Clause to reflect the totality of the powers of the Commission as provided under the revised ECSRC Agreement. The Clause now reflects the Commission's authority to regulate and supervise securities business taking place "in or from within the Currency Union". This amendment also addresses the IMF's recommendation that the Commission "*continue in its efforts to obtain regulatory and supervisiory authority for offshore securities activities.*" Section 31 in the new Bill also reflects this amendment.

2. **Interpretation –** This section contains the definition of key terms in the new Bill and a number of new provisions made necessary by the changes in the rest of the new Bill. Where significant existing definitions were changed, or important new definitions were introduced these are generally discussed under the respective Part of the new Bill where they are most relevant. Some of the amendments include the following:
   (a) A wider definition of "**securities"** has been included, which incorporates language that indicates that the list of instruments that qualify as securities is not exhaustive. This gives greater flexibility to apply the provisions of the new Bill to instruments and transactions of concern, without having to seek approval from the government for authorising instruments. IOSCO Principles demand that the regulatory structure be able to react in a timely fashion to the challenges that these developments may create. This new definition is consistent with international practice.

(b) **"Securities laws" - t**he term 'securities laws' include both the new Securities Bill and the new ECCU Investment Funds Bill. This simplifies the drafting of the Commission's functions and powers in a number of areas and ensures the scope of application of the relevant parts is wide enough to cover the investment fund industry where necessary or appropriate.

(c) **"Securities Registry"** means any person who engages on behalf of an issuer in:

(i) countersigning securities upon issue by the issuer;

(ii) monitoring the issue of such securities to prevent unauthorised issue;

(iii) registering the transfer of such securities;

(iv) exchanging or converting such securities; or

(v) transferring ownership of securities by bookkeeping entry without physical issuance of securities certificates.

but does not include an issuer that performs one or more of these functions for itself.

(d) The definition of a "**licensee"** has been expanded to include a person licensed under the new Bill. In the current Act, a licensee is defined as a person licensed under Part IV - a broker dealer, limited service broker or investment adviser and therefore failed to capture securities exchanges, clearing agencies, investment funds, management companies etc.

(e) Duplicate references such as "substantial shareholder" now termed "significant security holder," has been moved to the interpretation section, whereas, the test for determining whether a person is "fit and proper" for the purposes of securities laws was moved to Part XV of the General Provision under section 143 of the Bill.

PART II – LICENSING OF MARKETPLACES AND ANCILLARY FACILITIES

IOSCO Principles 33 to 38 require securities exchanges and other trading systems to be subject to regulatory authorisation and oversight. The supervision of these systems should aim to ensure:

(i) the integrity of the trading process is maintained through fair and equitable rules;

(ii) that investors are provided fair access to market facilities on a non-discriminatory basis;

(iii) fair treatment of orders and a reliable price formation process;
(iv) transparency of trading information;
(v) market manipulation and other unfair trading practices can be detected and deterred; and
(vi) the proper management of large exposures, default risk and market disruption;

Systems for clearing and settlement, trade repositories and central counterparties should also be subject to regulatory and supervisory requirements that are designed to ensure that they are fair, effective and efficient and that they reduce systemic risk. (Principle 38 of the IOSCO Principles).

Where Self-Regulatory Organisations (SROs) are present as part of the regulatory and supervisory framework, these entities should also be subject to regulatory oversight and should observe standards of fairness and confidentiality when exercising powers and delegated responsibilities (Principle 9 of the IOSCO Principles).

There are four (4) Divisions in Part II of the Draft Bill.

Division I contains provisions for the licensing of Marketplaces, Ancillary Facilities, Clearing Facilities and other Self-Regulatory Organisations.

The definition of a "**marketplace"** includes:

(a) a securities exchange, a quotation and trade reporting system or an Alternative Trading System;
(b) a person not included in paragraph (a) that-
    (i) constitutes, maintains or provides a market or facility for bringing together buyers and sellers of securities;
    (ii) brings together the orders for securities of multiple buyers and sellers; and
    (iii) uses established, non-discretionary methods under which the orders interact with each other, and the buyers and sellers entering the orders agree to the terms of a trade; or
(c) a person described in an Order made by the Commission pursuant to section 164(2) (Designation Orders).

An **"ancillary facility**" means a person providing prescribed services to a marketplace, clearing facility, licensee, or to a reporting issuer with securities listed or traded on a marketplace where the services facilitate or are ancillary to the operations of a marketplace.

The requirement for marketplaces and ancillary facilities to be licensed gives the Commission the authority to regulate trading platforms and ancillary facilities such as transfer agents and registrars and online advisory platforms, which traditionally, have not been supervised by securities regulators and operated outside the regulatory framework. The Bill will now bring these entities within the ambit of the securities laws.

Division II contains specific provisions relating to a securities exchange such as the procedure for delisting of securities, the power of the Commission to take disciplinary action over members of a securities exchange and closure of the exchange in an emergency.

Division III of the new Bill retains the provisions for default proceedings and insolvency procedures under sections 48 to 51 of the Current Act, which is consistent with international standards. Principle 37 of the IOSCO Principles provides that "*the legal system must support effective and legally secure arrangements for default handling. This is a matter that extends beyond securities law to the insolvency provisions of a jurisdiction. Insolvency law must support isolating risks, and retaining and applying margin previously paid into the system, notwithstanding a default or commencement of an administration or bankruptcy proceedings*".

Division IV makes provision for certain general requirements including rulemaking, review and amendment of rules and assistance that may be provided to the Commission by licensees under this Part.

Sections 21(1) of the new Bill provides that a holder of a marketplace or ancillary facility licence "*shall ensure as far as is reasonably practicable, an orderly and fair market in the securities that are traded through its facilities*." Section 21(2) provides that "*in performing its duties, the licensee shall act in the best interest of the investing public and ensure that such interests prevail*

where they conflict with any other interests the company is required to serve under any other law."

Section 24 provides the Commission with full authority to supervise the operations of persons licensed under the Act and to make certain decisions about the operations and services provided by an entity licensed under this Part.

A person licensed under this Part must appoint an auditor to conduct an audit of its financial statements within 120 days after the end of its financial year. The licensee shall also provide the Commission with prescribed reports on its financial affairs - section 26.

Section 27 provides for the establishment of a contingency fund by a licenced securities exchange in the event of the default of one of its members.

PART III - LICENSING OF INTERMEDIARIES AND OTHERS

In the Interpretation section, an "***Intermediary***" is *'a person licensed under Part III of the Bill*.'

IOSCO Principle 29 sets minimum entry standards for market intermediaries, including an assessment of whether management is fit and proper, the firm has the prescribed minimum initial capital, it satisfies the Commission that it will be able to comply with ongoing financial resources requirements and has 'specified premises suitable for keeping records'.

