

REGULATORY INTELLIGENCE

COUNTRY UPDATE-The Bahamas: Securities & Banking

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Unlike some jurisdictions where all forms of financial services are regulated by a single body, the insurance, banking and securities industries in The Bahamas are regulated by three separate regulators. The insurance industry is regulated by the Insurance Commission of The Bahamas, the banking industry is regulated by the Central Bank of The Bahamas (the Central Bank) and the securities industry is regulated by the Securities Commission of The Bahamas (the SCB). This article focuses on certain features of the banking and securities industry only.

Securities regulation

Securities business in The Bahamas, which includes dealing in securities, arranging deals in securities, managing securities or advising on securities, is regulated by the SCB in accordance with the Securities Industry Act, 2011 (the SIA) and the Securities Industry Regulations 2012 (the SIR).

The SIA and the SIR set out the overarching regulatory framework for the conduct of securities business in and from The Bahamas and provides for, among other things, (i) the powers and functions of the SCB, (ii) the regulation of marketplaces, (iii) the registration and licensing of persons carrying on securities business, and (iv) disciplinary and enforcement procedures for misconduct.

The local stock exchange, The Bahamas International Securities Exchange Limited (BISX), provides dealing and settlement facilities for its broker-dealer members and listing facilities for issuers and investment funds.

Capital reserve requirements

Firms registered with the SCB ("registered firms") are required to maintain regulatory capital which is adequate to meet their business commitments, withstand the risks to which their business is subject and meet the prescribed requirements. The capital reserve requirement is an amount to be calculated in accordance with the capital formula prescribed by the SCB in rules.

Although the rules setting out the capital formula have not yet been promulgated, the current minimum regulatory capital requirements imposed by the SCB are based on the nature of the securities business carried out by the registered firm:

- (i) a firm registered to deal in securities as principal or agent must maintain a minimum regulatory capital of \$300,000;
- (ii) a firm registered to deal in securities as agent only must maintain a minimum regulatory capital of \$120,000;
- (iii) a firm registered to arrange deals in securities must maintain a minimum regulatory capital of \$25,000;
- (iv) a firm registered to manage securities must maintain a minimum regulatory capital of \$25,000; and
- (v) a firm registered to advise on securities must maintain a minimum regulatory capital of \$25,000.

Product specific legislation

There is little in the way of legislation specifically relating to distinct types of securities products. In respect of listed securities, broker-dealer members and listed issuers of BISX are subject to the BISX Rules, which set out the relevant rules concerning the admission of members, disciplinary procedures and listing procedures.

Most securities, including, without limitation, stocks, bonds, debentures, debt instruments, warrants, certificates, contracts for differences, options and futures fall within the provisions of the SIA. However, certain securities, such as contracts for differences, are subject to additional regulatory requirements, by virtue of the Securities Industry (Contracts For Differences) Rules 2020 (the CFD rules). In particular, any registered firm which carries on securities business in, or otherwise provides or markets contracts for



differences in or from The Bahamas must, among other things, be registered with the SCB under the SIA and the CFD rules, in order to carry out such securities business.

Investment funds are generally subject to a different regime established under the Investment Funds Act 2019 (the IFA) and the Investment Funds Regulations 2020 (the IFR).

The IFA and IFR provide for the regulation of investment funds, as well as the regulatory, supervisory and disciplinary authority of the SCB in connection with, among other things, investment funds, investment fund administrators, investment fund managers and other parties related to an investment fund.

Investment funds may be structured as a company, partnership, unit trust or an investment condominium (also referred to as an ICON). An ICON is an alternative legal structure for investment funds which does not have a distinct legal personality but which is able to (through its appointed governing administrator) hold assets, enter into agreements and sue and be sued in its own name.

Enforcement and investigation

Under the SIA and the SIR, the SCB is empowered to investigate contraventions of securities laws and carry out inspections of the businesses of registered firms and market participants for this purpose. In addition to its powers of investigation and inspection, the SCB is empowered to compel evidence and to require registered firms and their registered representatives to furnish reports on any matter required by the SCB in connection with the registered firm.

In the event that it appears to the SCB that any person has contravened securities or anti-money laundering laws in The Bahamas, the SCB may exercise its enforcement powers which include, among others, the power to freeze assets, conduct regulatory hearings in connection with the denial, suspension or cancellation of a registration, suspend certain trading and other privileges, and impose penalties of up to \$300,000 for each contravention.

Financial promotion

Under the SIA, no person is permitted to publish, make or issue an advertisement or other public invitation in or from The Bahamas, including a public announcement, for persons to invest in a security or engage in a securities transaction, unless such person is registered with the SCB to carry on securities business.

Where advertising is permitted, the SIA requires that the advertisement contain sufficient information so that it is not misleading. The SCB may require that an advertisement or public invitation be approved by the SCB prior to it being published. If an advertisement is made, issued or published outside The Bahamas, it must comply with the laws in the jurisdiction where it will be made, issued or published.

