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Prospectuses and Public Offers by Bermuda Companies

Foreword

This memorandum has been prepared for the assistance of those who are considering the making of an offer by a Bermuda company of its shares to the public. It deals in broad terms with the requirements of Bermuda law for such offers. It is not intended to be exhaustive but merely to provide brief details and information which we hope will be of use to our clients. We recommend that our clients seek legal advice in Bermuda on their specific proposals before taking steps to implement them.

This memorandum is concerned, in general, with the offering of shares by an exempted company. The prospectus provisions of the Companies Act 1981 (the "Act") differ slightly in their application to a local company. In addition, it should be noted that residents of Bermuda may be subject to further restrictions on their ability to subscribe for the shares of exempted companies.

Before proceeding with any such offering, persons are advised to consult their tax, legal and other professional advisers in their relevant jurisdictions.

Copies of the Bermuda Companies Act 1981, as amended, have been prepared and are available on request.

This memorandum has been prepared on the basis of the law and practice as at the date referred to below.

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TABLE OF CONTENTS

1. CIRCUMSTANCES REQUIRING A PROSPECTUS

1.1 Who Must File

1.2 "Shares"

1.3 "Public"

1.4 Exemptions

2. CONTENTS OF A PROSPECTUS

2.1 Statutory Prospectus Contents

2.2 Foreign Authority Prospectus Contents

3. PROCEDURE FOR FILING OF A PROSPECTUS

4. LIABILITY FOR MIS-STATEMENTS

4.1 Criminal Liability

4.2 Civil Liability

1. CIRCUMSTANCES REQUIRING A PROSPECTUS

Part III and Section 25 of the Companies Act 1981 (the “Act”) are concerned with prospectuses and public offers. Section 26(1) of the Act provides that no company shall offer shares to the public unless prior to such offer it publishes in writing a prospectus, and prior to or as soon as reasonably practicable after the publication of such a prospectus, it is filed with the Registrar of Companies.

1.1 Who Must File

The prospectus provisions apply to every company incorporated in Bermuda which offers shares to the public. The prospectus provisions also apply generally in the following circumstances:

- (a) where a unit trust is established in Bermuda. The prospectus provisions and the requirements of those provisions referring to a “company” or its officers are construed as applying to the manager of the unit trust;
- (b) where shares are to be offered prior to the incorporation of the company. In such cases, the promoters are subject to the prospectus provisions and the prospectus should be signed by or on behalf of all the proposed directors; and
- (c) where a company is incorporated outside Bermuda but obtains a permit to carry on business from within Bermuda (a “permit company”).

1.2 “Shares”

An offer by a company of other types of securities may also require a prospectus. For the purposes of the prospectus provisions, “shares” includes:

- (a) warrants to be issued by the company conferring an option to acquire shares of such company;
- (b) units of a unit trust scheme;
- (c) debentures, debenture stock, bonds or any other security of the company whether or not secured.

1.3 “Public”

An offer to the public includes an offer to any section of the public. However, an offer need not be treated as an offer or invitation to the public if it is:

- (a) an offer to existing holders of shares in the company of the same class as the shares comprised in the offer without any right of renunciation;
- (b) an offer without any right of renunciation to the holders of convertible debentures or debentures having subscription rights in respect of shares into or in respect of which the right of conversion or subscription exists;
- (c) an offer certified in writing by an officer of the company on behalf of the board of directors to be an offer which the board considers as not being calculated to result, directly or indirectly, in the shares becoming available, in the case of an exempted company, to more than 35 persons;
- (d) an offer having a private character whether by reason of the connection between the company issuing the shares and those to whom they are issued or otherwise (and this would specifically include employee share schemes or similar arrangements); or
- (e) an offer certified in writing by an officer of the company on behalf of the board to be an offer which the board considers as not being calculated to result, directly or indirectly, in shares becoming available to persons other than persons whose ordinary business involves the acquisition, disposal or holding of shares, whether as principal or agent.