Section 31 of Part III of the Bill sets out the minimum entry standards for market intermediaries in the ECSM. Section 32 provides a list of persons otherwise exempted from the licensing requirements. Under section 33, it is an offence for any person to carry on business requiring a licence under this Part without holding a licence, or other than in accordance with the person's licence.

The requirement for licensees to be fit and proper is a continuing obligation of licensees for the maintenance of a licence. However, in the new Bill the duplicate references to the fit and proper

requirements for each type of licence in the Current Act, were deleted and relocated to the Interpretation section of the new Bill.

A person convicted under this Part, following an assessment by the Commission, shall be liable to the Commission for any profits earned from carrying on securities business without a licence - section 33.

PART IV - CONDUCT OF BUSINESS BY LICENSEES

A "***licensee***" is 'a person licensed under the Bill'. This definition includes securities exchanges, clearing facilities, marketplaces and ancillary facilities.

IOSCO Principle 30 requires that there must be "*initial and ongoing capital and other prudential requirements for market intermediaries that reflect the risks that the intermediaries undertake*." The provisions of **Part IV - Conduct of Business by Licensees** under section 40(1) of the Bill requires a licensee to maintain adequate financial resources to meet its business requirements, withstand the risks to which its business is subject and meet the prescribed requirements. Additionally, section 40(2) provides that the Commission may make regulations requiring licensees to have and maintain, in respect of the activities for which they are licensed, the financial resources set by the regulations.

IOSCO Principle 31 states, "*Market intermediaries should be required to establish an internal function that delivers compliance with standards for internal organization and operational conduct, with the aim of protecting the interests of clients and their assets and ensuring proper management of risks, through which management of the intermediary accepts primary responsibility for these matters*".

Section 34(1) sets out the standards of conduct of securities business for an intermediary and its licensed principal and representative. An intermediary and its licensed principal and representative shall at all times act according to the principles of best practice in relation to securities business and, in particular, shall-

(a) observe a high standard of integrity and fair dealing;

(b) act with due skill, care and diligence;

(c) observe high standards of market conduct;

(d) seek from customers, information about their circumstances and investment objectives which might reasonably be expected to be relevant in enabling an intermediary and its principals and representative to fulfil the licensee's responsibilities to the customer;

(e) ensure that the interests of the customers are placed first;

(f) deal with the Commission in an open and co-operative manner.

(g) take reasonable steps to give every customer, the licensee advises, in a comprehensible way, any information needed to enable the customer to make a balanced and informed investment decision;

(h) avoid any conflict of interest with customers and, where such a conflict unavoidably arises, ensure fair treatment of the customer by complete disclosure and obtaining the customer's consent, or by declining to act.

Section 34(2) provides that "*In the conduct of securities business, an intermediary shall act according to the principles of best practice and, in particular, shall –*

(a) protect, by way of segregation and identification or otherwise as prescribed, those customer assets for which the licensee is responsible;

(b) maintain adequate financial resources and insurance cover to meet the business commitments of the licensee and withstand all the risks to which the business is subject;

(c) have appropriate and sufficient systems and controls in place to perform its functions and manage its risks prudently;

(d) have adequate arrangements to ensure that all staff employed are suitable, adequately trained and properly supervised, and establish and maintain well-defined compliance procedures; and

(e) deal with the Commission in an open and cooperative manner.

IOSCO Principle 32 requires that "*there should be procedures for dealing with the failure of a market intermediary in order to minimize damage and loss to investors and to contain systemic risk."* Section 27 of the Bill contains provisions to satisfy this requirement.

Under section 35 of the Bill, "*a licensee shall be responsible for all acts and omissions of each director, officer, principal, representative, employee and agent acting on the licensees' behalf in the conduct of securities business*."

Section 38 provides for the safekeeping of customer property held by a licensee.

Section 39 of the Bill, expressly requires all market participants to keep proper books and records and allows the Commission to set specific recordkeeping and general reporting requirements as well as to require delivery of such records and requirements to the Commission. This will facilitate investigations and inspections by the Commission or by persons authorised to do so by the Commission. The information provided will allow the Commission to make an informal decision on whether to take further regulatory actions regarding any category of licensee.

Finally, as specified in section 46 of the Bill, throughout the period of licencing all holders of a licence under the Bill shall continue to meet the requirements for licensing set out in securities laws and any other requirements imposed by this Act or the Commission from time to time.

PART V - DISTRIBUTIONS OF CORPORATE SECURITIES

This Part replaces Part VII of the Current Act "*Offers of Corporate Securities*"

The Current Act prohibits the public offer of securities (by the issuer or any other offeror) unless the issuer or offeror has submitted a prospectus to the Commission, which has received the Commission's approval. According to the 2013 consultancy, this is problematic in two respects.

- The "offer to the public" trigger, while used in many jurisdictions, can be difficult to apply in practice. It is notoriously difficult to determine in advance, who is or is not a member of the public in a specific context. This has been challenged in some jurisdictions, as being unduly subjective. It also may require the involvement of significant time by the Commission's staff in assisting the market participants to determine when a prospectus is or is not required. These factors may reduce the

attractiveness of the jurisdiction as a capital-raising venue and can make enforcement actions difficult.

- The language in section 92(2) of the Current Act seems to catch secondary market trades. In most jurisdictions, prospectus disclosure is only required for primary market trades and in some limited other circumstances, such as a sale of securities by a large shareholder.

Prospectus Required/Distribution (section 47): The concept of an invitation to the public has been replaced by a more objective concept that focuses on the nature of the transaction proposed. It imposes the prospectus requirement on all distributions by any issuer (not just a public distribution), unless an exemption for the nature of the trade or the nature of the securities is available under section 54. A **"distribution"** includes trades from the issuer itself – both new issues from treasury and resales of securities redeemed or otherwise reacquired by the issuer – and sales by a holder of a significant block of voting securities of the company (defined as a control block holder). To keep participants from circumventing the prospectus process by issuing securities under an exemption to a friendly purchaser and then having the purchaser resell the securities more generally, the regime also imposes restrictions on the ability to resell securities acquired under certain exemptions. Generally, these securities must be resold under a prospectus exemption and held for a set period of time before resale (6 or 12 months are the most common periods) or a prospectus must be prepared (section 47).

Sales by Control Block Holders: "**Control Block Holder**" is defined under Part I to mean a person that holds more than 30% of the voting rights attached to all of an issuer's outstanding voting securities or is able to affect materially the control of the issuer, whether alone or by acting in concert with others. Trades by control block holders would always be a "*distribution*". A control block holder wishing to sell any of the securities he holds in the issuer would be required either to arrange for a prospectus to be prepared or resell the securities under a prospectus exemption. Limitations on the ability of a control block holder to freely trade securities of the issuer are consistent with international best practice, and are predicated on the theory that the security holder is more likely to have preferential access to information about the issuer that should be disclosed to prospective purchasers before the sale takes place. A control

block holder could sell securities under any available prospectus exemption, including, for example, to "accredited investors". In addition, a control block holder would be permitted to trade securities from its holdings without a prospectus in a normal course or series of trades through a registered securities exchange, provided the usual prescribed notice and other requirements are met.

