



**TRINIDAD AND TOBAGO SECURITIES AND EXCHANGE COMMISSION**

***Guidelines for Foreign Companies that wish to  
operate Employee Stock Compensation Plans  
in Trinidad and Tobago***

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## **Background**

Employee Stock Compensation Plans (“ESCP”) may be defined as any arrangement that a company has instituted whereby its employees receive the ability to acquire, or are awarded shares in the company as compensation. The use of these plans to remunerate employees at varying levels in public companies has increased significantly in Trinidad and Tobago and the wider Caribbean.

ESCPs have been touted as a possible solution to the agency problem through ensuring the alignment of shareholder and management/employee interests by providing incentives that are directed toward the maximization of shareholder wealth and consequently management/employee wealth, through focus on the share price. However, this incentive mechanism has also posed new forms of the agency problem, whereby a management team is driven by self interest to take measures that artificially increase the share price in the short-term but to the detriment of the company’s long-term prospects. Additionally, these compensation measures may further entrench a management team by shifting effective control of a public company from its shareholders to management.

In Trinidad and Tobago several of the companies listed on the Trinidad and Tobago Stock Exchange have some form of ESCP in operation. Naturally, these companies are registered with the Commission as reporting issuers and any shares that they offer to their employees pursuant to the ESCP are first registered with the Commission.

Informally however, the Staff of the Commission has come to understand that other companies, which are not registered with the Commission as reporting issuers and who operate in Trinidad and Tobago *may* have ESCPs in operation. Further, other companies which operate locally, but are domiciled elsewhere have indicated a desire to implement ESCPs but are somewhat reluctant to do so for the following reasons:

1. They are domiciled and regulated in other jurisdictions;
2. They do not want to incur further regulatory costs which would arise as a result of registering with the Commission and subjecting themselves to the jurisdiction of the Securities Industry Act, 1995;
3. Employees, the participants in the ESCP, are assumed to not need as much protection by way of disclosure of information as other investors. It can be argued that these employees by virtue of working for the company would already have access to information about the affairs of the company that would be needed to make an investment decision. Indeed the Act provides a prospectus exemption for issues of securities to employees of the Issuer;
4. The ESCPs are structured such that the shares that are issued pursuant thereto are not likely to end up in the hands of the public;
5. The Company is not, nor does it intend to become a reporting issuer in Trinidad and Tobago or have its shares traded in this jurisdiction.

This paper seeks to put forth a proposal to facilitate the implementation of Employee Stock Compensation Plans (“ESCPs”) by Multinational Corporations that have

operations in Trinidad and Tobago but who are not registered as Reporting Issuers in Trinidad & Tobago and have no intention of becoming a Reporting Issuer.

## **Review of current law**

An “offer to the public” is defined in Section 3(1) of the Securities Industry Act, 1995 (“the Act”) as follows:

*“...‘offer to the public’, in relation to any security, means any offer to the public at large or to any section of the public, whether selected as clients of persons issuing the Prospectus or in any other manner by way of advertisement or other form of solicitation, but does not include an offer by an offeror who is not a registered Reporting Issuer under this Act where the offer is made to fewer than thirty-five persons and the offer can be regarded as not being calculated to result directly or indirectly in the securities becoming available for subscription or purchase by persons other than those receiving the offer or invitation, or otherwise as being a matter of domestic concern of the persons making and receiving it...”*

The foregoing extract indicates that any offer of a security by a registered reporting issuer would be deemed to be an offer to the public. More pertinent to this matter however, is that an offer of a security to thirty five or more persons, by any issuer, whether that person is a reporting issuer or not, would be interpreted as an “offer to the public”.

An offer of a security to the public, places an obligation on the issuing entity to register as a Reporting Issuer in Trinidad and Tobago in accordance with Section 64(2) of the Act which proposes the registration requirement for Issuers of securities. Section 64(2) states that *“a person who proposes to issue securities to the public shall register with the Commission as a Reporting Issuer and file a registration statement in the prescribed form and within the prescribed time”*.