1.4 Exemptions

It is not necessary to publish and file a prospectus at any time or in any circumstances where the shares are listed on an appointed stock exchange¹, or an application has been made for the shares to be so listed, and the rules of the exchange do not require the company to publish and file a prospectus at such time or in such circumstances. Similarly, where the company is subject to the regulations of a competent regulatory

¹ Please contact Conyers Dill & Pearman for a current listing of appointed stock exchanges and competent regulatory authorities.

authority and such rules or regulations do not require the company to publish and file a prospectus at such time (except where such exemption is given by reason of the offer being made only to persons who are resident outside the jurisdiction of the authority).

Further, an application may be made to the Minister of Finance seeking a direction that Part III (or any provision of Part III) and Section 25 of the Act shall not apply to a proposed offer of shares. It is generally necessary to provide substantial justification for seeking an exemption.

2. CONTENTS OF A PROSPECTUS

The Act provides that a prospectus must contain certain prescribed particulars. However, where the prospectus has been received or accepted by an appointed stock exchange or competent regulatory authority outside of Bermuda (referred to herein as a “foreign authorities”) the contents requirements do not apply.

2.1 Statutory Prospectus Contents

The prospectus must contain all of the matters set out in the Act. Even where the intention is that a listing be sought, the prospectus may not be accepted by a stock exchange prior to the first issue. It is therefore often necessary for at least the initial prospectus to comply with the contents requirements of the Act. The matters which are required by the Act to be included are as follows:

- (a) the names, descriptions and addresses of the promoters, officers or proposed officers;
- (b) the business or proposed business of the company;
- (c) the minimum subscription which, in the opinion of the promoters, directors or provisional directors, must be raised by the issue;
- (d) the rights or restrictions attaching the shares which are being offered;
- (e) all commissions payable on the sale of shares referred to in the prospectus and the net amount receivable by the company in respect of these sales;
- (f) any shareholding in the company of an officer of the company;

- (g) a report by the auditors of the company prepared in such manner and containing such information and copies of such documents as shall be required by rules made under the Act;
- (h) the date and time of the opening and closing of subscription lists.

Section 28 of the Act deals with the minimum subscription which must be raised by the issue of shares in order to provide for certain matters, including working capital. The Act provides that no shares may be allotted unless such minimum is received within 120 days from the date of publication of the prospectus. The prospectus should, therefore, include a statement to this effect. Alternatively, the terms of the offer should be such that the requirement will not be infringed.

Further, the mechanics for issue and allotment of the shares must not be such that shares could be allotted prior to receipt of the minimum. For instance, if the minimum subscription which must be received is \$1,000,000 and the minimum which any one investor may subscribe for is \$10,000, the prospectus must not simply state that shares will be issued upon receipt of the application and funds.

Where, as is often the case with continuing prospectuses, the directors are of the view that there is no minimum subscription, a statement to that effect must, in any event, be included.

The Act provides that a company may pay a “reasonable commission” to a person in consideration of his subscribing for shares or in consideration for the processing of subscriptions. Save as aforesaid, no company shall apply any of its share capital in payment of any commission, discount or allowance.

Audited financial statements and an auditors’ report must be included with each prospectus. The financial statements must have been prepared as at a date not more than six months prior to the date of publication of the prospectus. If such audited financial statements relate to a period more than six months prior to the date of publication of the prospectus, unaudited financial statements for a financial quarter

ended not more than four months prior to such date must also be included with the prospectus.

In the case of an initial offer by a newly incorporated company, it is sufficient to include a report from the auditors stating that the company has not commenced business, no accounts have been made up and no dividends have been declared or paid.

Further, it is usual to include a statement to the effect that the auditors have given and not withdrawn their consent to the inclusion of their report in the prospectus.

2.2 Foreign Authority Prospectus Contents

Where a foreign authority has “received or accepted” a prospectus the prospectus need not comply with the statutory contents requirements but is deemed acceptable in the form as received or accepted by the relevant foreign authority.