Delivery of Prospectus (section 49): To get the full benefit of a disclosure regime, the disclosure documents must actually get into the hands of the investors. The new Bill mandates the delivery of the prospectus to a person who shall . The issuer or selling control block holder is responsible for paying the costs of printing the prospectuses and providing these to prospective purchasers.

Distribution Period (section 58): Many jurisdictions do not prescribe any set period for a distribution. In those that do, the maximum period is 12 to 13 months from the date of the issue of the receipt for the prospectus. All of these jurisdictions require the updating of the disclosure document for any material changes over the course of the distribution – which is the key point. The new Bill incorporates the 12-month maximum period and allows the Commission to order a shorter period of not less than six months.

Material Changes during Distribution Period (section 51): Any changes in material information about the issuer or the securities on offer during the period between the filing of the prospectus and the issue of the receipt for the final prospectus, requires a prompt amendment to the prospectus. An amended prospectus must accompany any subsequent solicitations or sales. If the material change occurs after the Commission issues the receipt for the prospectus, the sale of the securities must stop until the Commission has issued a receipt for the amended document. The issue of more recent financial statements is an example of a change that would require an amendment to a prospectus, assuming the financials were repeated in the document rather than just appended it.

Exemptions (section 54): The Bill includes all the exemptions in the current Act, along with a few others that appear almost universally – such as for securities issued to existing security holders as a dividend or ones issued on a statutory amalgamation or winding up. The Bill gives the Commission the authority to supplement this list, amend or remove any prospectus exemption by rule, regulation or specific order. The Commission also has powers to issue a specific exemption on application where it thinks it is in the public interest to do so. An example of an exemption is the **limited offering** which is *defined to mean a distribution by a government entity or private issuer where—*

(a) following the completion of such distribution, the number of security holders of the issue is fifty or less persons not including senior officers and employees or former senior officers and employees of the issuer and its affiliates;

(b) the constituent documents of the distribution contain provisions restricting the aggregate number of security holders of the issue to fifty persons or less not including senior officers and employees or former senior officers.

*A **"private issuer" is** an issuer—*

(a) that is not a reporting issuer;

(b) whose securities, other than non-voting debt securities—

(i) are subject to restriction on transfer; and

(ii) are beneficially owned by no more than fifty persons, not including directors, senior officers and employees or former directors, senior officers and employees of the issuer and its affiliates;

(c) that have distributed securities only to persons who fit within prescribed categories; and

(d) that meets such other requirements as may be prescribed;

Another such exemption is for an issuer of securities, where the distribution is to holders of its securities as a dividend or a distribution out of earnings, surplus, capital or other sources.

Foreign Issuers (section 55): Given the move to a distribution-based disclosure scheme, the prospectus exemption for foreign issuers has been included to allow an approved foreign issuer

to distribute securities in the Currency Union using the disclosure documents from its home jurisdiction. An approved foreign issuer is a reporting issuer, or equivalent, under similar securities legislation of a foreign jurisdiction recognised by the Commission [or other appropriate named entity for this purpose] and meets the prescribed criteria. The "other criteria" used in other jurisdictions include the securities being listed on a recognized foreign securities exchange, the company having at least a set market capitalization or having been an approved reporting issuer. Foreign issuers not meeting the approval criteria or coming from a jurisdiction other than a recognised one would have to comply with the full Currency Union prospectus regime. This simplified regime will allow for the development of the ECSM by providing additional investment opportunities for residents in the Currency Union.

Resale Restrictions or Hold Period (section 56): A "hold period" is a period of time during which a security issued under a prospectus exemption may not be traded again without filing a prospectus or using another prospectus exemption. Once the "hold period" expires, the securities subject to it would be freely tradable (other than securities held by a control block holder). The Provisions in this Part of the Bill reflects these concepts.

Offence (section 60): The new Bill creates an offence if a distribution is undertaken other than in compliance with the requirements of Part V of the Bill. The issuer and every person who is knowingly a party to the distribution commits an offence and will be liable to a fine of $10,000 for every day, or part of a day, from the date of the first solicitation in connection with the distribution until a receipt has been issued by the Commission, for a prospectus for the distribution. The parties shall be further liable on summary conviction to a fine not exceeding $300,000 or to imprisonment for six months or to both, or on conviction on indictment to a fine not exceeding $750,000 or to imprisonment for one year or to both.

PART VI: CONTINUING OBLIGATIONS OF REPORTING ISSUERS

The IOSCO Principles 16 to 18 relating to issuers require that –

- there should be full, accurate and timely disclosure of financial results and other information which is material to investors' decisions;
- investors in a company should be treated in a fair and equitable manner; and

- accounting standards used by issuers to prepare financial statements should be of a high and internationally accepted quality.

These requirements apply both on initial issues of securities and on a continuing basis thereafter.

The continuous disclosure requirements imposed on reporting issuers are key to fulfilling a jurisdiction's responsibilities to investors under the IOSCO Principles. Continuous disclosure provisions should require all issuers that have distributed securities to the public to file information on both a routine and *ad hoc* basis. The disclosure provisions should also require these issuers to provide regular reports to their securityholders.

The regime introduced in the Bill mandates the continuous disclosure requirements for all reporting issuers. "***Reporting issuer****" means an issuer—*

(a) that has filed a prospectus –

(i) for which the Commission has issued a receipt under securities laws; or

(ii) that was approved under the former Act;

(b) whose existence continues or who comes into existence following a takeover, business combination or other reorganisation involving an exchange of securities in which one of the parties was a reporting issuer at the time of the transaction;

(c) that has issued a security that-

(i) was listed for trading on a securities exchange licensed by the Commission at the time this Act comes into force; or

(ii) at any time after this Act comes into force, has been traded on a marketplace licensed under this Act; and

(d) a public company registered under the former Act,

but does not include a government entity or international agency."

General standards for disclosure, fair treatment of shareholders and the fiduciary duties of officers and directors of reporting issuers are included under this Part (see sections 61 to 63).

These standards are followed by detailed requirements on disclosure of material changes, provision for annual and interim financial statements, annual reports and on proxy solicitation. The Bill also contains the requirement that reporting issuers send financial statements and annual reports to their security holders, as this is best practice under both securities and corporate legislation.

Financial Statements (sections 66 and 67): Many jurisdictions are moving to shorten the time within which public companies are required to prepare and file financial statements. The timeframe (90 days) under the current Act will remain unchanged in the Bill.