Furthermore, according to Section 65(1), *“...no security shall be offered to the public or listed with any self-regulatory organization unless it is registered with the Commission.”*

Having regard to the foregoing, the offer of any security to the public ought not to take place unless and until such security is first registered with the Commission. The registration of the security will also require the registration of the Issuer of the securities as a Reporting Issuer in accordance with Section 64 (2) of the Act.

In upholding the Commission’s mandate, adequate disclosure must be made by Issuers to investors of securities through the filing of a Prospectus or Information Memorandum. However, certain instances will allow for Prospectus exemptions to be granted. With particular reference to the subject of this paper, Section 75(1)(j) of the Act allows for a prospectus exemption by an Issuer of securities to its employees, if:

*“(1) the employees are not induced to purchase the securities by expectation of employment or continued employment with the Issuer; and*

*(2) no commission or other remuneration is paid or given in respect of the distribution except for professional services or for services other than the solicitation of employees, performed by an Issuer.”*

To summarize, Companies that offer securities to thirty five or more of their employees by way of an ESCP would be deemed to have made an offer to the public and as such would be required to register the shares that are the subject of the ESCP as well as the company itself as a reporting issuer. The requirement to have a prospectus receipted however, would be waived in accordance with Section 75(1)(j) of the Act.

### **Overview of requests from the Market**

Several companies have requested that the Commission consider facilitating the operation of ESCPs in Trinidad and Tobago without mandating either the registration of the shares that are the subject of the ESCP or the company itself.

The substance of these Companies’ submission to the Commission is that they have ESCPs in operation in other countries and would like their employees in Trinidad and Tobago to be allowed to participate in the ESCPs. As alluded to above however, the companies are somewhat reluctant to subject themselves to the registration and disclosure requirements of the Act.

Following is a synopsis of the arguments that were advanced for the Commission to reconsider its position with respect to the requirement to register the shares issued to the public via ESCPs as well as the issuers themselves:

1. The offer will be made to employees only, who do not constitute the public, or a “section of the public”. The argument here is that employees by virtue of their employment with the organization would already have access to information about the affairs of the company that would be needed to make an investment decision.
2. Section 75 of the Act sets out certain exemptions from the Prospectus requirements for a distribution that has certain characteristics, including the issue of securities by an Issuer of securities of its own or an associate’s issue to its employees once certain conditions are satisfied;
3. Section 75(1)(j) of the Act enshrines a public policy in favour of share ownership by a Company’s employees, and the exemption from the Prospectus requirement can be viewed as evidence of Parliament’s intention to encourage such shareholder schemes and to not extend the protection of the Act, such as registration of the securities, to employees; and

4. Once the Commission is satisfied that the foreign Issuer of shares is subject to a foreign securities regulator approved by the Commission, and it has no intention of becoming a Reporting Issuer in Trinidad and Tobago, both the Issuer and the securities should be exempt from registration. This approach has been adopted in some Canadian cases.

Items 1 to 3 above can be considered together. These arguments essentially state that once an Issuer is offering shares to its employees, those employees would not be considered as the “public” and as such would not necessarily require the protection that is afforded by the disclosures accompanying a registration statement. The fourth argument postulates that it may not be necessary to register either the shares that are issued pursuant to ESCPs or the issuers themselves based on the fact that the issuers would be registered with and regulated by a foreign securities regulator.

### **Staff Position**

Based on the Staff’s research there appears to be sufficient precedent in Canadian case law for the Commission to consider granting an exemption to foreign issuers that are registered and regulated by another securities regulator, from the requirement to register as a Reporting Issuer as well as the requirement to register the shares that it intends to offer, subject to the satisfaction of certain criteria. The conditions that were present in the certain cases cited in the Canadian decisions were as follows:

1. The Issuer of the securities was incorporated under the laws of a foreign jurisdiction and regulated by an approved foreign securities regulator. Further, the Issuer was not a Reporting Issuer and must have no intention of becoming a Reporting Issuer or its equivalent in the local jurisdiction.
2. Any trades of shares by participants in the Employee Stock Compensation Plan would not be conducted in the local jurisdiction. Rather any such trades would be executed in the Issuer’s home jurisdiction where it is registered with a securities regulator or any other jurisdiction where it is registered to do so.
3. There was no present or anticipated future market for the Issuer’s shares issued under the ESCP;
4. The actual sale of shares issued pursuant to the plan takes place outside of the local jurisdiction.

