



**CONSULTATION PAPER**

**PROPOSALS FOR ENHANCEMENT OF  
THE LEGISLATIVE FRAMEWORK FOR  
THE DEPOSIT TAKING SECTOR**

December 2012

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# **OMINIBUS STATUTE**

## **Consultative Document on Proposed Enhancements to the Legislation for the Deposit-Taking Sector**

**(Commercial Banks, Licensees under the Financial  
Institutions Act and Building Societies)**

This consultation paper is available on the Bank of Jamaica's website at  
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## **Table of Contents**

Introduction.....	4
Executive Summary .....	7
PART 1: DEFINITIONS .....	21
PART 2: LICENSING .....	32
PART 2A: FITNESS AND PROPRIETY .....	38
PART 3: CAPITAL AND RESERVES.....	41
PART 4: CASH RESERVES AND LIQUID ASSETS.....	45
PART 5: CREDIT RISK MANAGEMENT, PROVISIONING AND RESERVES.....	48
PART 6: DIRECTORS, MANAGERS AND OFFICERS .....	50
PART 7: GENERAL COMPLIANCE AND PROHIBITED BUSINESS .....	54
PART 8: REGULATIONS, ENFORCEABLE PRUDENTIAL RULES AND SUPERVISORY STANDARDS OF BEST PRACTICE .....	59
PART 8A:REGULATORY IMPLEMENTATION OF MACRO-PRUDENTIAL MEASURES	61
PART 9: REGULATORY AUTHORITY AND FUNCTIONS.....	62
PART 10: OTHER SUPERVISORY APPROVALS AND NOTIFICATIONS .....	65
PART 11: EXAMINATION AND PRUDENTIAL RETURNS.....	67
PART 12: DISCLOSURE REQUIREMENTS.....	72
PART 13: ACCOUNTS AND AUDITORS (EXTERNAL).....	74
PART 14: CONSOLIDATED SUPERVISION& FINANCIAL HOLDING COMPANY (“FHC”) PROVISIONS .....	76
PART 15: REGULATION OF CHANGES IN OWNERSHIP OR EFFECTIVE CONTROL ..	91
Part 16: GENERAL MARKET CONDUCT ISSUES.....	94
PART 17: CORPORATE AND GROUP RESTRUCTURINGS (Including Mergers and Amalgamations).....	96
PART 18: BRANCHES (Branches of Local Banks and Local Branch Operations of Foreign Banks) & REPRESENTATIVE OFFICES.....	98
PART 18A: AGENT FINANCIAL SERVICES, BRANCHLESS BANKING AND AGENCY OPERATIONS.....	104
PART 19: SPECIAL PROVISIONS FOR BUILDING SOCIETIES .....	107
PART 20: SPECIAL PROVISIONS FOR MERCHANT BANKS (formerly known as “Licensees under the FIA” ).....	109
PART 21: SECRECY AND INFORMATION-SHARING .....	110
PART 22: ENFORCEMENT ACTIONS.....	113

Consultative Paper on Proposed Enhancements to the Legislation for the Deposit-Taking Sector

PART 22A:	ENFORCEMENT ACTION – ILLEGAL DEPOSIT-TAKING .....	117
PART 23:	TEMPORARY MANAGEMENT .....	120
PART 24:	VESTING AND RECONSTRUCTION.....	123
PART 25:	LIQUIDATION (VOLUNTARY AND INVOLUNTARY).....	124
PART 26:	CUSTOMER ISSUES .....	126
PART 26A:	ENFORCEABLE CODE OF CONDUCT .....	128
PART 27:	OFFENCES.....	131
PART 28:	TRANSITIONAL.....	133

## **ABBREVIATIONS**

AML/CFT	Anti-money laundering/ countering the financing of terrorism
BA	Banking Act
BCBS	Basel Committee on Banking Supervision
BCP	Basel Core Principles for Effective Bank Supervision
BOJA	Bank of Jamaica Act
BSA	Building Societies Act
DTI	Deposit taking Institution
FATF	Financial Action Task Force
FHC	Financial Holding Company
FIA	Financial Institutions Act
FSAP	Financial Sector Assessment Programme
HMOFP	Honourable Minister of Finance and Planning
POCA	Proceeds of Crime Act
SAB	Supervisory Appeals Body
SBP	Standards of Best Practice
SIFI	Systemically Important Financial Institution
SIB	Systemically Important Bank
SOC	Supervisory Oversight Committee
TPA	Terrorism Prevention Act

## **Introduction**

1. This policy paper proposes amendments to achieve a rational consolidation and enhancement of the framework for the prudential supervision of licensed deposit taking institutions (DTIs) (i.e. commercial banks, licensees under the Financial Institutions Act (FIA) and building societies), taking into account international best practice standards, frameworks in certain jurisdictions (Australia, Canada, USA and regionally), emerging trends within the sector, external and domestic factors and past experience as regards the effectiveness of existing provisions.
2. This paper also identifies key areas for policy determinations to inform direction and structure of the new framework including the fundamental issue of supervisory autonomy with respect to DTIs (Basel Core Principle 1). The paper will also inform the Cabinet Submission for approval/for ratification of the approval<sup>1</sup> for drafting instructions to be prepared as well as for the legislation to be drafted. The paper is now being circulated to the industry (commercial banks, merchant banks/licensees under the FIA, building societies) and all other relevant stakeholders<sup>2</sup> to facilitate industry discussion and consultation on the proposed enhancements to the supervisory framework.
3. Accordingly, the Paper outlines the main objectives to be achieved with the passage of the Omnibus legislation –
  - a. Collapsing statutes into one statute, harmonizing most of the DTI obligations by ensuring consistency and correcting oversights in this regard, updating outdated provisions (e.g. minimum capital, expanded licensing provisions, connected party unsecured limits, arms-length credit dealings, penalties etc.)

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<sup>1</sup> Cabinet Approval of September 6, 2010

<sup>2</sup> Including, for example, Jamaica Bankers Association (JBA) and Institute of Chartered Accountants of Jamaica (ICAJ)

- b. Meeting the updated Basel Committee on Banking Supervision (BCBS) and Financial Action Task Force (FATF) standards (by establishing Supervisory Autonomy; incorporating enforceable rulemaking powers; expanding the consolidated supervisory framework and establishing a financial holding company framework; expanding information sharing provisions for licensees within a financial group and for the supervisor (enterprise wide for purposes of financial stability, as well as externally to ensure the broadest cooperation with regulatory counterparts, and diagonally to facilitate information sharing with the wider competent authorities responsible for oversight of a country's AML/CFT framework as contemplated by FATF).
  
- c. Improving governance and transparency of the governance processes for licensing and other applications for supervisory approval as well as other supervisory determinations under the new framework of Supervisory Autonomy (viz. Supervisory Oversight Committee; Supervisory Appeals Board).
  
- d. Addressing emerging issues - namely (consumer protection; agency banking; electronic products)
  
- e. Incorporating new offences (namely illegal deposit-taking, fraudulent misrepresentation to obtain a license; operating or offering DTI services to persons resident in Jamaica without being licensed; undertaking dealings with shell banks and breaches of financial holding company provisions) and an enhanced enforcement framework (such as written warnings; mandatory measures when capital falls to certain points below the minimum levels; conferring certain investigatory powers on the Supervisor as well as powers to request a court to order restitution).

Consultative Paper on Proposed Enhancements to the Legislation for the Deposit-Taking Sector

4. The Bank of Jamaica welcomes feedback on the proposed changes and enhancements to the legislative framework as outlined in this document.

Comments on this proposal should be submitted by **4 March 2013** by e-mail to:  
[Maurene.Simms@boj.org.jm](mailto:Maurene.Simms@boj.org.jm) or [FISDfeedback@boj.org.jm](mailto:FISDfeedback@boj.org.jm).

Alternatively, comments may be sent by post to:

Miss Maurene A. Simms  
Division Chief  
Financial Institutions Supervisory Division  
Bank of Jamaica  
Nethersole Place,  
Kingston  
Email address:

## **Executive Summary**

5. This Omnibus policy paper proposes amendments to achieve a rational consolidation and enhancement (harmonization of requirements) of the framework for the prudential supervision of licensed deposit taking institutions (DTIs) (i.e. commercial banks, licensees under the FIA and building societies). It also identifies key areas for policy determinations to inform direction and structure of the new framework including the fundamental issue of supervisory autonomy with respect to DTIs (Basel Core Principle 1).
6. The paper is now being circulated to the industry (commercial banks, merchant banks/licensees under the FIA, building societies) and all other relevant stakeholders<sup>3</sup> to facilitate industry discussion and consultation on the proposed enhancements to the supervisory framework.