Failure to file (section 70): This provision is a new requirement that allows for the imposition of an administrative penalty for the non-submission of financial reports to the Commission, within the timeframe specified in the Bill, unless where prior arrangements are approved by the Commission for an extension of the statutory filing deadline.

Extension of period for providing information (section 159): Provides that "*at the request of a person or an affiliate, the Commission may extend, any period within which the person or affiliate is, in accordance with the provisions of securities laws, obliged to furnish any document or information.*"

It is the Commission's expectation that section 70 of the new Bill will discourage the late filing of submissions.

Additional Routine Disclosure - (section 68 and 69): Best practice for continuous disclosures often requires reporting issuers to prepare other regular disclosure documents, such as annual information forms, or management discussions and analysis (MD&A[2]) of financial statements to give the market and investors more up-to-date and detailed information about the company. This reporting requirement currently exists in the current Act and continues under the Bill. These documents are filed with the Commission and are provided to investors (on request or routinely),

[2]The MD&A is a narrative explanation, through the eyes of management, of how the issuer performed during the period covered by the financial statements and its financial condition and future prospects.

but they are not normally subject to prior review or approval by the Commission. The most commonly mandated additional disclosure document is the MD&A. The Bill allows the Commission to mandate this and other continuous disclosure documents.

Material Change Reporting (section 64): The provisions in this area have been tightened to meet international standards. Reporting issuers are required to make immediate disclosure of all changes in material information and file a report in prescribed form with the Commission. As is required under the law in many major jurisdictions, the official report may be filed with the Commission later than the time the public disclosure is made. The delay recognizes the practical issues of ensuring all required information is included in the report and the appropriate certification is completed. If concurrent disclosure and filing is required, the result, in practice often is that public disclosure is delayed until the report can be completed. This delay is not desirable from a public policy perspective.

A material change report may be filed on a confidential basis. This treatment is subject to three restrictions:

(a) the Commission may review the information and require immediate disclosure;
(b) the issuer must disclose the information where it is apparent that people are trading on the information and
(c) in any event, no information may be kept confidential longer than thirty days.

In some jurisdictions, the 30-day deadline does not apply, but the issuer is required to justify the continued confidential treatment every 7 to 10 days and the Commission must either accept or reject that justification. This justification and review process imposes a significant burden on both the issuer and the regulator. In practice, confidential reports seldom remain so for more than 30 days – the reason for the confidential treatment disappears, the Commission requires disclosure or the information leaks and the issuer's share price begins to be affected. This is particularly true in a small jurisdiction. To deal with the very rare exception the Commission still retains the authority to exempt an applicant in appropriate circumstances.

Proxy Solicitation (section 71): The Bill contains provisions for to regulate proxies and proxy solicitation and gives the Commission the ability to prescribe additional exemptions from the definition of 'exempt solicitations' as this is consistent with international best practices.

The new provisions give the Commission the power to require prior submission of any proxy material and to review and order changes even after the material is distributed. The added wording will permit the Commission to prescribe additional proxy-related documents, such as management or dissident proxy circulars, and require the despatch of these to security holders, as this is consistent with international best practices in the area.

In some countries, a public issuer that is subject to equivalent proxy solicitation requirements by the statute under which it was incorporated is automatically exempt from the ambit of the securities provisions if it complies with its corporate statutory requirements. This reduces the risk that the securities and corporate requirements impose slightly different requirements making full compliance difficult. If this proves to be the case for a particular issuer, the Commission may issue an exemption order. If there is enough demand, the Commission could provide an exemption to a class of issuers by regulation.

Approved Foreign Issuers (section 72): As a complement to the prospectus exemption provided by the Commission, to approved foreign issuers under Part V of the Bill, these reporting issuers may comply with the continuous disclosure requirements of the Currency Union by filing and delivering the same or similar documents filed in its home jurisdiction.

PART VII - GOVERNANCE OF REPORTING ISSUERS

The Bill includes a new Part VII - Governance of Reporting Issuers.

The IOSCO Principles do not expressly address corporate governance. However, the principles that drive governance standards would generally fall under Principle 17 - treating shareholders of a public company in a fair and equitable manner. In recent years, many of the major jurisdictions have made changes to their regulatory requirements to enhance corporate governance standards of reporting issuers. The highest profile legislation is the *Sarbanes-Oxley*

Act in the United States of America. The proposed authorizing provisions also cover the main categories of rules introduced to date in other jurisdictions: board composition (independence and qualification), board committees and responsibilities (audit committees etc.), business codes of conduct, and conflict of interest rules. The language in the proposed amendment is inclusive, rather than exhaustive, meaning that there is freedom to prescribe corporate governance rules that might not fall into these four categories. (2009 Consultancy)

In addition, the current Act includes two concepts; the requirement for auditors of public companies to meet certain requirements – such as membership in the local professional association, and the requirement for registrants to use an auditor approved by the Commission. The definitions in the Bill include the term "approved auditor" and various provisions throughout the Bill require all licensed persons and reporting issuers to appoint an approved auditor. The requirements, which will be set out in the rules or regulations would include the requirement that the auditor be independent of the person whose financial affairs is the subject of an audit.

PART VIII - TAKEOVER BIDS

This Part contains one provision to allow for the prescribing of regulations governing corporate takeovers.

PART IX - DISCLOSURE OF SHAREHOLDINGS OF DIRECTORS, OFFICERS AND SIGNIFICANT SECURITY HOLDERS

IOSCO Principle 17 requires that the holders of securities in a company should be treated in a fair and equitable manner. One of the key requirements for full implementation of this Principle is that the securities regulatory framework should require timely disclosure of the holdings and any changes in the holdings of the reporting issuer's securities by its substantial security holders, directors and senior managers. This information should be disclosed in public offering and listing documents and at least annually. Best practice suggests up-to-date information on these significant holdings should be publicly available on a continuing basis.

It is standard international practice to require persons to report their ownership of, and transactions in, securities of the reporting issuer of which they are insiders. Public reporting of transactions by these persons conveys important information to the market. The requirement to disclose all trading is to discourage trading on undisclosed information. Failure to file the appropriate reports may be a red flag that improper trading has taken place. Comparing the trades reported to the disclosure of material information may provide useful evidence of improper trading. International standards acknowledge this type of disclosure as a key element of a fair securities marketplace.

The Bill contains amendments to the requirements in the current Act, which extends these obligations to all reporting issuers. The obligations do not only require reporting by substantial shareholders and directors, but also now extends to officers. The 14-day reporting requirement was also amended to reflect the more common approach, which is a 7-day reporting requirement.

PART X - UNCERTIFICATED SECURITIES

The IOSCO Principles do not include rules relating to certificated versus uncertificated securities. The Bill extended the provisions under this Part to apply to all securities of reporting issuers rather than just those of listed securities. This is in an effort to encourage more companies to utilise the services of a licensed registry.

