Securities Act 2005

Purpose

The main purpose of the Securities Act 2005 ("the Act") is to ensure a fair, efficient and transparent securities markets and most importantly, to strike an appropriate balance between the protection of investors and the interests of the securities market.

The Act, which replaces the Stock Exchange Act 1988, draws on modern legislation in analogous jurisdictions and underpins the Government's intention to expand financial services in Mauritius while assuring appropriate regulatory and supervisory standards, recognising the on-going development of the Mauritian financial sector and its continuing integration into the world economy.

Administration and Objects of the Act

The Act shall be administered by the Financial Services Commission (FSC). The main objectives of Act are to-

(a) promote the confident and informed participation of investors and consumers in, and the efficiency of, securities markets in Mauritius;

(b) improve the protection of investors in Mauritius from unfair, improper and fraudulent practices in relation to securities;

(c) foster fair, efficient, transparent and informed markets for securities in Mauritius; and

(d) act in co-operation with other agencies in Mauritius and elsewhere, to reduce systemic risk in the Mauritius financial sector.

(e) regulate the disclosure of information by persons issuing securities and by reporting issuers to securities holders and to the public

(f) monitor and regulate the operation of securities exchanges and the activities of persons providing depository, clearing and settlement services and trading systems for securities;

(g) suppress and prevent financial crimes and illegal practices;

(h) cooperate and collaborate with domestic and international organisations, law enforcement, supervisory and regulatory bodies, and

(i) carry out research and collect, compile, publish and disseminate data and information on the securities industry.

Regulation of Market Infrastructure

Under the Act, it shall henceforth be an offence to set up and operate a securities exchange, depository and clearing facility or a securities trading system without a license issued by the FSC. In granting a licence, the Commission has to be satisfied that, having regard to the general condition, the needs and interests of the capital market and the community, there is a need for the additional facility or system proposed to be authorised by the licence. Companies licensed to operate such facilities

will be able to make enforceable rules to govern their operations but such rules will not be effective unless approved by the Commission.

Existing market operators such as the Stock Exchange of Mauritius (SEM) and the Central and Depository Service (CDS) will be deemed to be licensees under the new Act. Under the Act, the SEM will be bestowed with a number of additional regulatory functions to ensure the integrity of the exchange including the supervision of market participants, the investigation of market abuses and misconduct, and the imposition of disciplinary measures. The SEM will be required to convert into a public company and shall be a demutualised exchange. On the other hand, the CDS will have to establish a Clearing and Settlement Advisory Committee to to review and make recommendations concerning systems design, operational procedures and problems and the introduction of new service

Regulation of Market Intermediaries

The Act creates two classes of market intermediaries, **Investment Dealers** and the **Investment Advisers,** who are both required to be licensed by the FSC.

(i) The investment dealer replaces the traditional *stockbroker* under the Stock Exchange Act 1988 and is a person who shall

(a) act as an intermediary in the execution of securities transactions on behalf of other persons;

(b) trade or deal in securities as principal for his own account with the intention of selling them to the public; or

(c) underwrite or distribute securities on behalf of an issuer or a holder of securities.

Only body corporates will be entitled to apply for an investment dealer licence, whereas natural persons may be licensed as *representatives* of the investment dealer. The investment dealer however remains liable for the conduct of its representatives in relation to securities.

(ii) The investment adviser is a person who

(a) advises, guides or recommends other persons about entering into securities transactions, and may also

(b) manages a portfolio of securities under a discretionary or non-discretionary mandate.

An investment adviser may be a natural person or a body corporate. A natural person may also be licensed as representative of an investment adviser.

An application for a licence shall be made to the Commission in accordance with the requirements in Sub-Part E of Part III of the Act and in rules that will be made by the Commission. Sub-Part F of the Act contains a number of prudential and conduct of business requirements which will be supplemented by detailed rules.