### **7. Harmonization and Consolidation of Supervisory Statutes and Regulations**

Effecting amendments to the three (3) main statutes (i.e. the Banking Act (BA), Financial Institutions Act (FIA), Building Societies Act (BSA)), and Bank of Jamaica (Building Societies) Regulations can be a very complex and time consuming process which often ends up with unintended differences and some inconsistencies which are in instances material. To a large extent, the prudential treatment of key issues for DTIs remains identical, notwithstanding differences in the legal forms of these institutions and differences in the types of business in which they engage. Consequently, consolidation of these statutes into one statute will simplify the amendment and regulation issuing processes, while preserving the unique features of each of the sector types.

### **8. Addressing Emerging Products, Trends, Issues and Developments**

The emergence of new products and service channels also requires that the DTI regulatory framework be appropriately updated to allow for flexibility in dealing with

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<sup>3</sup> E.g. Jamaica Bankers Association (JBA) and Institute of Chartered Accountants of Jamaica (ICAJ)

new products in existence and being developed in the financial sector; to allow the authorities to effectively supervise these activities including taking the appropriate enforcement action where necessary and to allow for consistency with international standards and best practices.

## **9. Major Regulatory Enhancements to the Supervisory Framework**

Enhancements are proposed for the Supervisory framework to:

- a. More comprehensively address illegal deposit-taking;
  - b. Enhance the corrective action regime and sanctioning framework<sup>4</sup>;
  - c. Enhance the consolidated supervisory framework. In this regard a financial holding company (FHC) framework will be introduced; and
  - d. Incorporate enabling provisions to allow for the extension of banking services through agents.
- 
- ## **10. Significant New Areas being introduced under the Omnibus**
- a. Supervisory Autonomy (see paragraph 11 below)
  - b. Power To Issue Binding Supervisory Rules
  - c. Enforceable Code of Conduct
- 
- ## **11. Supervisory Autonomy<sup>5</sup>** - The international standards on banking supervision (the Basel Core Principles (BCPs)) provide that the autonomy of the Supervisory Authority is fundamental to modern banking supervision systems. Accordingly, the proposed legislation will incorporate provisions that will reflect the transfer of the remaining operational supervisory responsibilities from the Honourable Minister of Finance and Planning (HMOFP) to the Supervisor of Banks. This will have implications for areas such as licensing, fit and proper determinations and the mechanism for appeals from the statutory debarring provisions and other Supervisory determinations or decisions. Supervisory autonomy will also have implications for the appointment and removal of

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<sup>4</sup>The law will be revised to inter alia, mandate that specific action be taken against “problem licensees” within specific timelines when certain triggers occur. This amendment is one of the enhancements required to the legislative framework under the current IMF Stand-By Agreement.

<sup>5</sup> Will require consequential amendments to section 34B BOJA

the Supervisor and Deputy Supervisor of Banks as well as of other authorized officers, which issues are now dealt with in the Bank of Jamaica Act (BOJA). The governance structure for the Bank's supervisory function in terms of its accountability and transparency will also be impacted and the proposed Omnibus statute will recognize this.

**12. Powers to be Transferred from the HMOFP to Bank of Jamaica**

Autonomy also requires that existing powers be transferred from the HMOFP to the Bank of Jamaica. These include:

- i. Licence Approvals, Suspensions and Revocations
- ii. Fit and Proper Determinations
- iii. Approval of Ownership Changes
- iv. Format and timing of Prudential Returns
- v. Publication requirements
- vi. Exemptions from statutory limits
- vii. Variations of statutory limits
- viii. Extension of statutory timeline for sale or disposal of land
- ix. Designation of liquid assets (in consultation with the HMOFP)
- x. Approval of Branch & Representative Office Establishments, Relocations and Closures
- xi. Regulatory cooperation and information sharing
- xii. Miscellaneous (other administrative/operational matters)

13. The powers reflected at paragraph 12 (i), (iii) and (x) above can have substantial consequential implications for wider Government policy (Government to Government relationships and cooperation) which extend well beyond financial issues. Accordingly, the Omnibus will reflect that the exercise of these powers, when transferred to the Supervisor,:-

- (a) will occur with the requisite update or notification to the HMOFP for the purpose of ascertaining whether any issues of public interest, policy and/or national

interest exist that would prevent the Supervisor from completing its assessment, or from rendering a determination of an application. The law will require the HMOFP to disclose to the Supervisor the circumstances in respect of which it is believed issues of public interest or national security exist; and

- (b) will be subject to a veto power which can be exercised by the HMOFP on the bases of public interest and/or national security (the law will require the HMOFP to disclose to the Supervisor the basis and reasons therefor, on which a veto power will be or has been exercised).

**14. Ministerial Powers (under DTI laws) to be Retained in the Omnibus Statute**

- i. Regulation Making Powers
- ii. Ministerial Orders
- iii. Vesting as a resolution mechanism (*resolution strategies are recognized as inter-agency and Ministerial matters (eg. BCP3, Essential Criterion 5 Cooperation and Collaboration)*)
- iv. Vesting under voluntary restructuring provisions (section 35 BA & FIA)
- v. Authority to receive periodic reports from the Supervisor on the state of the financial system and matters of systemic importance;
- vi. Policy Directives (of a general nature in the public interest) to the Supervisor in exercising temporary management powers;-
- vii. Authority to publish unclaimed balances of DTIs and to transfer these balances to the Accountant General;
- viii. Discretion to determine assets that will qualify as liquid assets.
- ix. Designation of specified financial institutions (*This function is currently undertaken pursuant to the BOJA and allows the HMOFP to determine whether a person undertaking certain financial activities should be subject to prudential supervision. Building societies and credit unions have been designated under this power.*)

15. **Institutional and Governance Arrangements**

**Supervisor and Deputy Supervisor of Banks** – these persons are currently appointed by the Board of the Central Bank with the approval of the HMOFP. Traditionally, the Supervisor of Banks is the Governor and the responsibility of overseeing the daily operations of the Bank Supervisory functions is delegated to the executive (normally a Deputy Governor) with responsibility for the supervision of Financial Institutions (i.e. the Deputy Supervisor).

- i. **Option 1** - It is proposed that the Omnibus reflect that the Supervisor shall be the Governor and the Deputy Supervisor shall be the Senior Executive with responsibility for the Supervision of Financial Institutions. This would ensure the appointments of the Supervisor and Deputy Supervisor are settled by statute. Although the proposed approach will settle the issue of Supervisor and Deputy Supervisor, the appointment as Governor and Deputy Governor remains with the HMOFP which can impact a determination of whether this approach will satisfy the Basel requirement for these persons to be independently and transparently appointed and be accountable to Parliament. Consideration is currently being given to the issue of Central Bank autonomy which, if granted, would resolve the issue of both appointments vis-a-vis Supervisory Autonomy.
  
- ii. **Option (2)** - Alternatively, the Omnibus could reflect that the mechanism for the appointment of the Supervisor and Deputy Supervisor would be addressed by requiring that proposed appointments be ratified or approved by the Public Services Commission or a Joint Select Committee of Parliament. This approach would however be subject to the same limitation outlined for option 1 given that the persons who would ordinarily function as the Supervisor and Deputy Supervisor (i.e. Governor and Deputy Governor) are appointed by the HMOFP. Under this option it would be further proposed that the duration of these

appointments of the Supervisor and Deputy Supervisor reflect appointment terms which extend beyond the Parliamentary term.

16. For transparency, the bases for dismissal of appointees (indicated at paragraph 15 above) will be set out in the Omnibus. This will also ensure these persons are insulated from arbitrary dismissal. The essential criterion to BCP 1 requires inter alia, that *“the head of the supervisory authority be removed from office during his term only for the reasons specified in law and the reason for removal should be publicly disclosed”*.
17. The corporate governance arrangements surrounding the operational independence of the Supervisory function will also treat with matters such as –
  - a) Accountability and transparency arrangements governing the Supervisor and operations of the Supervisory process;
  - b) Decision-making powers of the Supervisor of Banks, and
  - c) Establishment of an independent (i.e. external to the Bank of Jamaica) process for appeals arising from decisions and determinations of the Supervisor.
18. It is recommended that the foregoing corporate governance arrangements pertaining to accountability, transparency and the decision-making powers of the Supervisor be addressed through the establishment of an internal Supervisory Oversight Committee (SOC) chaired by the Supervisor of Banks to which Supervisory functions will report (in place of the HMOFP). SOC’s oversight function will include a mandate for the SOC to either ratify, veto or vary supervisory technical determinations and accept or reject recommendations made by the technical operations of the supervisory function. The composition of the SOC will be specified in law and reflect that the Committee shall comprise not less than three (3) persons and shall at minimum include the Supervisor of Banks and the Deputy Supervisor of Banks. For transparency, the appointment and removal mechanisms from the SOC will be set out in the law. There

will be provision for the Supervisor to name additional persons to this Committee such as the Bank of Jamaica's General Counsel. The law will outline the basic criteria that such persons must meet to qualify for invitation to this Committee (e.g. such invitees must be employed with the Bank of Jamaica; and must be subject to the same confidentiality obligations that are imposed on executors of the Supervisory functions;).