Market abuse

Persons who engage in market manipulation, false trading, market-rigging and other forms of misleading and deceptive conduct are guilty of an offence under the SIA and may be subject to a fine of up to \$150,000 and/or imprisonment for up to two years. Such persons may also be required to pay a penalty of up to double the amount of gains or losses avoided by them.

Members and listed issuers of BISX are also subject to the disciplinary procedures set out in the BISX Rules. These enable BISX to carry out investigations, conduct disciplinary hearings, impose fines and penalties as well as terminate membership.

Corporate governance: Remuneration and bonuses

Under the SIA, no person may trade in a security on a person's own account or on behalf of another person, where the trade would be a "distribution" of a security in The Bahamas, unless a preliminary prospectus and a prospectus containing the information prescribed by the SIA and the SIR has been registered with the SCB or an exemption from the requirement to register a preliminary prospectus or prospectus with the SCB applies.

For the purposes of the SIA, a "distribution" includes a purchase or sale for valuable consideration of a newly issued security or a previously issued security that has been redeemed or purchased by an issuer.

Issuers which are required to comply with the requirement to register a prospectus with the SCB, are required to disclose therein, among other things, the remuneration of directors and senior officers of the issuer including, without limitation, cash, bonuses, securities, options, insurance, pensions, the payment of any expenses including housing, automobiles, lodging, relocation, reimbursements of any kind, non-cash gifts, forgiveness of debts and extension of loans.

Public companies, whose securities are listed on BISX, state-owned enterprises and private companies either seeking to raise funds from the capital markets through the issuance of their own securities, or seeking listing by introduction, are also subject to the Securities Industry (Corporate Governance) Rules, 2019. The rules impose additional requirements in respect of, among other things, the remuneration of the board of directors of the issuers to which the rules apply, including the obligation of such boards to develop a comprehensive policy on remuneration for company directors, executives, and senior management.

Data protection



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The provisions of the Data Protection (Privacy of Personal Information) Act (DPA) apply to securities firms, persons carrying on securities business, entities engaging in banking business (as defined below) and the relevant governmental and regulatory authorities in the manner discussed further below.

Banking and financial services regulation

Any person who accepts deposits of money which may be withdrawn or repaid and uses those deposits for lending or investment purposes, or any person who provides money transmission services, is engaged in 'banking business' for the purposes of the Banks and Trust Companies Regulation Act, 2020 (BTCRA) and is subject to licensing by the Central Bank.

Similarly, any person acting, engaged in or carrying on the business of providing financial services or corporate services is subject to licensing by the SCB, pursuant to the Financial and Corporate Services Providers Act, 2020 (FCSPA). For the purposes of the FCSPA, (i) financial services include, among other things, money lending, money broking, payday and cash advances, credit extension, custody of digital assets and financial leasing; trading in commodities and other financial instruments; and wallet services providers and (ii) corporate services include, among other things, directorship services and registered office and registered agent services.

Capital reserve requirements

The minimum capital reserve requirements applicable to a licensed bank depend on the class of licence that the bank holds. For example, if a bank holds a public licence, which authorises that bank to carry on banking business with members of the public, the minimum capital reserve requirement is \$5,000,000. Banks that are either in voluntary liquidation and require monitoring of its winding up, or which are approved by the Central Bank to hold a dormant license, do not have stipulated capital reserve requirements. In the latter case, the minimum capital requirement may be determined by the Central Bank in the light of the circumstances of the particular bank.

Financial and corporate services providers under the FCSPA are also required to maintain adequate regulatory capital and solvency. Licensees have a statutory duty to maintain the prescribed regulatory capital as prescribed by the SCB, which may include a requirement for indemnity insurance.

Product specific legislation: Mortgages

The Mortgages Act and the Conveyancing and Law of Property Act (CLPA) set out and regulate the rights, powers and obligations of mortgagors and mortgagees in respect of mortgaged property and the powers of the courts to deal with related actions. In particular, the CLPA regulates the exercise by mortgagees of their power of sale such that it may not be exercised unless certain statutory requirements have been met. The CLPA also dictates how the proceeds of sale of mortgaged property received by a mortgagee upon the exercise of its power of sale should be applied.

Banks and credit institutions are also regulated by the Money Lending Act which empowers the courts of The Bahamas to provide relief to debtors where interest or other charges or expenses relating to a loan are excessive, or if the transaction is harsh and unconscionable. Additionally, under the Rate of Interest Act, credit and other money lending institutions which are not licensees under the BTCRA and which provide loans in Bahamian currency, are prohibited from charging simple interest in excess of 20% on loans of more than \$100.

The Homeowners Protection Act 2017 (HOPA) provides certain protections and relief to persons who have granted a mortgage (mortgagors) over residential property (mortgaged property). Where a financial institution to whom a mortgage has been granted (a mortgagee) seeks the court's assistance and institutes court proceedings arising from the mortgagor's breach of the mortgage terms, the mortgagor or a member of his immediate family who has contributed to the payment of the mortgage, may apply to the Supreme Court of The Bahamas for relief. Such relief may include an adjournment of the proceedings for a maximum of 6 months subject to such conditions as the court may think fit.