Self-Regulatory Organisation (SROs)

Part IV of the Act sets out a novel approach towards regulation through the use of organisations or associations comprising of industry professionals to assist the regulator in supervising and regulating the activities of licensees with a view to improving protection of investors and consumers of securities services and the standards of practice and business conduct of licensees. This approach is in compliance with one of the core principles of IOSCO which advocates the use of front-line regulators who are in direct contact with market participants and the industry at large. SROs could include securities exchanges such as the SEM, or other industry groups. The FSC may delegate relevant functions and powers to SROs. Because SROs will exercise important regulatory functions, they will be subject to detailed control by the FSC, including over their articles of association and shareholding as well as over their internal and industry rules.

Offers and Issues of Securities

All public offers of securities in or from within Mauritius by whatever means will require a prospectus registered with the FSC, unless specifically exempted. The provisions contained in Part V of the Act will supplant the provisions in the Companies Act 1984, which were kept in force in the Companies Act 2001. The provisions of the Act in this respect will be later be supplemented by detailed rules. The Act provides that the FSC shall grant a provisional registration to any prospectus lodged with it. No subscription of securities of an issuer shall be allowed until the Commission has granted effective registration. The Commission will only grant such effective registration after having assessed the prospectus in terms of compliance with disclosure requirements **only** and **not** in terms of the merits of the offer. The directors of the issuer and others associated with the offering shall bear responsibility for the accuracy of statements therein. The FSC may refuse to register a prospectus if it appears that the prospectus does not comply with the Act.

Disclosure

The Act introduces the concept of "reporting issuer". A "reporting issuer" is defined as any issuer of securities

(i) who by way of a prospectus, has made an offer of securities either before or after the commencement of the Act

(ii) who has made a takeover offer by way of an exchange of securities or similar procedure,

(iii) whose securities are listed on a securities exchange in Mauritius; or

(iv) who has not less than 100 shareholders

The Act imposes a duty of public disclosure on all reporting issuers. The FSC will keep a register of reporting issuers which shall be available for public inspection and

indicate whether the reporting issuer is in default of the disclosure requirements. Reporting issuers are required to make both timely disclosure of material changes that occur in their affairs and which is likely to have a significant influence on the value or market price of its securities as well as periodic disclosure, that is, quarterly financial statements and annual reports. Insiders of reporting issuers (as defined) shall equally have a duty to disclose their interests and any change of such interests in the shareholding of reporting issuers.

Takeovers

The Act contains no detailed provisions in relation to takeovers, which are defined as offers made by or on behalf of a person ("offeror") to acquire such securities of the offeree which will result in the offeror acquiring effective control of the offeree, either at one time or over a period of time. However, the Act empowers the Minister to make regulations in relation to

(a) the making of takeovers; and

(b) the rights and obligations of persons when a takeover is made.

Collective Investment Schemes

In line with international trend, the Act has adopted the term "collective investment scheme" to all arrangements or schemes that operates on the basis of pooling of funds from investors with the object of investment in portfolios of securities and non-financial assets. Such schemes are currently known as mutual funds, unit trusts or investment trusts. The Act provides for a uniform framework of regulation governing all collective investment schemes in such legal forms as may be approved by the Commission. Part VIII of the Act subjects the operation of collective schemes to the authorisation of the FSC. Foreign schemes are not subject to any authorisation requirement but will instead be required to apply for recognition of the Commission before they may be distributed in Mauritius.

Detailed regulations will be made in due course regarding their operation in relation to duties of operators and functionaries, level of disclosure and conduct of business rules. For prudential reasons, there ought to be a demarcation between the custody and control of collective investment schemes. The Act requires the assets of a scheme to be held for safe custody by a licensed custodian who shall be either a bank or a trustee or trust company. Further, all schemes will have to be managed by a CIS manager who shall have to be independent from the custodian and on whom a number of fiduciary duties are imposed

Market Abuses

Part IX of the Act creates a number of serious offences, to preserve the integrity of the Mauritius securities market

Insider Dealing

The offence of insider dealing prohibits a person who has inside information about securities of a reporting issuer from knowingly buying, selling or otherwise dealing in those securities, or counsel, procure or cause another person to deal in securities or disclosing the information otherwise than in the proper performance his employment or office or profession. The penalty for the offence a fine of not less than 500 000 rupees and not exceeding one million rupees or a fine not exceeding three times the amount of any profit gained or loss avoided by any person as a result of the offence whichever is higher.