19. SOC determinations are currently contemplated to cover:-

- Licensing matters<sup>6\*</sup> (approvals and revocations)
- Fit and proper determinations (licensing\* and post licensing; change of ownership\* transactions (i.e. 20% and over))
- Branch and Representative Office Approvals\*
- Approval of corporate and group restructurings
- Approval of new products, services and service channels
- Approval of amendments to incorporation documents
- Exemptions from statutory limits
- Approval of binding Prudential Rules
- Approval of binding Enforceable Code of Conduct
- Approval of Standards of Best Practice
- Varying prudential capital adequacy requirements
- Information sharing and cooperation abilities
- Supervisory Notices (e.g. Prescribed Liabilities)
- Format and timing of Prudential Returns
- Publication requirements
- Variations of statutory limits
- Extension of statutory timeline for sale or disposal of land
- Regulatory cooperation and information sharing
- Miscellaneous (other administrative/operational)
- Enforcement actions (temporary management; other supervisory actions such as cease and desist orders; statutory directions; referrals for prosecution; invoking the process for voluntary penalties; imposing administrative

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<sup>6</sup> Functions described with \* will be undertaken in consultation with the HMOFP and with a residual veto power residing with the HMOFP for exercise in the public interest or for reasons of national security.

sanctions; applications for search warrant, production orders etc.) and new enforcement powers proposed such as injunctive orders; orders for restitution etc..

20. In relation to the external independent appeals process it is recommended that a Supervisory Appeals Board (SAB) be established as part of the Supervisory corporate governance framework to facilitate the necessary appeals process. This will mean that appeals from Supervisory determinations will be addressed by the SAB acting in an appeals tribunal (quasi-judicial) role in relation to certain supervisory decisions such as follows –
  - i. Licensing matters;
  - ii. Fit and proper determinations;
  - iii. Branch & Representative Office Approvals
  - iv. Enforcement actions
21. However the Supervisory determinations would remain in effect until the SAB rules on such matters. The law will also reflect that appeals from the SAB determinations can be made to the Court of Appeal.
22. The SAB will also act as an appeal mechanism from other Supervisory actions/determinations (e.g. enforcement of the Code of Conduct established for DTIs and other related issues and determinations). Determinations of the SAB in this regard will be final, and the appeals process will be executed in a format deemed appropriate for the issue being reviewed or appealed.
23. The members of the SAB will be subject to confidential obligations and its membership will be drawn from suitable candidates possessing the appropriate independence, body of knowledge, skill sets and experience to facilitate effective adjudication. These persons should be fit and proper; and should not be a party connected to any licensee under the Omnibus. Such persons could include retired regulators and judges of the commercial court.

24. The appointment and removal mechanisms for the SAB will be set out in the law and will further reflect that appointments will be effected in consultation with the HMOFP.
25. The BOJA will also need to be consequentially amended to reflect the new corporate governance arrangements that will treat with the appointments (and removals) of the: -
  - a) Supervisor of Banks
  - b) Deputy Supervisor of Banks, and
  - c) Other Authorized Officers (as currently defined in the BOJA)
  - d) Officers and Employees of the Supervisory Department of the Bank of Jamaica
26. Provisions treating with the accountability and transparency arrangements governing the Supervisor and operations of the Supervisory process, decision-making powers of the Supervisor of Banks, and establishment of independent processes of appeals arising from decisions and determinations of the Supervisor, will be expressly addressed in the Omnibus.
27. **Section 34B(1) BOJA**

Under section 34B (1) of the BOJA the Supervisor and Deputy Supervisor are currently appointed by the Board of the Central Bank with the approval of the HMOFP. (Refer to paragraph 15 above). Section 34B would therefore need to be amended to reflect the revised position as reflected in paragraph 15 once a determination is made.
28. **Sections 34D and 34F BOJA**

Other proposed amendments under the Omnibus that may require further consequential amendments to the BOJA include –

  - (i) Expanded Regulatory powers to cooperate with regulatory counterparts. In this regard section 34D of the BOJA will be revised to either reflect that, in relation to licensees under the Omnibus, these powers will be expanded to outline the

expanded powers or revised to reflect that in relation to licensees under the Omnibus, the existing regulatory cooperation powers and proposed expanded powers will be addressed under the Omnibus. Section 34D will also be revised to reflect that the power to cooperate and share information will reside fully with the Supervisor. The law may possibly require such functions to be exercised in consultation with the HMOFP where issues of public interest and/or national security arise in the circumstances.

- (ii) Revised Regulation making powers - In this regard, section 34F of the BOJA will be revised to specify, in relation to licensees under the Omnibus, the matters that will remain under Regulations as against matters that will now be addressed by binding Supervisory Prudential Rules (refer Part 8: Regulations, Enforceable Prudential Rules and Supervisory Standards of Best Practice) that will be developed and enforced under the Omnibus.

**29. Enforceable Code of Conduct**

The Enforceable Code of Conduct will outline the responsibilities of DTIs in relation to treating with the offer of services and products to their customers as articulated in Part 26A: Enforceable Code of Conduct of this Paper.

**30. Rulemaking Powers of the Supervisor of Banks & Strengthening the Corrective and Sanctioning Framework**

Under the Basel Core Principles (BCP) assessment of Jamaica's supervisory arrangements, the recommendation was made that the Bank of Jamaica should be given regulation-making powers similar to those of the Financial Services Commission (FSC) and this was initially proposed in earlier considerations for enhancements to be effected through Omnibus. However on further analysis of the issues of concern identified in the Financial Sector Assessment Programme (FSAP) and in the Supervisory powers and functions recommended in the BCP, this aspect of the recommendations proposed under the Omnibus has been revised to reflect proposals for the power to issue

enforceable Supervisory Prudential Rules as against legislative regulation-making powers.

31. The Bank of Jamaica therefore recommends that a third tier in the legal framework be established in the form of Enforceable Rules issued by the Supervisor that will treat with certain operational and prudential aspects of banking operations (e.g. rules regarding matters such as liquidity management in keeping with the Basel III framework). These Rules will be gazetted and breaches will attract civil penalties and regulatory sanctions.
32. The Supervisor of Banks will continue to issue Standards of Best Practice to provide broad principles and guidance to keep the licensees apprised of the Supervisor's expectations with regard to their risk management infrastructure and operations. Non-adherence to these Standards will impact the assessment of the institution and may, in certain circumstances, trigger Supervisory action (e.g. where it is assessed that risk is materially escalated as a result of the non-adherence).
33. **Strengthening the Supervisory Corrective and Sanctioning Framework**  
Principle 11<sup>7</sup> of the BCP states that Supervisors must have at their disposal an adequate range of supervisory tools to bring about timely corrective actions. The Omnibus will ensure that the Supervisor is appropriately equipped with a wide range of enforcement powers to address activities that are currently offences under the existing legislation as well as the activities that will amount to offences under the Omnibus. The intent also is for supervisory action to be taken at an early stage to prevent deterioration in the condition of a licensee (e.g. capital falling below the statutory minimum). These tools include the ability to require a licensee to take timely corrective action and for the Supervisor to take increasingly non-discretionary measures as conditions worsen.
34. A strengthened framework for corrective action should typically exhibit the following characteristics or features:

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<sup>7</sup> BCPs, September 2012 BCP

- a. Sequencing of intensified and escalated intervention action as conditions of supervisory concern worsen;
- b. No incentives (i.e. penalty regime) for licensees to delay taking remedial or corrective actions or implementing corrective measures, and progressively less discretionary powers for authorities to unduly forebear regulatory intervention or action; (The consideration here is to ensure that the regulatory regime is so structured to provide owners with strong incentive to quickly take corrective action, before the imposition of escalated supervisory action.)
- c. Allowing for more effective supervisory response to systemically important financial institutions (SIFIs), including both DTIs and FHCs. Note that international standards require higher regulatory capital requirements and that ‘living wills’ i.e. succession/resolution plans be imposed on SIFIs as mechanisms for crises resolution.
- d. Allowing for resolutions that will ensure that Jamaica, as host country supervisor, can intervene in local establishments of foreign institutions (i.e. branches, subsidiaries, representative offices). NB. Whereas subsidiaries are separate legal persons, branches are not, and in Jamaica closure may be the only option available to the Supervisor of Banks (outside of the existing ring fencing provisions at section 26 of the BA and FIA).<sup>8</sup>
- e. Provision for:

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<sup>8</sup> USA and Canada impose registration requirements on branches of foreign banks that give host authorities supervisory rights and the ability to intervene in the event of difficulty. The Turner Review in the UK speaks to authorities looking at considerations such as reinforcement of host country supervisory powers over liquidity, right to demand subsidiarization (where there are branch operations) and to impose capital adequacy requirements and restrictions on local business activity. New Zealand insists that where all significant banking presence is through subsidiaries, such subsidiaries must be capable of operating independently within ‘the value day’ i.e. New Zealand subsidiary must be covered in the event of parent failure. Early Intervention and Prompt Corrective Action in Europe, David G. Mayes – Bank of Finland Research Discussion Papers 17, 2009