PART XI - MARKET MISCONDUCT

The provisions of this Part cover most of the range of abusive conduct that the IOSCO Principles contemplate and which are included in the legislation of other jurisdictions.

Prohibited Acts (sections 82 to 93): The full range of misconduct offences have been included in the Bill, including, market manipulation, market rigging by creating artificial prices or artificial activity, misleading or deceptive conduct, issuing false or misleading statements, improperly inducing persons to deal, general dishonest conduct and the making of prohibited representation.

Insider Trading (section 92): The provisions governing trading on undisclosed information (usually referred to as insider trading prohibitions) have been clarified in the Bill and the related concept of front running introduced. Insider trading is defined as trading with knowledge of material undisclosed information about a public issuer by anyone who is either an insider of the issuer or by virtue of a business or other specified relationship ('person in a special relationship' with the issuer'), is likely to have access to such information about the issuer. Consistent with international best practice, the test for determining who would fall within the definition of an 'insider' is an objective one - if the specified relationship exists, then the person will fall within the definition.

Front Running (section 93): Front running carries with it the same concept as insider trading of having undisclosed information that would affect the price of an issuer's securities, but rather than relating to the issuer itself, the information relates to a person's trading intentions regarding those securities. If the licensee advising a company on a significant acquisition, bought its shares before the company released particularly good financial results, that licensee would be breaching the rule against insider trading. If the same licensee bought the shares knowing that another client of the licensee was about to place an order for a large block of shares thereby driving up the price of the shares, the licensee would be front running.

Policy Rationale: Insider trading and front running are prohibited on the basis that all material information should be available to the public as soon as possible and anyone with an informational advantage owing to his relationship with a reporting issuer should not be able to profit from that information. Investors cannot be expected to have confidence in a market where insiders are permitted to profit at the expense of everyone else.

Tipping: In addition to direct trading by the person with material undisclosed information, encouraging someone else to do so or passing the information on to a third party, other than as required in the course of business are also offences (sections 92 (3), 93 (2)(c) and (d)).

Defences (sections 94 to 97): The usual defences to front running and insider trading are included in the Bill. These defences turn on the other party to the trade also having knowledge

of the material undisclosed information or where some factor outside the trader's control triggers the trade. For example, a licensee does not breach these provisions by filling a previously placed order for a client or where it is acting as agent for someone who does not know the undisclosed information. Statutory defences to other market misconduct offences are not commonly provided.

PART XII - LISTING AND TRADING FOREIGN SECURITIES, LICENSING AND EXCHANGE MEMBERSHIP OF FOREIGN MARKET PARTICIPANTS

This purpose of this Part, which was introduced in 2004 as an amendment to the current Act, was to address issues related to the development of a regional market and to allow the Eastern Caribbean Securities Exchange (ECSE) to compete effectively in the Caribbean Community (CARICOM) as a regional securities exchange by –

- permitting the listing and trading of securities of a foreign company or a foreign government on a securities exchange licensed by the Commission;
- eliminating duplicative registration requirements where listing is solely for ECSE trading;
- accepting compliance with other regulatory authorities' requirements where the Commission is satisfied that adequate supervision exists; and
- facilitating the use of dematerialisation for the trading of foreign securities listed on the ECSE.

Foreign issuers would apply to the ECSE for listing using a simplified application process and agree to comply with the rules of the exchange, which are subject to Commission review and approval. The listing requirement would recognise that the issuer is already subject to disclosure rules by another securities regulatory authority in its home jurisdiction or by the listing requirements of another recognised exchange. While the foreign issuer is required to make disclosure filings with the Commission or ECSE, copies of filings made with the primary regulator generally would be acceptable. If the Commission imposes additional disclosure requirements, the issuer may issue addendums to provide this information.

The listing or trading on the ECSE is not deemed to be 'offering of shares to the public' and so does not trigger the requirement to comply with the Bill's prospectus requirements. However, if

an issuer engages in other activities with respect to the securities, that would otherwise attract the prospectus obligation, it will be required to comply with the requisite requirements.

The amendments also contemplated allowing foreign intermediaries (brokers or advisers) to be licensed to carry on ordinary securities business in the jurisdiction, in the same manner as local intermediaries, on the condition that these foreign intermediaries appointed an agent who is resident in an ECCU member territory.

The 2009 Consultant noted that, "*The concepts contemplated by this Part are not inconsistent with the Principles and are in place in many countries. For issuers, so long as the home country (foreign) disclosure requirements provide for suitable disclosure*[3] *and those documents are made available to regulators and investors in the host (local) jurisdiction in a timely fashion, the relevant Issuer Principles will be met*."[4]

The usual home-host supervision arrangements for cross border operations of brokers places the primary responsibility for prudential regulation (prudential capital requirements and fit and proper regulation) of the firm on the home regulator. The host regulator generally relies on the home regulator for that oversight[5] and focuses on conduct of business regulation within its jurisdiction. If the foreign broker does not deal with local customers and trades only for its own account and that of its foreign customers, then most of the conduct of business rules that should apply would fall to the home regulator to impose. The trading rules of the local exchange should reinforce certain key conduct rules with particular relevance to exchange trading, such as that client orders take priority. If the Commission is satisfied that the home regulator applies an acceptable level of regulation to a foreign broker, then having general information about the broker, confirmation of its good standing with the home regulator and having arrangements in place to facilitate information exchange regarding that broker, are acceptable to permit this sort

[3]This means that the foreign jurisdiction imposes requirements that full information is disclosed on a timely basis and the accounting and auditing standards in that jurisdiction are of an acceptable international standard.

[4]See for example, IOSCO, International Disclosure Standards for Cross-Border Offerings and Initial Listings by Foreign Issuers (Sept. 1998). http://www.iosco.org/library/pubdocs/pdf/IOSCOPD81.pdf

[5]Although it should be noted that the recent global financial crisis has raised questions about this reliance and it is under review in the EU and elsewhere.

of activity, particularly where the foreign broker also has to be a member of the exchange and will be subject to supervision by that exchange.

The regulatory regime for the listing and trading of foreign securities, licensing and exchange membership of foreign participants will be prescribed in separate Regulations.

PART XIII - INVESTIGATION, INSPECTION AND ENFORCEMENT

IOSCO Principles 10 to 12 provides that the Regulator should:

- Have comprehensive inspection, investigation and surveillance powers;
- Have comprehensive enforcement powers;
- Ensure an effective and credible use of inspection, investigation, surveillance and enforcement powers and implementation of an effective compliance programme.

In order to facilitate full cooperation under the terms of the IOSCO MMoU, the securities regulator must have the authority to access, obtain and share certain information to assist with the investigation of alleged securities fraud that may ultimately be used in enforcement proceedings by foreign regulators. At present, the ECSRC receives requests for assistance from foreign regulatory authorities that it has been unable to fulfil, due to resource limitations and challenges related to its legal authority to access information and/or provide information in a timely manner.