Disgorgement

Where a court finds, on application by the FSC, that a person has engaged into an act of insider dealing, it may order that person to pay to the FSC up to an amount found by the Court to be the amount of the profit. These amounts are to be paid into a special trust fund to compensate investors that suffer a loss by the insider dealing. Proceedings for disgorgement are civil proceedings, not criminal.

Market rigging & False Trading

It an offence to indulge in market rigging activities by creating or sustaining artificial prices for securities on a Mauritius securities exchange, intending to induce another person to buy, sell or hold securities, or carrying out artificial or fictitious transactions. On the other hand, false trading involves creating a false or misleading appearance of active trading in securities on an exchange or in relation to the market for, or the price of, securities on a Mauritius securities exchange. This includes, for example, buying and selling securities without any real change in beneficial ownership. The penalty for such offences is a fine of up to one million rupees and imprisonment up to five years.

Powers of the FSC

A fundamental principle of IOSCO requires securities regulators should have adequate powers, proper resources and the capacity to perform its functions and exercise its powers. The IOSCO principle states that the regulator should have comprehensive inspection, investigation and surveillance powers. Under the Act, the Commission is empowered to

(a) request information from its licensees in relation to securities transactions

(b) carry onsite inspections and investigations

(c) suspend licences

(d) appoint administrators

(e) give directions, the non-compliance of which is an offence

(f) impose administrative sanctions in accordance with the procedures laid out in the Financial Services Development Act 2001 (FSDA) (as amended)

(g) issue cease trade orders

Reviews

Decisions of the Commission and the Enforcement Committee under the Act and SROs under their rules, will be amenable to review in accordance with the procedure laid out under the FSDA. The application for review does not act as an automatic stay of execution of the decision of the FSC. However, the Review Panel, may on application grant a stay of execution.

Certain decisions will not be reviewable such as a decision to declare or recognise an SRO, a decision to revoke a declaration or recognition of an SRO, a decision to appoint an administrator, decision to conduct an investigation, a decision to grant or not to grant an exemption, and any interim decision or direction.

Representative Proceedings

To reduce the cost of private enforcement, and to allow a more efficient use of court and other resources for the benefit of consumers, section 149 of the Act allows for representative proceedings. This section caters for a situation where a number of investors have substantially the same claim against a defendant. Currently, our civil procedure does not allow for such claims to be grouped so as to be heard in the same sitting and this causes inconvenience and delay and leads to a multiplicity of court actions and costs. In line with IOSCO's recommendation on investor protection, this clause allows one person (who can be the FSC) to start one set of proceedings in respect of all such claims. The judgment given will then be valid for and bind all the claimants.

Transitional Provisions

The Act provides for the repeal of several pieces of legislation such as the Stock Exchange Act 1988 and the Unit Trust Act 1989 and some provisions of the Companies Act 1984 that were saved under the Companies Act 2001.

Stockbrokers, dealers representatives and authorised clerks

Persons registered as stockbrokers and dealer's representatives shall continue to operate according to the terms of their licence but shall need to apply for a licence as investment dealer and representative of investment dealer within one year of the commencement of the relevant part of the Act. Dealer's authorised clerk may be eligible for a license as a representative where he/she carries out activities within the definition of a representative under the Act.

Investment advisers and investment managers

Similarly, persons acting as investment advisers and investment managers of collective investment schemes, whether licensed or not, shall have to apply for a licence within one year of the commencement of the relevant part. However, a manager of a unit trust

scheme shall have five years after the commencement of the Act to apply for a license as investment manager of a collective investment scheme.

Approved investment institutions, unit trusts and mutual funds

Approved investment institutions, unit trust schemes and authorised mutual funds in existence prior to the commencement of the Act shall be allowed to continue their operations governed by the repealed enactment but will have to apply for authorisation as a collective investment scheme within five years of the commencement of the Act.

Commencement

The Act will come in force on a date to be fixed by proclamation but different sections of the Act may be proclaimed on different dates.