- i. Depositors' uninterrupted access to funds;
  - ii. Supervisory action to commence before capital triggers (i.e. critical levels above statutory minimum) are reached or hit;
  - iii. Resolution or intervention action to be possible before capital is entirely depleted.
35. The foregoing means that –
- a. The section 25 provisions in the BA and FIA and regulations 63 and 64 of the BOJ (Building Societies) Regulations would need to be broadened to incorporate specific mandatory regulatory actions being prescribed to address varying levels of capital concerns and/or deficiencies, which actions would be applicable once critical triggers occur (i.e. capital falling below statutory minimum levels; or evidence of undercapitalization<sup>9</sup> is identified). This would mean for example, that instead of the Supervisor having the discretion to impose either Cease and Desist Orders, Board Undertakings or Supervisory Directions on the existence of the circumstance set out in the Second Schedule at paragraph (3) of the existing BA and FIA, (a licensee's capital base is less than the amount required by the statute or any regulations thereunder) the law would prescribe the precise measure(s) that must be applied once that circumstance exists or is believed by the Supervisor to exist. The law will also define the capital triggers that will be subject to specified regulatory action, so that for instance:
    - i. Breach of the primary ratio will trigger regulatory action which will lead to Temporary Management if the primary ratio falls below 50% of the ratio established either by law or the Supervisor.

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<sup>9</sup> In the US minimum regulatory capital is set at 8% and the ratings of capital adequacy are - well capitalized > 10%; adequately capitalized >8% < 10%; undercapitalized < 8%; significantly undercapitalized < 6%; critically undercapitalized (leverage ratio, set at 4%, falls below 2%). - Early Intervention and Prompt Corrective Action in Europe, David G. Mayes – Bank of Finland Research Discussion Papers 17. 2009

- ii. The application of these triggers does not limit the Supervisor from taking earlier action under its existing discretionary powers provided that the prevailing fault conditions are in keeping with the existing conditions contained in the law.
  
- b. The law will also expressly articulate the escalating nature of Supervisory responses to deepening regulatory issues (e.g. deteriorating asset quality – NPL exceeds tolerable limits) and in that regard key elements that are now in the BOJ’s Guide to Regulatory Intervention (“Ladder of Enforcement”) will be placed in the law
  
- c. Under the existing laws temporary management with or without bank closure can be taken as circumstances may warrant. It is not proposed to change this regime. The BA, FIA now speak to the vesting of assets by the HMOFP being preceded by circumstances amounting to insolvency.

## **PART 1: DEFINITIONS**

### **TERMS (NEW AND EXISTING) THAT WILL BE DEFINED IN THE LAW/WHICH WILL BE SUBJECT TO REVISED DEFINITION IN THE LAW**

36. This PART will take into account some new terms that will be used in the Omnibus as well as seek to improve certain existing definitions within the current legislation governing banks, merchant banks and building societies that have noted deficiencies.

### **New Terms, New Definitions and Revised Definitions**

37. **Agent** - a definition will be inserted once the policy position on mobile payment services is finalized.
38. **Aggregate Group Capital**<sup>10</sup> - this is a new term that will be used to describe minimum regulatory capital to be held on a consolidated basis to ensure that an aggregate minimum capital amount is held on a group basis. Notwithstanding the foregoing, each individual entity in the financial group will still be required to hold capital sufficient to meet its respective regulatory requirements. (The parameters of the capital requirement for FHCs are currently being developed and will be guided by the Basel Committee Capital Adequacy Standards.) (Refer also to *Part 14: Consolidated Supervision and FHC Provisions*, paragraph 228).
39. **Auditor** – a definition for auditor will be incorporated in the Omnibus and will be defined to mean an auditor external to the DTI who/whose -
- a. is either employed with, or is a Partner in, a company of chartered accountants which is not connected with a DTI or with any person connected with a DTI;
  - b. is a certified Public Accountant under the Public Accountancy Act;
  - c. is himself independent of the DTI and parties connected with the DTI;

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<sup>10</sup> The Australian Prudential Regulatory Authority (APRA) uses the term *Aggregate Group Free Capital* to describe a sum that should be maintained by a financial group at the financial holding company level. It is represented as an aggregate minimum capital amount computed and held on a group basis as distinct from the prescribed statutory minimum required for each regulated entity.

- d. has the requisite experience, knowledge, skills and competence;
- e. connectivity with the FHC or any member of the financial group has not rendered the auditor ineligible for appointment in relation to a DTI, its FHC or any member of that financial group

The law will expressly reflect that a person shall not be eligible for appointment or to act as an auditor for a licensee if the Supervisor objects to the appointment; and an appointment of a person ineligible to act as an auditor will constitute grounds for regulatory sanction. Connectivity with the FHC or any member of the financial group will also render an auditor ineligible for appointment in relation to a DTI, FHC or any member of that financial group.

- 40. **Banking Business** – ‘Card based’ electronic money products are classified by Ministerial Order<sup>11</sup> as ‘banking business’ for the purposes of the Banking Act, on the basis that such activities substantially comprise ‘taking deposits’. The definition of ‘banking business’ will be updated to explicitly address the evolving issue of electronic financial services which include prepaid electronic payment products (such as mobile payments, electronic purses and electronic money). The definition will also be expanded to explicitly prohibit non-DTIs from undertaking, advertising or otherwise soliciting banking business without the requisite authorization<sup>12</sup>.
- 41. **Branches and Representative Offices** - revised definitions of **branches** and **representative offices** will be inserted in the law (see Part 18: Branches and Representative Offices).
- 42. **Connected person**<sup>13</sup> - this definition will be expanded to include, the ultimate holding company of a DTI, the ultimate natural beneficial owners of the holding company of the DTI (including persons legally responsible for overseeing legal arrangements i.e. trustees, settlors, grantors etc.), the ultimate natural beneficial owners of trusts or any

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<sup>11</sup> The Banking (Banking Business) (Electronic Money) Order, 2006

<sup>12</sup> The framework for issuing electronic money is currently being developed and it contemplates the issue of electronic money products by non-DTIs under a system of authorization by the Central Bank.

<sup>13</sup> Refer BCPs September 2012 (BCP 20 – Transactions with related parties)

legal arrangement which holds ownership interest in the DTI; key employees and their direct and indirect interests, the immediate relatives of these key employees as well as connected persons of affiliated companies.

43. **Credit facilities** – the treatment of this issue contemplates:-

- a. The revision of the terminology to ‘counterparty exposures’ which term will address all direct and indirect credit exposures now captured under the existing definition of credit facilities, as well as investments (debt and equity) and any other counterparty exposure. Counterparty exposures will be subject to the statutory limits under the Omnibus (existing limits are now set out at section 13 BA/FIA, etc.). Existing limits will be reviewed in the context of the revised definition. Counterparty exposure limits will also be introduced on a consolidated basis for the FHC and its subsidiaries.
- b. The continued provision for appropriate accounting treatments for impaired credit facilities as well as for the impairment of other counterparty exposures.
- c. Measurement of counterparty exposure at cost for the purpose of computation of statutory limits. For those exposures denominated in foreign currency, conversion to JMD for measurement purposes will be at current market translation rates.
- d. Consequential adjustments to other areas under the Omnibus as regards counter party exposures (e.g. exemption of “*specified credit facilities*” would be changed to exemption of “*specified counter party exposures*” – i.e. all debts that are fully cash secured or issued by central government and debts subject to Parliamentary guarantee.)
- e. Revision of exposure limits (as noted at (a) above) to be more in line with international standards (BCP). For example *BCP 19, Concentration Risks and Large Exposure Limits*, recommends that exposures to a counter-party or a group

of counterparties should not exceed 25% of capital base)<sup>14</sup>. BCP also recommends that supervisors should have the power to exercise discretion in applying the definition of a group of connected counterparties on a case by case basis. Supervisory discretion to revise the statutory limit applicable to credit exposures will be included in the Omnibus.

44. **Deposit-taking institutions (DTIs)** – with the passage of the Omnibus statute and the corresponding repeal of the BA, FIA and the Bank of Jamaica (Building Societies) Regulations and the repeal of the deposit-taking provisions under the BSA, the term “deposit taking institutions” will be defined to mean Commercial Banks, Merchant Banks and Building Societies. This definition will also reflect the distinction between persons within the category of “*deposit-taking institutions*” as against “*licensees*” under the Omnibus, which latter category includes a non-trading FHC or a trading FHC which is not a DTI<sup>15</sup>.