The IMF, in its report to the ECSRC stated that the "**Restrictions on access to and use of bank records"** was a major obstacle to the ECSRC signing the IOSCO MMoU**.**

The report stated that the law in the ECCU is unclear with regard to the ECSRC's ability to obtain bank records related to securities transactions (including names of account owners and controllers and transaction records), where the bank is not licensed by the ECSRC to conduct securities business. In practice, under the auspices of a regional Memorandum of Understanding that is currently in place, the ECSRC can obtain bank records from banks regulated by the ECCB via the ECCB and from offshore banks licensed in each territory through the Regulatory Authority in each Member Territory. However, as this arrangement is not supported in

legislation it was deemed unacceptable by IOSCO in its 2004 review of the ECSRC's membership application.

The report also highlighted the "**Regulatory bifurcation of the ECCU securities market into domestic and offshore securities activities"** as another obstacle to IOSCO membership. The ECSRC has jurisdiction only over the domestic securities market and must rely on the co-operation of the non-bank financial sector regulators in each of the eight ECCU member territories in order to assist foreign authorities requesting information relating to offshore securities activities occurring from within the ECCU member territories.

DIVISION I - INVESTIGATIONS AND INSPECTIONS

Investigation Powers (sections 101): The Bill substantially expands the investigation powers under the current Act and gives the Commission the full range of powers contemplated by the IOSCO Principles and that are present in the securities legislation of many other countries.

Under the Bill, the Commission may initiate an investigation if it considers this to be necessary or expedient in order to determine:

(a) whether any person has contravened, is contravening or is about to contravene the Act;
(b) whether a person may have committed a breach of trust, fraud or misconduct, in carrying out securities business;
(c) whether the manner in which a person has engaged, or is engaging, in any securities business is not in the public interest;
(d) for the administration of the securities laws; or
(e) to assist in the administration of the securities legislation of another jurisdiction.

The statutory threshold for launching an investigation is 'where the Commission considers it necessary or expedient', which is the threshold used in several other countries. The 2009 Consultant viewed the threshold in the current Act – *where the regulator has reasonable grounds for believing there has been a breach of the law*" – [to be] too restrictive, as the regulator may need to use its investigative powers to establish whether or not reasonable grounds exist. This

higher threshold is particularly problematic when the investigation is being carried out on behalf of another regulator.

The Commission sought to address the restriction the "**Restrictions on access to and use of bank records" under section 101.** Under the new Bill, the Commission's power to investigate is against any "person or a person". A 'person' is defined in the Act to include an individual, company, partnership, party, trust, fund, **licensed financial institution,** association and any other legal entity, organised or incorporated group of persons, and the personal or other legal representative of any person to whom the context can apply.

S**ection 102** of the Bill provides the Commission with the Power to obtain information. Under *section 102*, where the Commission considers that a person is or may be able to give information or produce a document that is or may be relevant to an investigation, it may-

(a) require such person to attend before it at a specified time and place to answer questions, including under oath or affirmation that the statements that the person will make will be true;

(b) enter, during reasonable hours, the business premises of such person for the purposes of-

i. inspecting and copying information or documents stored in any form on such premises; or

ii. seizing and taking possession of any information or documents; and

(c) require such person to give, or procure the giving of, specified information or information of a specified description in such form as the Commission may reasonably require.

The Commission may carry out the investigation directly or appoint another person to act on its behalf. The provisions also give the Commission full authority to summon witnesses, compel testimony and compel the production of documents.

Inspection Powers - licensed Persons: (section 103) The provisions in the current Act have been expanded to allow the Commission to inspect any licensed person (which for the purposes of this Part include a licensee, licensed marketplace or clearing facility, investment fund or party related to an investment fund) whenever the Commission chooses to do so. No notice is required and the Commission does not have to suspect a breach of the Act to carry out an examination. The Bill gives the Commission a full range of powers to enter the licensed person's premises, examine and inspect data and copy information and remove information or documents from the premises as contemplated by the IOSCO Principles.[6] The section requires the licensed person to pay for an inspection of this type, and provides for the Commission to give an exemption as appropriate.[7] The Commission may also require the licensed person's auditor to review and report on the licensed person's operations (also at the licensee's expense; see section 104).

Inspection Powers - Other Market Participants (section 105): The Bill gives the Commission the authority to conduct limited compliance inspections of other market participants that are not licensed persons. This would allow the Commission to order a market participant such as a reporting issuer to produce documents or other information to ensure the requirements of securities laws are being satisfied. Again, the market participant bears the cost of this review. This section does not contemplate the conduct of on-site examinations of these other market participants.

The definition of market participant as set out in the Interpretation section of the Bill, is extensive and would include anyone who participates in the market other than as an investor. In particular, it includes licensed persons (securities firms, marketplaces, clearing facilities, investment funds and investment fund administrators), public issuers, custodians of assets of registered firms, transfer agents, credit rating organisations and the directors, officers and significant security holders of any of them. The definition of '**record**' in the Interpretation section of the Bill gives the Commission a general right to prescribe the books and records that these entities must keep.

[6]See Principle 10.

[7]This fee charging power is present in the legislation in most Canadian provinces.

Participation of other Regulatory Authorities in Inspections (section 108): The Commission now has specific authority to allow another regulatory authority, domestic or overseas, to participate in a compliance inspection of a market participant, such as a banking supervisor for the purposes of consolidated supervision.

Restrictions on Withholding or Concealing (section 109): The Bill also provides that anyone who fails to cooperate with a requirement under this Part, destroys information or otherwise obstructs an inquiry is guilty of an offence and will be subject to a substantial fine.

Protection of persons providing information (section 110): No person shall be required to disclose information, or to produce a document, which the person would be entitled to refuse to disclose or produce on the grounds of legal professional privilege in court proceedings.

DIVISIONS II AND III – ASSISTANCE TO DOMESTIC AND FOREIGN REGULATORY AUTHORITIES

IOSCO Principles 13 to 15 sets out the requirements for Cooperation in Regulation. Accordingly, the regulator should have the authority to:

(i) share both public and non-public information with domestic and foreign counterparts;
(ii) establish information sharing mechanisms that set out when and how they will share both public and non-public information with their domestic and foreign counterparts; and
(iii) have a regulatory system that allows for assistance to be provided to foreign regulators who need to make inquiries in the discharge of their functions and exercise of their powers.

The IMF report noted the Commission's **"lack of authority to conduct investigations on behalf of foreign authorities without the ECSRC having an independent interest in the matter."**

The ECSRC Agreement, 2000 permits the Commission to cooperate with foreign securities regulators, but the current Act does not specifically empower the Commission to conduct an investigation on behalf of a foreign regulatory authority where the alleged misconduct involves a

possible violation of the laws of a foreign country only. This limitation would effectively require the Commission to have an independent interest in a matter in order to use its investigation powers on behalf of a foreign regulatory authority. Such a restriction would be unacceptable under the terms of the IOSCO MMoU.

