



Unit Trusts – Alive Again

The Financial Services Commission (“FSC”) has lifted the moratorium it placed on the registration of new unit trusts and new unit trust products in the 1990s. The FSC News Release of February 18, 2010 indicates that this policy change has been taken “against the background of the need to promote further financial market development and provide additional investment opportunities”.

Unit trust schemes and mutual funds are both arrangements dealing with collective investment and are therefore generally lauded for allowing smaller investors, by pooling with others, to invest in securities which may otherwise have been out of their reach.

The FSC’s change in policy is therefore likely to be welcomed by financial market participants who, notwithstanding that the Securities (Mutual Funds) Regulations (“the Mutual Funds Regulations”) allowed the registration of mutual funds to continue during the period of the moratorium, would have been constrained to resort to overseas mutual funds if they wanted to make such collective investments available to their clients.

Persons who would have been interested in registering local mutual funds under the Mutual Funds Regulations, and therefore would have had to operate such mutual funds in accordance with the Companies Act, would have found that the current state of the Companies Act, which, for example, presently fails to differentiate between the founder shares creating the mutual fund company and the investor shares which would be issued and redeemed constantly, rendered such registration impractical.

A unit trust scheme is defined by the Unit Trusts Act as “any arrangements (whether in Jamaica or elsewhere) made for the purpose, or having the effect, of providing facilities for the participation by persons, as beneficiaries under a trust, in profits or income arising from the acquisition, holding, management or disposal of securities or any other property whatsoever, but does not include any arrangements having as their object or principal objective the provision of pensions”.

A mutual fund on the other hand, is defined by the Securities Act as any fund, scheme or arrangement (other than a private trust or pension) from which the proceeds, profits or income are pooled and are managed and/or invested on behalf of persons investing in the fund and in which the investor has the right to dispose of his shares, stocks, securities or other property or to have them redeemed or repurchased by the person or body corporate which owns, controls, supervises or operates the mutual fund.

A fine distinction exists between unit trust schemes and mutual funds and the two concepts may in fact overlap. One of the basic differences between the two concepts is that the unit trust scheme must encompass a validly constituted trust in which event the investors do not have a legal interest in the securities or other property themselves but instead have an equitable interest in the profits or income arising from them whereas the concept of the mutual fund is not so limited and could be organized based on a trust, a company or a partnership. To constitute a mutual fund, however, the investor must have the right to dispose of his shares, stocks, securities or other property or to have them redeemed or repurchased by that person or body corporate, whether or not at fixed periods, the definition of unit trust schemes is not so restricted.

Unit trust schemes are regulated by the FSC. Unit Trusts registered under the Unit Trusts Act are expressly excluded from the operation of the Mutual Funds Regulations. The FSC, however, with a view to ensuring that “a unit trust investor will have a similar level of protection to that afforded an investor in a mutual fund registered under the [Mutual Funds Regulations]” (Financial Services Commission, SR-ADVI-10/02-0005) has recently introduced new Regulations under the Unit Trusts Act. These regulations, among other things, require disclosure of certain documents and information to investors including every material change affecting the scheme to be published in a daily newspaper in circulation throughout Jamaica and on a website maintained by the scheme’s manager or by post or email to the unit holders immediately upon becoming aware of the change.

The FSC has indicated that it is ready to assist persons contemplating registering new unit trust schemes. It is, however, for each participant to determine how best to structure their own product. Whether, for example, to establish stand-alone schemes or to utilize an umbrella scheme, whether to have a paper based register or a paper-less version. There are therefore several different variations which a unit trust scheme may take, however the general structure remains the same.

The unit trust scheme is created by a trust deed which will set out the rules governing the operation of the scheme setting out the rights and obligations of the main players. The Unit Trust Regulations (as amended) lists fifteen matters which must be addressed in the trust deed of a unit trust scheme such as, identifying the duties and responsibilities of the main players, for determining the procedures for changing the main players, whether due to removal or retirement, or for determining the kind of investment permissible under the scheme and the maximum amount, if any, to be invested in respect of that investment, subject to the diversification limits specified by the FSC.

The main players in any unit trust structure generally include: (a) the trustee of the unit trust scheme, who will hold the trust assets themselves or through a custodian and is appointed to supervise the operation of the scheme; (b) the manager, who will manage the investments of the scheme and promote, sell, buy back units of the scheme to investors and calculate the selling and buying prices and determine the amount distributable to investors; (c) the investor or unit holders who are the beneficiaries under the trust and will supply the capital by purchasing units in the scheme.

As securities dealers look to diversify their investment products and investors look around for better returns they may wish to once again consider unit trusts, but investors beware, collective investments schemes generally do not give guaranteed returns and are required to disclose in any offering circular regarding the scheme that "Unit trusts own different types of investment depending on their investment objectives. The value of these investments may change from day to day, reflecting changes in interest rates, economic conditions and company news. As a result, the value of the scheme's units may go up or down and the value of your investment in the scheme, when you redeem it, may be more or less than when you purchased it".

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