45. **Effective Control** – The legislation will:-

- a. ensure that the issue of exerting influence or ‘control’ over a DTI (i.e. section 20 and 21 provisions) is extended to building societies as well as to ensure that the terminologies used in treating with this issue (i.e. “control” and “effective control”) are synchronized; and
- b. clarify that a person may be able to exert effective control and direct policy, (including the ability to appoint directors<sup>16</sup>) even where he does not have majority voting power or has not met the threshold shareholding at which the statutory

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<sup>14</sup> Note that the revision of the definition of credit facilities to the wider concept of counterparty exposures, means that the limits will be applicable to any exposure (debt and equity) undertaken by a licensee and will operate to reduce the current funding limits available to a single counterparty or group. The foregoing will be factored in the review of current counterparty exposure limits.

<sup>15</sup> In time licensees under the Omnibus may include agents of DTIs. It should also be noted that when the regulatory framework for credit unions is in place, these persons will also form another category of licensed deposit-taking institutions but will not be incorporated under the Omnibus framework.

<sup>16</sup> This issue relates to the HMOFP’s /Supervisor’s powers to approve applications where a change in control is affected by transfer of shares or other arrangement (see BA/FIA sections 20 and 21).

definition of control is set. Additionally the threshold shareholding limit for deemed effective control<sup>17</sup> of a deposit-taking licensee will remain at 20%.

46. **Exemptions from the Banking Laws** – this definition will retain the statutory listing of exempt persons and expand to any other person specified by the Supervisor by way of gazetted Notice which will be subject to Affirmative Resolution.
47. **Exposures** – refer to Credit Facilities at paragraph (43) above.
48. **Financial Group** – will be defined as a group of financial entities including a DTI. (refer Part 14: Consolidated Supervision and FHC Provisions)
49. **Financial Holding Company (FHC)** - in recognition of the phenomenon of DTIs being owned or held within broader corporate structures and legal arrangements, the law will be revised to expand the definition of Financial Holding Company. The existing definition of a FHC is confined to a holding company which owns regulated or supervised financial institutions within the group<sup>18</sup>. This definition will be expanded to specify that the company:
  - a. must be a Bank of Jamaica regulated company;
  - b. can either be a regulated operating financial entity or a non-operating holding company;
  - c. can hold financial entities whether regulated or unregulated;
  - d. can hold non-financial entities that provide support services solely for the financial group (e.g. IT support); and
  - e. must act as the main source of fund raising and capital support for the group and have responsibility for risk oversight at the group level.

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<sup>17</sup>US defines effective control at 25% shareholding; significant interest at 5%, and significant ownership at 10% requiring fit and proper due diligence process. Canada defines significant interest at 10% and Ministerial approval is required to exceed this holding and full regulatory treatment – fit and proper etc., - is applied.

<sup>18</sup> Section 29D (7) of the BA; FIA and section 75B (7) of the BSA.

50. **Financial Services** – for the purposes of the Omnibus legislation this definition will include inter alia, banking services, acceptance of deposits and other repayable funds from the public, lending (consumer credit; mortgage credit; factoring with or without recourse; finance of commercial transactions including forfeiting); insurance services; money or value transfer services, financial guarantees and commitments; trading (in money market instruments; foreign exchange; interest rate and index instruments; transferable securities; commodity futures); participation in securities issues and the provision of financial services related to such issues; individual and collective portfolio management; mobile financial services; funds investment on behalf of third parties. (Refer Part 14: Consolidated Supervision and FHC Provisions)
51. **Foreign Bank** - the definition of foreign bank will be revised to clarify that a foreign bank is one which is licensed to carry on banking business in Jamaica through branch operations.
52. **Group** –the existing definition of “**group**” will be expanded by:
- a. Incorporating relationships not expressly captured within the existing definition such as:
    - i. **Counter-party Group**<sup>19</sup> – this is a group in which the parties are related to each other but not connected with the DTI, who have benefited from facilities from the DTI; (refer *BCP 19, Concentration Risks and Large Exposure Limits*), and can include natural and legal persons. A counter-party group is deemed to exist where two or more individual counterparties are linked by:
      1. Cross guarantees;
      2. Common collateral;
      3. Common ownership, management or financial interest (e.g. partnerships, joint ventures) ;
      4. Ability to exercise control over other(s), whether directly or indirectly;

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<sup>19</sup> APRA Banking laws speak to ‘a group of related counterparties’.

5. Financial interdependence such that the financial condition of any of them may affect the financial soundness of the other(s);
  6. Other connections or relationships which, according to the Supervisor's assessment, identify the counterparties as constituting a single risk.
- ii. The concept of counter-party group will be applicable for the purposes of calculating compliance with the statutory exposure requirements for the DTI as well as for the FHC on a consolidated basis.
  - iii. **Connected Group** – will be defined in the Omnibus as a group of persons connected to the DTI and/or FHC (including any trust or other legal arrangement which holds assets for and/or on behalf of the DTI and/or FHC directly or indirectly; and/or on behalf of any manager or other senior officer<sup>20</sup> of the DTI and/or FHC, a director and/or shareholder(s) of the DTI and/or FHC).
- b. Allowing for supervisory discretion<sup>21</sup> to deem a party or person to be a party falling within any of the relationships included in the definition of 'group' to ensure that, this deeming can occur for the purposes of assessing counterparty exposure and connected exposure; meeting capital adequacy requirements and complying with risk management obligations as well as for the purposes of undertaking conglomerate or consolidated supervision.
53. **Interest Acquisition Notification Requirement** – this is a new term which will be applicable to acquisitions of shares of licensees under the Omnibus that will trigger notification obligations.
54. **Key Employees** – this is a new definition that will be incorporated and it will apply to certain employees subject to fit and proper requirements (refer Part 2A: Fitness and

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<sup>20</sup> It should be noted that "officer" is defined in the Companies Act as including a director, manager or secretary)

<sup>21</sup> Refer section 29C of the BA and FIA and section 75C of the BSA (allow deeming to occur for information access purposes)

Propriety, paragraph 87c below) - that is employees who may not be at a senior corporate management level but whose activities can substantially affect or adversely impact the financial condition of the DTI.

55. **Officer**<sup>22</sup> – the term will be expressly defined in the law and will include executive and managing directors, managers and the company secretary. (The term officer is currently applicable to the statutory lending provisions of the law.)
56. **Merchant Banks** – this definition will cover current Licensees under the FIA. The appropriate savings provisions will be included in the Omnibus to reflect that the revision of the terminology to merchant banks will not affect the statutory obligations this group has under any other legislation which refers to licensees under the FIA. This adjustment will also require consequential amendments to other statutes which refer to licensees under the FIA, such as the POCA and regulations thereunder; the TPA and regulations thereunder; the BOJA; the Securities Act and the Income Tax Act etc.
57. **Mixed conglomerate** – the law will speak to this terminology which will be defined as a corporate group which includes a DTI and at least one ‘real sector’ member. (Refer Part 14)
58. **Regulatory Capital** – the law will speak to this terminology which will be defined to mean Tier 1 capital. This new definition will be incorporated to clarify the distinction between Regulatory Capital (i.e. Tier 1 Capital<sup>23</sup>) and Capital Base (i.e. Tier 1 and Tier

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<sup>22</sup> It should be noted that “officer” is defined in the Companies Act as including a director, manager or secretary)

<sup>23</sup>**Existing definition** of Tier 1 Capital - The aggregate of paid up capital (ordinary shares or stock); qualifying paid up capital ((non-redeemable, non-cumulative preference shares); (qualifying paid-up share premium in respect of shares or stock); (capital raised from an issue of shares to a Government agency or Government company)); eligible reserves; less the aggregate of any operating losses for the current year and any accumulated losses for previous years; any net loss positions on revaluation reserves arising from fair value accounting for financial assets and liabilities; and any goodwill, start-up expenses and other intangible assets. **NB. Tier 1 in the Capital Adequacy Regulations to be revised as follows:**

**Revised definition of Tier 1 Capital** - The aggregate of paid up capital (ordinary shares or stock); qualifying paid up capital (non-redeemable, non-cumulative preference shares; qualifying paid-up share premium in respect of referenced shares or stock; capital raised from an issue of shares to a Government agency or company); and eligible reserves; less

2 Capital<sup>24</sup> less prescribed deductions). “Regulatory capital” is used in the computation of exposure limits (including counterparty and fixed assets) as well as for the computation of the primary ratio, while “Capital Base” is used in reference to Risk Weighted Capital Adequacy Requirements<sup>25</sup>. This will ensure that the definitions in relation to capital in the financial legislation are synchronized. The definition of Tier 1 Capital in the Capital Adequacy Regulations will be revised as reflected in footnote 23. The detailed requirements of the Capital Adequacy regime will continue to be specified in Regulations.