In order to fulfill the IOSCO MMoU obligations, the Commission must have the ability to obtain and share information with a foreign securities regulator in another country to assist the foreign regulator in carrying out its supervision, investigation and enforcement functions. The IOSCO Principles expect the local regulator to have the ability to obtain and share information regarding matters that may entail criminal liability, but only where these are securities-related offences. These requirements are now included in the provisions in Division III - **Assistance to a Foreign Regulatory Authority,** which comprises sections 112 to 115 of the Bill**.**

Under **section 114** of the Bill, the Commission has the authority to enter into Memoranda of Understanding. This will facilitate the ECSRC becoming a signatory to the IOSCO MMoU concerning Consultation and Cooperation and the Exchange of Information.

Offence (section 115): A person who without reasonable excuse, refuses or fails to comply with an order under this Part; or in purported compliance with an order under this Part furnishes to the Commission any document known to the person to be false or misleading in a material particular, or in purported compliance with an order under this Part, makes a statement to the Commission that is false or misleading in a material particular, commits an offence and is liable on summary conviction to a fine not exceeding $500,000.

ENFORCEMENT

The IOSCO Principles 10 to 12 stipulate *inter alia* that a regulator should have comprehensive enforcement powers including:

- power to seek orders and/or to take other action to ensure compliance with these regulatory, administrative and investigation powers;
- power to impose administrative sanctions and/or to seek orders from courts or tribunals;
- power to initiate or to refer matters for criminal prosecution;

- power to order the suspension of trading in securities or to take other appropriate action;
- where enforcement action may be taken, the power to enter into enforceable settlements and to accept binding undertakings.

The actions that the Commission may take on a breach or suspected breach of the current Act are not comprehensive (2009 Consultancy). The Bill replaces and supplements these provisions with powers that are present in securities legislation in other Commonwealth countries.[8]

Power to issue directions (section 116): *The Commission may, by notice in writing, give a direction where it appears to the Commission that-*

(a) it is desirable for the protection of investors;

(b) a person is contravening, has contravened or is about to contravene any provision of or requirement under the securities laws;

(c) a person has failed to comply with any provision of or requirement under the securities laws; or

(d) a person, in purported compliance with any provision or requirement, has furnished the Commission with information that is false, inaccurate or misleading.

A direction under this section may require or prohibit a person:

- to cease and desist from the contravention;
- to comply with the prohibitions or requirements;
- from entering into transactions of a class or description specified in the notice or prohibit entering into them otherwise than in the specified circumstances or to the extent specified;
- from soliciting business from a person of a class or description specified or from persons other than persons of such a class or description;
- from carrying on business in a specified manner or otherwise than in a specified manner; as regards any assets,

[8]Including Australia, Canada, Hong Kong, Singapore, Bermuda and the Cayman Islands.

- to maintain in the Currency Union, assets of such value as appears to the Commission to be desirable with a view to ensuring that the person will be able to meet its liabilities in respect of its securities business; or to transfer control of assets of a specified class or description to a trustee approved by the Commission.

Orders in the public interest (section 117): The Commission now has extensive powers under the Bill to make orders where it considers it is in the public interest to do.

Some of the Orders that the Commission may make incude:

a) order a person to comply with—

(i) securities laws or a Commission decision; or

(ii) the regulatory instrument or a decision of a person licensed under Part II;

(b) order a person, a class of persons or all persons to cease trading a security, a class of securities or all securities;

(c) order that any or all of the exemptions in securities laws do not apply to a person;

(d) prohibit a person from –

(i) acting as a partner, director or officer of another person;

(ii) acting as a related person;

(iii) acting as a party related to investment fund as defined in the Investment Funds Act;

(iv) acting as an auditor of a market participant;

(v) acting in a management or consultative capacity in connection with activities in the securities market; or

(vi) promoting the trading of a security or of securities generally;

(e) issue a censure or reprimand;

(f) impose conditions or restrictions on grant, suspension or revocation of a licence;

(g) restrict the trading or advising activities of a licensee or a person exempt from licensing;

(h) order a person to change a document;

(i) order a person to publish information or a document;

(j) order a person not to publish information or a document;

(k) order a person that is a market participant to make changes to its practices and procedures;

(l) apply to the court for an order to take such actions as it considers necessary to protect the interests of-

(i) clients or creditors of a regulated person;

(ii) investors or creditors of an investment fund; or

(m) apply to the court for an order that the person be wound up by the court;

(n) order that a distribution of securities cease and that any subscription funds collected be repaid to subscribers;

Administrative Penalty (section 119): This provision gives the Commission the power to impose monetary penalties for breaches of the Act. This will be subject to the right to a prior hearing.

Administrative fines may be imposed for certain offences (section 120): This provision will allow the Commission to impose a fine on a person who commits an offence, in order to discharge the liability for conviction, without a hearing. It should be noted that this ability is limited to provisions where the statutory requirements imposed on the person are totally objective and so a prior hearing would serve very little purpose, other than for pleading guilty with an excuse in mitigation.

Costs (section 123): The provisions on costs stipulate that the Commission may require a person to pay investigation and hearing costs. These costs may also include the costs of a monitor, advisor or controller appointed under an order of the Commission. The Commission retains the discretion to grant an exemption from the requirement to pay costs.

Freezing of assets (section 124): The additional powers included give the Commission the **authority to freeze assets** on a temporary basis**,** both for domestic reasons or to assist in the administration of the laws of another jurisdiction, as this increasingly is seen as a necessary

adjunct power in the cross-border enforcement of securities legislation.[9] The Commission does not need to provide an opportunity to be heard to the persons affected by a freezing order before it makes a decision to issue the order. This is so despite the remedy in subsection (2) which provides prompt recourse before a judge for an aggrieved person. The Commission's authority to take actions extends to investment funds and their related parties.

Hearing (section 130): The IOSCO Principles and the rules of natural justice generally require that no sanction be imposed before the person is given an opportunity to be heard. However, international best practice recognizes that the public interest may demand that the regulator act quickly, and without holding a hearing. Best practice also dictates that any such order that is given be of limited duration and that a hearing follow promptly. Accordingly, the enforcement provisions, as drafted, allow the Commission to apply many of the sanctions without holding a hearing, but only for a maximum of 15 days (subsections 117(5) to 117(6)). A notice of hearing must accompany the temporary order.

Disciplinary and enforcement authority of the Commission: (section 129): The Bill retains the provisions enabling the Commission to have the authority to conduct disciplinary hearings.

Appeals (sections 133 and 134): These sections outline the procedures for appeal process under the Bill.