Where a mortgagor seeks to exercise its power of sale of the mortgaged property in accordance with the terms of the mortgage without the assistance of the court, a mortgagor may also apply to the court for relief. The court has the power to order that the sale of the mortgaged property be postponed for a reasonable period if it is satisfied that the mortgagor is likely to be able to (a) pay any sums due under the mortgage; (b) remedy a default consisting of a breach of any other obligation arising under or by virtue of the mortgage; or (c) pay arrears.

The HOPA also imposes certain conditions that the mortgagee must satisfy before it exercises its power of sale, and prohibits the sale of the mortgaged property to specified persons including an immediate family member of a director or employee of the mortgagee.

Failure to comply with the provisions of the HOPA attracts severe penalties.

Enforcement and investigation

In the event of a concern arising or a supervisory breach by a licensee of the Central Bank, the Central Bank may, among other things, conduct onsite examinations of the licensee, make recommendations and issue formal directions to the management or board of directors of the licensee, impose administrative fines, inform the bank's home regulator of the supervisory action taken by the Central Bank and/or impose restrictions on the bank's ability to conduct certain business activities, including appointing a statutory administrator, substituting directors or officers, suspending or revoking the licensee's bank licence or invoking the intervention provisions under the Protection of Depositors Act (PDA), discussed below.



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The PDA provides protection to Bahamian depositors. The PDA requires all banks licensed under the BTCRA and which carry on banking business either wholly or partly in Bahamian currency to be members of, and pay annual premiums to, a deposit insurance fund managed by the Deposit Insurance Corporation (DIC), a public corporation.

The DIC provides insurance coverage of up to \$50,000 (or such other amount that may be determined by the Minister of Finance) for depositors in the event of a member bank's failure, provided the deposit is payable in The Bahamas in Bahamian currency. If, however, a bank in The Bahamas is not a member bank of the DIC, or if the relevant deposits are not payable in The Bahamas in Bahamian currency, creditor hierarchy would be established with reference to the relevant corporate statute under which the bank was formed, if formed under the laws of The Bahamas, or otherwise in accordance with the laws of its country of formation.

In the event of a winding up of a bank incorporated under the Companies Act 1992 of The Bahamas, priority is accorded first to secured and preferred creditors, secondly to unsecured creditors, and thirdly to the shareholders according to their rights and interest in the company. This applies equally in the case of securities firms.

Financial promotion

Under the BTCRA, no person may make any advertisement that such person is carrying on banking business or is authorised by the laws of The Bahamas to carry on such business, unless that person is duly licensed by the Central Bank and is acting in accordance with the terms of its licence, or otherwise has obtained the prior approval of the Central Bank.

Corporate governance: Remuneration and bonuses

Banks which are licensed by the Central Bank are required to carry out an annual review of their corporate governance process to assess and document whether it achieves its objectives. The annual review should include the remuneration scheme of the board of directors as well as the rationale there for, and should be disclosed to the Central Bank on an annual basis.

Data protection

Banks licensed under the BTCRA have a duty to preserve client confidentiality and may not disclose to any person any information relating to the identity, assets, liabilities, transactions or accounts of its customers. A similar duty exists under the DPA, which prohibits any person (including governmental and regulatory agencies) from disclosing the personal data (i.e. data that can identify an individual) in its possession of another person.

Under the BTCRA, FCSPA and the DPA, there are a number of exceptions to the prohibitions on disclosure including, inter alia, disclosure (i) required by law or by an order of the court, (ii) where the consent of the relevant person is obtained, (iii) made with a view to instituting certain criminal or disciplinary proceedings, and (iv) made to an employee or agent of the person in possession of the data in the course of their employment or agency.

Exchange controls

Exchange controls exist in The Bahamas and are enforced by the Central Bank. Under the Exchange Control Regulations Act (ECRA) persons who are "resident" for exchange control purposes (e.g. Bahamian citizens, permanent residents with an unrestricted right to work and entities which are designated or deemed to be "resident" for exchange control purposes) may not deal in nor hold non-Bahamian currency ("foreign currency") or securities denominated in non-Bahamian currency (foreign securities) without the prior approval of the Central Bank.

However, natural persons and entities that are "non-resident" for exchange control purposes (i.e., temporary, annual or permanent residents without the right to work in The Bahamas, companies incorporated under the Companies Act 1992 which have been designated "non-resident" by the Central Bank in writing and companies incorporated under the International Business Companies Act 2000 which carry on business exclusively outside of The Bahamas or conduct business exclusively with persons who are "non-resident" for Exchange Control purposes) may deal in foreign currency and foreign securities without the prior approval of the Central Bank.

Due to the COVID-19 pandemic, the Central Bank has implemented certain conservative measures aimed towards preserving its external reserves. One such measure is the prohibition of persons deemed "resident" for exchange control person purposes from investing in overseas securities and real estate via the Investment Currency Market. The Central Bank, however, has advised that this prohibition is anticipated be removed by year end.

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