59. The Capital Adequacy Regulations will be revised simultaneously with the passage of the Omnibus. Regulation 8 (“primary ratio”<sup>26</sup>) is one such provision that will be subject to amendment to reflect that the ratio will be computed using the revised Tier 1 definition at footnote 23. The definition of ‘prescribed deductibles’<sup>27</sup>, will also be revised to reflect that prescribed deductibles include any other deductible designated by the Supervisor by Notice.
60. An essential feature of Regulatory Capital is that of its permanence. Therefore the Omnibus will retain the requirement for express Supervisory approval for any discretionary reduction of the Statutory Reserve Fund and will also clarify that this requirement will extend to the Retained Earning Reserve Fund<sup>28</sup>. The Omnibus will

- 
- Any goodwill, start-up expenses and other intangible assets; and
  - the aggregate of any net loss arising from:
    - the aggregate of any operating profit/loss for the current year and any accumulated profits/losses for previous years, and
    - any loss position arising from revaluation reserves arising from fair value accounting for financial assets and liabilities. and
  - Any other deduction designated by the Supervisor by Notice.

<sup>24</sup> **Existing definition of Tier 2 Capital** = The aggregate of qualifying, paid-up capital (non-redeemable, cumulative preference shares; and/or term preference shares with an original tenor of 5 years or more); paid-up premium in respect of referenced shares; subordinated debt issued to a Government agency or Government company; general provisions for loss up to a maximum of 1 ¼% of the bank’s risk weighted assets.

<sup>25</sup> Currently the use of the term “capital base” in both the Capital Adequacy Regulations (to measure risk weighted capital) and in the measurement of certain exposure ratios may cause confusion.

<sup>26</sup> Ratio between regulatory capital held in relation to total assets

<sup>27</sup> Banking (Capital Adequacy) Regulations, regulation 2(1)

<sup>28</sup> This is a voluntary fund put beyond distribution and as such treated as a component of Regulatory Capital.

expressly address the issue of share buy-back schemes which will have the specific impact of reducing issued or paid-in capital (permitted under sections 57 and 58 of the Companies Act 2004). The mechanism of share buy-back is recognized as a capital management tool. The Omnibus will therefore allow for share buy-back schemes to be pursued by licensees but proceeding will be subject to prior written sign off by the Supervisor against considerations such as whether a licensee is over-capitalized.

61. **Shell Banks** – in consideration of the recommendations of the international standard setters, including FATF and BCBS, that countries should not approve the establishment or accept the continued operation of shell banks, the law will specifically speak to this by including a definition of “shell bank” and expressly prohibiting the establishment of and dealings with, such entities.
  
62. **Significant interest holdings**<sup>29</sup> – the law will now speak to significant interest holdings which will be set at 10% shareholding. Prior notification of intended acquisitions, the submission of PQs for the standard fit and proper assessments to be undertaken, and meeting the statutory fit and proper criteria will therefore be prerequisites in this case. “Change of ownership” shareholding threshold will remain at 20%, however the due diligence of such persons will be expanded beyond fit and proper assessments to include an assessment of financial strength (akin to assessment undertaken for licensing).
  - a. The Basel Core Principles require the Supervisor to have the power to take appropriate action to modify, reverse or otherwise address a change of control which takes place without the requisite approval of the Supervisor. The law will be revised accordingly to reflect that it is the Supervisor that must now approve such acquisitions. (See also *Part 15: Regulation of Changes in Ownership or Effective Control*).

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<sup>29</sup> Refer BCPs September 2012 *BCP 6 Transfer of Significant Ownership*, Essential Criteria 1 – Laws or regulations contain clear definitions of “significant” ownership and “controlling interest”.

63. **Statutory Impairment of Capital** – the law will incorporate this terminology which will be defined to mean the point at which a licensee’s regulatory capital falls below the minimum level specified by the Supervisor.
  
64. **Supervisor of Banks & Deputy Supervisor of Banks** – will be defined in law as specified below:
  - i. The Supervisor of Banks shall be the Governor of the Central Bank.
  
  - ii. The Deputy Supervisor of Banks shall be the Senior Executive Officer with responsibility for Supervisory Oversight Operations (currently Deputy Governor with responsibility for Financial Institutions Supervisory Division).
  
65. **The ‘taking of deposits’** – the business of accepting deposits (currently reflected in the FIA) will be retained in new terminology ‘*taking of deposits*’ that will be incorporated in the Omnibus. This new terminology will also retain the current prohibition (in the FIA) from the taking of deposits as well as advertising or otherwise soliciting for deposits by non-DTIs and/or by persons not licensed in Jamaica to undertake such activities (even if the actual deposits are held overseas).

## **PART 2: LICENSING**

66. Currently the licensing process involves the Bank of Jamaica making a recommendation to the HMOFP for the granting of a deposit-taking licence. The amendments will see the powers to grant and revoke the licence being transferred to the Bank of Jamaica. This will facilitate compliance with BCP 1 which speaks to the independence and autonomy of the Supervisory Authority.
67. This area of the law will also be adjusted to reflect the entirety of the licensing process (refer paragraph 83 below) as well as fit and proper considerations including the application of the requirement of fitness and propriety to key categories of staff that may fall outside of the senior executive management who carry out centralized corporate functions, but whose actions may have the ability to significantly impact the financial condition of the institution (e.g. traders). (Refer *Part 2A: Fitness and Propriety* below regarding the on-going requirement of fitness and propriety)
68. The law will provide for the power of the Supervisor to exempt entities from the operation of the Omnibus by gazetted Supervisory Notice<sup>30</sup> which Notice will be subject to Affirmative Resolution. The existing list of exempt entities will be retained.
69. The equivalent of section 7 of the BA (limitation on foreign government holdings in DTIs) will be retained, with the Supervisor being the approving authority. However the law will contain sufficient flexibility to address the possibility of a foreign government taking intervention action in an overseas parent of a local bank and thereby either directly or indirectly assuming a larger ownership share in a local bank. (E.g. the CLICO scenario and FINSAC type developments). In such circumstances there might have to be an initial waiver of the statutory limitation on foreign government holdings, until a resolution strategy is determined.

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<sup>30</sup> Currently, under the FIA, entities listed as exempt from the provisions of that Act include BOJ, any commercial bank, the Jamaica Mortgage Bank; any statutory body, any insurance company under the Insurance Act, societies registered under the BSA, the Cooperative Societies Act, the Friendly Societies Act, the Agricultural Board Act or any other cooperative arrangement for savings that are not deposits among individuals.

70. The provisions relating to Supervisory approval for alterations to a licensee's<sup>31</sup> Memorandum and Articles of Association (or Articles of Incorporation)<sup>32</sup> will remain but will probably be moved to another section dealing with Supervisory Approvals (refer *Part 10: Other Supervisory Approvals and Notifications* of this Paper).
71. The law will also take into account the new incorporation regime under the Companies Act, 2004 and the special regime for registration of building societies by the Deputy Keeper of the Records.<sup>33</sup>
72. Currently failure to commence operations within six (6) months of obtaining a licence under the BA or FIA renders a person liable to the Temporary Management process being invoked. It is proposed to revise the law to remove the measure of Temporary Management and to reflect that in such a case, that person would face having the licence revoked for failure to commence operations within a specified time of the licence being granted. The law will also retain the specified period to commence operations of six months within a licence being granted and further incorporate a power to the Supervisor to extend that time as circumstances may warrant.

### ***Recommendations:***

73. Provisions will be inserted to reflect that the power to approve and revoke licenses as well as to make fit and proper determinations will be transferred from the HMOFP to the Supervisory Authority (which will exercise such determinations through the SOC, refer to *Executive Summary*, paragraphs 18 and 19 above). The law will also reflect that appeals from such determinations can be made to the SAB. (Refer to *Executive Summary*, paragraph 20 above).

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<sup>31</sup> (i.e. DTIs and FHCs)

<sup>32</sup> Per BA and FIA section 5. These provisions should take into account the new terminology in the Companies Act.

<sup>33</sup> A fundamental policy decision would have to be made to determine whether building societies will continue to be a part of the Cabinet responsibility of the Ministry of the Environment and Housing or whether full responsibility will be transferred to the Ministry of Finance. This decision would ensure that the Building Societies Act could properly be repealed.

74. Retain the existing prohibition against taking deposits unless the institution is licensed<sup>34</sup>.
75. Retain the restriction on the **use of the term “bank”** per section 12 of the BA and extend a similar prohibition in relation to the use of the term “*Building Society*” and the term “*merchant bank*”.
76. Retain the provisions relating to Supervisory approval for alterations to a licensee’s<sup>35</sup> Memorandum and Articles of Association (or Articles of Incorporation)<sup>36</sup> but relocate this requirement to that section of the law that will treat with Supervisory Approvals (refer *Part 10: Other Supervisory Approvals and Notifications* of this Paper). The law will also take into account the new incorporation regime under the Companies Act, 2004 and the special regime for registration of building societies by the Deputy Keeper of the Records.<sup>37</sup> The law will also treat with any area of building societies operations not currently addressed under the existing BSA/Bank of Jamaica (Building Societies) Regulations (for e.g. unclaimed monies – refer section 40 of the BA and FIA).
77. Expressly reflect that operations must commence within six months of a licence being granted and will retain the approach of sanctioning a failure to comply with this requirement. However the sanction will be revised to remove the measure of Temporary Management and to reflect that the licence will be revoked for failure to commence operations within a specified time of the licence being granted. The law will further incorporate a power to the Supervisor to extend that time as circumstances may warrant.