PART XIV - CIVIL LIABILITY FOR MISREPRESENTATION

This Part of the Bill addresses civil liability and the rights of investors where there has been a misrepresentation in a prospectus. The provisions outline an investor's rights of action against the parties responsible for a prospectus and introduces the remedy of rescission as an alternative to taking action for damages.

Policy Rationale: The concept behind civil liability is simple: where a prospectus contains a misrepresentation, the investor should have the ability to seek the recovery of his losses against the issuer and anyone who was responsible for the statements in the prospectus, including the

[9]See IOSCO, Resolution on Cross-border Cooperation to Freeze Assets Derived from Securities and Derivatives Violations, June 2006, http://www.iosco.org/library/resolutions/pdf/IOSCORES25.pdf

underwriter, the directors and officers of the issuer, any promoter of the issue and any expert who provided an opinion. Common law makes these parties liable for negligent misstatements but a plaintiff must bear the onerous burden of **proving** he relied on the misstatement. Civil liability provisions in securities legislation simplify that process by deeming reliance and codifying who is responsible and for which errors.

Action for Damages (section 135): The provisions have been simplified in the Bill, to list the persons against whom action may be taken. Essentially, a person who is an issuer, or is a selling security holder, an officer or director of either of these or have signed a certificate in the prospectus or provided a consent for the prospectus, you may be liable. Liability of these persons is joint and several, but the underwriter is not liable for more than the portion of the offering that the licensee sold. As is usual, an expert is only liable if the misrepresentation is in his report or the summary of his report contained in the prospectus. The other persons are not liable for misrepresentation in this expert opined part of the prospectus provided they had reasonable grounds for relying on the expert and had no reasonable grounds to believe there was a misrepresentation.

Action for Rescission (section 136): The Part also introduces an alternative remedy suggested by international best practices. Rather than suing for damages, a purchaser may opt to rescind the transaction and receive back what they paid for the securities. This action is only exercisable against the issuer (or selling security holder) or against the underwriter who sold the security to the purchaser. A purchaser who opts for rescission cannot also file a claim in damages. An action for rescission is usually simpler, as the plaintiff does not have to prove the extent of the damages suffered.

Defences (**section 137):** A person is not liable in damages for a misrepresentation if they prove that they exercised due diligence to ensure that there were no misrepresentations in the prospectus. They are also not liable if they can prove that the purchaser knew of the misrepresentation at the time of the purchase. In some jurisdictions the due diligence defence is not available to the issuer or selling security holder, but it is more commonly available to all.

The latter approach has been taken, as the alternative makes misrepresentation a strict liability offence for the issuer, which is rather draconian.

Civil Liability for Market Misconduct Offences/Civil Liability for trading contrary to section XI/Liability for misrepresentation in other offering documents (sections 138 to 139): The Bill extends the statutory civil liability for misrepresentations to other offering documents, to cover civil liability for insider trading and market misconduct offences.

Commission Intervention (section 141): The Commission now has the authority to bring an action on behalf of a party or intervene in any action undertaken by any investor under this Part.

PART XV - GENERAL PROVISIONS

This Part includes provisions for the determination of whether an individual is "fit and proper", the Commission's rulemaking authority, provisions governing some administrative proceedings and the appointment of a receiver or liquidator and sets out the Commission's authority to make orders. It also contains the power to recognize foreign securities exchanges and foreign jurisdictions for various purposes under securities laws.

Guidelines (section 144): The Bill extends the Commission's authority to issue guidelines. The Commission can make guidelines to give effect to the Act, to enable the Commission to perform its functions and to aid with compliance with any other law that is being administered by the Commission. The Bill contains detailed procedures for proposing guidelines by the Commission.

Regulations (section 146 to 147): the Minister may make regulations on the recommendation of the Commission. This power has not been changed in the Bill.

Rulemaking Authority (section 148): The Commission now has the authority to make any rule necessary or expedient to carry out its functions and responsibilities.

Rulemaking Process (section 149): International best practice requires the rulemaking process to be objective and transparent to the public. The Commission must publish a proposed rule for public comment by interested parties, prior to its effective date. The publication should be to the public at large, as a limited distribution to a narrow group may raise questions of fairness and independence. A public process also enhances the accountability of the Commission for its actions. The rule then becomes final on the approval of the Commission. The Commission's approval process should also be transparent. The process proposed in the Bill is as follows:

- the draft is published for general public comment for 60 days;[10]
- comments are collected, analysed and incorporated into the draft as the Commission deems appropriate;
- the Commission, on or before the rule's effective date, publishes it in the Gazette.

The publication for comment step may be skipped in specified circumstances (section 149(5)), including where the Commission believes there is an urgent need for the new rule.

Appointment of Receiver (section 154): The Commission has the authority to appoint a receiver where it considers that it is in the best interest of or is necessary for the protection of investors. The Commission may obtain an ex parte application from the court for a period not exceeding fifteen days.

Appointment of a Liquidator (section 155): With the leave of the Court, the Commission may make application to the court for a winding up order.

Public Availability of Documents (**section 159):** imposes a new obligation on the Commission to make all documents "filed" with it available to the public, subject to an exemption where the disclosure would not be in the public interest. From a policy perspective, the objective of this disclosure requirement is to raise the level of information available to the securities markets thereby increasing transparency, efficiency and fairness. In accordance with international best practice, filings can be made available through direct access at the Commission offices or by

[10]There is no international standard period for publication for comment. The US uses 60 days, Canada uses 90 days and several other jurisdictions set no particular time frame. The period should be long enough to ensure the proposal comes to the attention of the public and gives enough time to formulate thoughtful responses.

posting the documents to its website. In most jurisdictions, the presumption is that all documents relating to reporting issuers are public documents and should be made available to the public by the regulator. The practices with respect to the affairs of licensees, marketplaces and licensed individuals are more varied, but the default often is that the information is treated as public.

Not all documents provided to the Commission would be publicly available. The definition of "file" means documents provided to the Commission that are required to be "filed" under the securities laws. Documents that are required to be "provided" or "delivered" to the Commission (and are not otherwise required to be filed with the Commission) would not be subject to the public disclosure obligation. For example, documents demanded of a person under an investigation would be provided to the Commission and would therefore not be made public.

Discretionary Orders: **(section 164)** The Commission now has extensive powers to take action by individual order. Basically, if it is satisfied that an order would be in the public interest, it may issue the order.

PART XVI - REPEAL AND TRANSITIONAL PROVISIONS

The transitional provisions in the new Bill generally provide a grace period for reporting issuers and persons that are currently licensed with the Commission to move to the new requirements under the new law. For licensed firms, individuals etc., all authorizations are deemed to continue. Where new requirements are imposed under the Bill, those requirements generally become effective 12 months after the day the new law comes into force (the "effective date"). Regulations and rules made under the current Act, in force at the commencement of the new Bill, will remain in force until replaced by new Regulations made pursuant to this Bill.