Based on the foregoing the Staff is of the view that the Commission, may agree to exempt foreign issuers from the registration requirements, not because the offer is not an offer to the public, nor because the legislation is not intended to fully protect employees,

but on the basis that the issue involved is an foreign employee stock purchase plan, registered and regulated in a foreign jurisdiction, under which securities are not issued in Trinidad and Tobago to employees in this jurisdiction. Further any such exemptions may be subject to such other conditions as the Commission may determine. These conditions include:

- i. The provision of a Prospectus, financial statements, and other materials provided to shareholders in the Issuer's country of domicile to local shareholders; and
- ii. In the event that an exemption is granted to the foreign Issuer, the first trade of any securities by a beneficiary in the ESCP in the local jurisdiction would be considered a distribution to the public, thereby triggering the registration requirement of the Act.

### **Proposed Procedure**

Foreign Issuers that would like to implement an ESCP for employees in Trinidad and Tobago and who:

- Are domiciled in foreign jurisdictions;
- Are registered and regulated by securities regulators in their country of domicile; and
- Do not intend to make their shares available to the general public in Trinidad and Tobago and have instituted measures to ensure that participants in the ESCPs are either required to either sell their shares back to the ESCP itself, or contact a foreign market intermediary to sell their shares in another jurisdiction where trading in the companies' shares is allowed;

will be eligible to utilize this policy for implementation of the said ESCP.

Applications for exemptions based on this policy will be considered on a case by case basis. i.e. there will not be any automatic guarantee that a company will be granted an exemption based on satisfying the criteria outlined above. Rather, the conditions identified must be satisfied in order for a company to be considered eligible for consideration for an exemption. The Commission would then be required to consider the application and either authorize or reject the application for exemption.

Following is the proposed procedure to treat with applications of this nature:

1. The applicant must submit an application to the Commission outlining how it has met the conditions outlined above. These conditions must include:
  - a. Showing proof that the company is domiciled elsewhere and is regulated by another securities regulator, with which it is:
    - i. In good standing;
    - ii. Required to prepare financial statements in accordance with IFRS or US or Canadian GAAP; and

- iii. Required to comply with continuous disclosure requirements;
  - b. Filing a copy of the ESCP's rules and any disclosure material that is disseminated to employees. The plan must be structured in such a manner that the shares issued pursuant thereto cannot be sold in the local market. Rather arrangements must be made so that the shares can only be sold back to the plan or via a registered market maker in another jurisdiction in which the applicant is registered.
  - c. Declaring that the Foreign Issuer does not intend to be a reporting issuer in Trinidad and Tobago and that it does not intend to sell its shares in Trinidad and Tobago.
  - d. Committing to provide any documents that it provides to investors or employees in other jurisdictions to its employees in Trinidad and Tobago as well as with the Commission;
2. The Staff will review the application to ensure compliance with the prerequisites for consideration.
  3. Provided that the Staff are satisfied, a paper will be prepared outlining the terms of the application and requesting, subject to the Commission's agreement to approve the application, that the Commission make an order under Section 133 of the Act declaring that the shares that are the subject of the ESCP are exempt from registration under the Act because the shares are part of a foreign employee stock compensation plan.
  4. Making an order referred to in (3) above may necessitate the holding of a hearing under section 134(1) of the Act to ensure that all persons who are likely to be affected by the order make their concerns known. Where the Commission is satisfied however, that the making of this order will not adversely affect the rights or interests of any person, or is essentially procedural, it may be possible to forgo the hearing in accordance with Section 134(9) of the Act.
  5. The Commission will be asked to make the Order subject to the applicant satisfying certain conditions that it deems appropriate
  6. The Staff will follow up with the applicant to ensure compliance with these conditions.