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<sup>34</sup> Per section 3 of the FIA

<sup>35</sup> (i.e. DTIs and FHCs)

<sup>36</sup> Per section 5 of the BA and FIA. These provisions should take into account the new terminology in the Companies Act.

<sup>37</sup> A fundamental policy decision would have to be made to determine whether building societies will continue to be a part of the Cabinet responsibility of the Ministry of the Environment and Housing or whether full responsibility will be transferred to the Ministry of Finance. This decision would ensure that the Building Societies Act could properly be repealed.

78. **Permissible Activities**

The law will retain the current formulation of indicating the activities in which DTIs cannot participate as in the Supervisor's view, this reflects a more practical supervisory approach.

79. **Licensing conditions**

The law will clearly allow for **special terms and conditions to be incorporated into a licence** as circumstances dictate (for example additional requirements specific to applicants for a DTI licence such as more frequent reporting, or requirements specific to the FHC such as corporate restructuring, in line with supervisory imperatives for *superviseable* structures). This is especially important where such applicants provide commitments upon which licensing considerations depend but which will take effect post-licensing. This provision would assist in ensuring that these obligations are legally entrenched in a manner that will lead to sanctions, if not honoured. In this regard section 4(5) of the BA and FIA (which speaks to conditions being written into the licence) will be retained under the Omnibus and will also speak to sanctions in addition to revocation of licences, that will be applicable for non-compliance (i.e. supervisory directions and administrative fines that are effective, proportionate and dissuasive; etc.).

80. The provisions relating to the annual payment of licence fees will be revised to reflect that the obligation arises on a calendar year end basis as against the current stipulation of arising on the anniversary of the licence. Currently, licence fees are payable to the Accountant General. The BOJ is not proposing to revise this status quo.

81. The decisions re: licensing, revocation and licensee name change will continue to be gazetted as per sections 4(7) of the BA and 4(6) of the FIA and will expressly provide for Supervisory approval of licensee's name changes. Currently, the requirement for approval arises by default in that the list of persons to whom licenses have been granted must be published by notice in the Gazette.

**82. Additional Licensing Considerations**

The existing licensing requirements treat with fitness and propriety (see *Part 2A: Fitness and Propriety* below) as the main substantive area and do not expressly reflect the broad range of issues that would influence a decision to licence including the nature of the information requirements critical to determination of whether a licence should be issued. The law will therefore specify more clearly the additional considerations that inform the decision making process and the details of the licensing criteria.

83. The law will further expressly reflect that applicants must meet specific minimum criteria in order to be licensed as a DTI<sup>38</sup>. Accordingly, the legal framework will expressly speak to the requirements below that will assist the Supervisor in assessing whether an applicant satisfies the criteria:

- a. The validity and sufficiency of documents submitted in support of the application;
- b. Financial resources, the source of those resources; financial condition, history and track record of the applicant;
- c. The business plan, feasibility study and other projections which indicate the viability of the institution (taking into account any special areas of business in which the entity expects to engage);
- d. The adequacy of proposed systems of corporate governance, risk management and internal controls including those related to AML/CFT for the licensee and financial group (including capacity and fitness of the holding company's management);
- e. The transparency of the ownership structure (in this regard the issue of individuals owning their shares through corporate structures and/or legal arrangements (such as IBCs or Trusts) which makes verification of identity of ultimate beneficial owners difficult, will be addressed to disallow such structures unless acceptable avenues for ascertaining and independently verifying such information is possible and satisfactory to the Supervisor);

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<sup>38</sup> BCPs, September 2012 - BCP 5 Licensing Criteria

- f. The legal, managerial, and operational structure of the group will not hinder or impede the effective supervision on a solo and consolidated basis (BCP 5);
  - g. Prior approval of, or no objection from, home regulator if the applicant is a foreign bank seeking to establish a presence (subsidiary, branch or representative office); and
  - h. Such other matters and information as the Supervisor deems appropriate.<sup>39</sup>
84. The Omnibus will grant supervisory power to reject an application if the criteria identified above are not fulfilled or if information provided is found to be false or inadequate. The Omnibus will retain the provision that a licence can be revoked if it is subsequently discovered or realized that the licence was approved on the basis of information that was found to be false or materially misleading.<sup>40</sup>

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<sup>39</sup> Extracted from clause 5 of Draft CARICOM Banks and FI Bill

<sup>40</sup> See paragraph 6 Part A of the 2<sup>nd</sup> Schedule of the BA and FIA

## **PART 2A: FITNESS AND PROPRIETY**

85. In keeping with BCP 5 the fit and proper requirements will be retained<sup>41</sup> for all directors, senior managers and substantial shareholders (including ultimate owners) of DTIs and extended to all such persons in relation to FHCs and their subsidiaries.

### ***Recommendations:***

86. The fit and proper requirements will also be expanded to reflect in the law:-
- a. That meeting these requirements is an on-going obligation throughout the life of the licence and not an obligation to be met at only at the point of licensing. Licensees would therefore be expressly required to submit principals etc. to a full review every five (5) years. This mandate is currently executed in practice but will now be codified in the Omnibus;
  - b. The extension of fit and proper requirements to shareholders of 10% or more voting interest in a licensee (currently applicable to DTI shareholders of 20% and more). Fit and proper sign off in this regard will be in the form of a Supervisory ‘no objection’ communication. In addition to meeting the statutory fit and proper requirement, an applicant acquiring controlling interest (i.e. holdings of 20% or more) and/or effective control in a DTI will continue to be subject to prior express approval for that acquisition. However, such approval will now be required from the Supervisor of Banks (Currently such matters are subject to Ministerial approval);
  - c. The extension of fit and proper requirements to key personnel, who may not be at a senior corporate management level but whose activities can substantially affect, impact or influence the financial condition of the institution (e.g. branch managers, i.e. head of the largest branches, traders or such other person determined by the Supervisor,<sup>42</sup> from time to time).

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<sup>41</sup> As contained in section 4(3) of BA and FIA and section 8A of the BSA.

<sup>42</sup> BOJ Fit and Proper Guidelines 2004 (Revised December 2010)

87. Incorporate a revised process to address appeals from fit and proper determinations made by the Supervisor that will ensure that the rules of natural justice continue to be observed (currently appeals re: licensing and fit and proper determinations are addressed by the HMOFP). Appeals will now be referred to the SAB (refer *Executive Summary*, paragraph 20 above).
88. Retain the framework regarding persons who are statutorily debarred. This would mean retaining the debarring provisions (per section 11 of the BA, FIA and regulation 66(3) A of the Bank of Jamaica (Building Societies) Regulations). Accordingly applications for re-entry to the deposit-taking sector will continue to be informed by circumstances or factors such as culture of wilful non-compliance; licence revoked by Regulatory authority for substantial breaches of the laws and regulations; cost to the public purse in providing resolutions (in relation to distressed entities).
89. Expressly provide for the Supervisor to have the power to require additional information pertinent to the fit and proper assessment either at licensing or in satisfying on-going fit and proper requirements. The requirement can be implied from the existing provisions but for clarity, will be expressly stated.
90. Include consideration of factors such as a person who is subject to criminal charges for serious offences<sup>43</sup> (other than simply convictions for offences in relation to dishonesty<sup>44</sup>). The general provisions will be expanded to prescribe the procedures to be followed upon such circumstances arising whether at the time of licensing, at the point of consideration of the addition of a director, senior manager or key personnel, or during the course of the operation of a licensee.
91. Provide for the on-going nature of fitness and propriety. Accordingly, directors and managers will be expressly mandated to advise of change in circumstances which may

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<sup>43</sup> Refer list of offences in 2<sup>nd</sup> Schedule to section 6 of POCA

<sup>44</sup> BCPs, September 2012, BCP 5 EC 7 “...Fit and proper criteria include no record of criminal activities or adverse regulatory judgments that make a person unfit to hold important positions in a bank”.

affect an individual's status, and to provide such information to the Supervisor as necessary to establish continued fitness and propriety<sup>45</sup>. Additionally the Omnibus will expressly provide for the Supervisor to have the power to direct that a person who does not continue to meet the fit and proper criteria, be removed from that position so that, that person does not continue to act as a director of, or be directly or indirectly concerned in the management of a DTI.

92. The Omnibus will also expressly incorporate resolution mechanisms to treat with shareholdings of persons who have not met, or who have ceased to meet the statutory fit and proper criteria (Refer also to *Part 14: Consolidated Supervision and FHC Provisions*).
93. Once the fit and proper requirements are determinations that will be reserved to the Supervisor, the matter of appeals will be addressed by the SAB (refer *Executive Summary*, paragraph 20 above) acting in an appeals tribunal role. In all such cases, a determination by the Supervisor would remain in effect until the SAB rules on the matter.