3. PROCEDURE FOR FILING OF A PROSPECTUS

Every prospectus must be “signed by or on behalf of all directors.” It is usual to obtain powers of attorney from all of the directors for the purpose of signing the prospectus.

In order to be filed, a prospectus must be accompanied by a certificate of an attorney. In the case of prospectus satisfying the statutory contents requirements, the attorney must certify that the relevant particulars have been included. In addition, such attorney’s certificate must be accompanied by a consent letter of the auditors relating to the inclusion of their report in the prospectus.

In the case of prospectuses satisfying the foreign authority contents requirements, the attorney’s certificate must state that the prospectus has been received or otherwise accepted by a relevant foreign authority. In order to give such certificates, it is necessary to receive confirmation from the foreign authority or attorneys in that

jurisdiction to the effect that the prospectus has been received or accepted by the foreign authority.

It is important to note that the document or documents filed must be identical to the document or documents delivered to potential investors. In other words, it is not sufficient to comply with the prospectus provisions for the purposes only of filing the prospectus.

The Act states that where there is a continuous offer of shares to the public and where the particulars in a prospectus cease in a material respect to be accurate the company must publish and file supplementary particulars. This requirement may be satisfied by issuing and filing a new prospectus. Alternatively, it will generally be sufficient to prepare a supplement, amend pages or enclosures to be included with the original prospectus. It must be remembered that a prospectus is a document intended for use by new investors. If there is a material change with respect to the company's activities, it may also be necessary to give notice to, or obtain the consent of, the existing shareholders.

It should be noted that, except where a general permission for the issue and transfer of shares has been obtained from the Bermuda Monetary Authority, all subscribers for shares pursuant to a prospectus must submit the usual references to the Bermuda Monetary Authority. The prospectus in such circumstances should make mention of this requirement.

In certain cases it may be necessary to file the prospectus prior to the incorporation of the company. Any such prospectus should clearly state that the company has not yet been incorporated and that there is no guarantee that permission will be given for such incorporation. Powers of attorney for the signing of the prospectus should be obtained from all of the proposed directors.

4. LIABILITY FOR MIS-STATEMENTS

4.1 Criminal Liability

Any person who makes or authorizes the making of an untrue statement in a prospectus faces criminal liability, unless he proves either that the statement was immaterial or that at the time he made the statement he had reasonable grounds to believe it was true. Criminal penalties including imprisonment and fines can be imposed.

4.2 Civil Liability

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

- (i) every person who is an officer of the company at the time of the issue of the prospectus;
- (ii) every person who has authorised himself to be named and is named in the prospectus as an officer or as having agreed to become an officer of the company either immediately or after an interval of time;
- (iii) every person being a promoter of the company;
- (iv) every person who has authorized the issue to the public of the prospectus.

No person is liable under this section of the Act if he proves -

- (i) that having consented to become an officer, he withdrew his consent before the issue of the prospectus and that it was issued without his authority or consent;
- (ii) that the prospectus was issued without the officer's knowledge or consent, and that on becoming aware of the issue he forthwith gave reasonable public notice that it was issued without his knowledge or consent;

- (iii) that, after the issue of the prospectus and before the allotment thereunder, he, on becoming aware of any untrue statement therein, withdrew his consent and gave reasonable public notice of the withdrawal and the reason therefor; or
- (iv) that, as regards every untrue statement he reasonably relied on the authority of an expert or public official (or an extract of a report or valuation of an expert or copy of or extract from a public official document).

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

This publication is not a substitute for legal advice nor is it a legal opinion. It deals in broad terms only and is intended merely to provide a brief overview and give general information.

About Conyers Dill & Pearman

Conyers Dill & Pearman advises on the laws of the Cayman Islands, British Virgin Islands, Bermuda, Mauritius and Cyprus. Conyers' lawyers specialise in company and commercial law, commercial litigation and private client matters.

The combination of Conyers' structure, culture and expertise enables the highest quality, responsive, timely and thorough legal advice. Conyers' strategic global presence in major international business centres allows a seamless 24 hour service.

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