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<sup>45</sup> BCPs, September 2012 BCP 14

### **PART 3: CAPITAL AND RESERVES**

94. Under the existing framework:-
- a. there are statutory minimum start-up capital requirements, and
  - b. licensees are mandated to transfer a percentage of profits to the reserve fund annually. Licensees may also elect to transfer a portion of their retained earnings to a non-distributable reserve account to allow for its inclusion in regulatory capital.
95. The capital adequacy ratio requirements are dealt with in detail in the Capital Adequacy Regulations. (Refer *Part 1: Definitions* paragraph 58 above)

#### ***Recommendations:***

96. Minimum Share Capital Requirements (section 6 of BA and FIA) - The Omnibus will revise the existing statutory minimum share capital requirement and allow for future adjustments to the minimum requirement to be effected by the Supervisor by gazetted Notice. (The existing law speaks to the HMOFP exercising the power to vary by Order). Adjustments in the minimum share capital requirement will continue to be preceded by the appropriate industry consultations and the process will retain transitional arrangements deemed necessary to ensure compliance.
97. The proposed revised statutory minimum start-up capital will be set at the JMD equivalent of approximately USD2million<sup>46</sup>.
98. In relation to foreign banks the law will further clarify that capital adequacy requirements will also be informed by an assessment of the adequacy of capital available or in place to ensure there is sufficient minimum capital to cover the activities of the overseas Head office, and its proposed local branch operations for which

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<sup>46</sup> Barbados – section 16 FIA- start-up capital requirement for local and foreign banks is BD\$4million  
Trinidad – section 20 FIA – start-up capital requirement for local and foreign financial institutions is TT\$15million or such larger amount specified by the CBTT in relation to foreign financial institutions

assigned capital is necessary. (Refer also to Part 18: *Branches and Representative Offices* below)

99. The Omnibus will also incorporate a requirement for DTIs to maintain their regulatory capital at or above minimum start-up capital levels (i.e. a capital floor) as well as to maintain ratios above the set regulatory minimum.
100. The capital requirements for Jamaican operations of foreign banks through branches and locally incorporated institutions will be clarified<sup>47</sup> (Refer also to *Part 18: Branches and Representative Offices* below). This issue will be dealt with under the general licensing provisions (Refer *Part 2: Licensing* above) and additionally under the provisions relating to branches.
101. The specifics of the Capital Adequacy regime will continue to be specified in Regulations which afford greater flexibility in revising the applicable thresholds and ratios on a risk weighted basis. The Regulations will be revised to bring them more in line with the revised Basel Capital Accords (Basel II and III) and will include provisions to address capital adequacy requirements for SIFIs and SIBs. The framework will also be streamlined to synchronize the capital adequacy requirements for all DTIs including building societies which are currently not subject to ‘stand-alone’ capital adequacy regulations. The Regulations will preserve the Supervisor’s ability to vary capital adequacy requirements on an individual and industry basis (e.g. to determine a higher or lower risk weight for a particular asset given its risk profile; or the deductions from Tier 1 and Tier 2 capital). Regulators will provide guidance on how this power will be exercised. Variations will continue to be subject to the appropriate advance notices and transitional arrangements.
102. As regards the terminology used in the law:
  - a. A proposed definition for the term “*capital base*” is outlined (refer *Part 1: Definitions*, paragraph 58 above).

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<sup>47</sup> This provision has raised concerns as regards Jamaica’s compliance with its WTO obligations.

- b. Greater clarification will be made between the Statutory Reserve Fund and the Retained Earnings Reserve Fund and other eligible reserves as may be determined by the Supervisor.
103. The provision dealing with maximum deposit liabilities requirement<sup>48</sup> will be removed as the Primary Ratio<sup>49</sup> obviates the need for this leverage ratio, insofar as the primary ratio requires that a fixed percentage of *Regulatory Capital* be available to fund all assets (on- and off-balance sheet, regardless of risk-weighting).
104. The general prohibition on the reduction in Statutory Reserve Fund without supervisory approval (i.e. section 8(6) of the BA and section 8(5) of the FIA) will be retained and expanded to explicitly include a similar prohibition for the Retained Earnings Reserve Fund. In relation to the Statutory Reserve Fund, the law will further clarify whether the reduction can only be permitted in the manner set out in section 8(6) BA and section 8 (5) of the FIA (i.e. by the issue of bonus shares, redemption of preference shares or both options) or whether reduction by any other option can be permitted by the Supervisor.
105. Any reduction of the Retained Earnings Reserve Fund will be subject to the express approval of the Supervisor. The provisions will also expressly reflect the mandate for DTIs to provide adequate notification and justification in any case where a DTI wishes to reduce its Statutory Reserve Fund and or its Retained Earnings Reserve Fund or any other eligible reserves (as determined by the Supervisor).
106. Prior to 2004, the Companies Act, 1965<sup>50</sup> expressly prohibited “share buyback”, i.e. companies repurchasing their own shares<sup>51</sup>. Share ‘buy backs’ are permitted under the sections 57 and 58 of the Companies Act, 2004, and constitute a reduction in issued

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<sup>48</sup> Section 9 of BA and FIA – limits a license from incurring indebtedness exceeding 25 times capital base which in effect achieves the same objective of mandating that a percentage of capital be held to fund total assets (i.e. both requirements amount to the same leverage ratio).

<sup>49</sup> Ratio between regulatory capital held in relation to total assets

<sup>50</sup> See section 58 of the Companies Act

<sup>51</sup> Under IFRS share buy-back as treated is a reduction in capital by the netting of treasury stocks (i.e. those stocks re-acquired).

capital. It is therefore recommended that for DTIs, share buy-back schemes require the express prior approval of the Supervisor which approval will be extended against the same considerations that apply in the case of the reduction of Statutory Reserves.

## **PART 4: CASH RESERVES AND LIQUID ASSETS**

### ***Recommendations:***

107. All provisions comprising monetary policy tools will be relocated to one section of the Omnibus statute.
108. The **Statutory Reserve Requirements (cash reserves, liquid assets)** (per sections 14 and 15 of the BA/FIA and Parts VI & VII of the Bank of Jamaica (Building Societies) Regulations) will be retained subject to the following: –
- a. The reference to “prescribed liabilities<sup>52</sup>” as set out in the BA, FIA and Bank of Jamaica (Building Societies) Regulations will be retained by incorporation in the Omnibus. Currently this definition is set by the Central Bank and communicated to the industry via statutory notice pursuant to section 14(3) of the BA and FIA and regulation 34 of the Bank of Jamaica (Building Societies) Regulations.
  - b. The differential treatment of reserve requirements vis-à-vis prescribed liabilities for building societies which have an appropriate level of qualifying assets will be retained by incorporation in the Omnibus and will be factored into the provisions under this section. Currently building societies are accorded preferential reserve requirements where they continue to hold the appropriate level of qualifying assets (i.e. residential mortgages)<sup>53</sup>.
  - c. The Omnibus<sup>54</sup> will incorporate a provision which indicates to DTIs that the special deposit requirements are addressed under the BOJA. The special deposit provisions at section 28A of the BOJA will be revised to incorporate other provisions pertinent to the special deposits regime. Such provisions will for example, reflect how

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<sup>52</sup> Category for banks is established by Notice from the Central Bank and includes deposit liabilities; interest accrued and payable on deposit liabilities and balances owing by banks (inclusive of interest) in respect of any borrowings made by it, except such borrowings and interest as may be specifically exempted from time to time.

<sup>53</sup> See Prescribed Liabilities Notice

<sup>54</sup> Consequential amendment to the special deposit provisions under the BOJA.

compliance is monitored by the Supervisor and possibly give the Central Bank the power to direct that DTIs hold a specific part of these assets in cash placements at the Central Bank.

- d. Currently the components of liquid assets are defined in section 15 (2) of the BA and FIA and part VII of the Bank of Jamaica (Building Societies) Regulations. It is recommended that the Omnibus reflect that:
  - i. Liquid asset requirements will continue to be defined in the Act. It should be noted that the current position under the law allows a discretion for the HMOFP to determine assets other than those defined in the law, that will qualify as liquid assets, and this will be retained. The BCP<sup>55</sup> 24 treats with liquidity risk management and EC 5 requires that "...as part of a bank's overall liquidity strategy, it should maintain a cushion of high quality liquid assets that can be used without impediment to obtain funding in times of stress..."
  - ii. Liquid asset components will include qualifying assets denominated in foreign currency.
- e. The definition of "Money at call" (which is a component of liquid assets) in relation to DTIs will remain as currently reflected in the BA, FIA and Bank of Jamaica (Building Societies) Regulations. Building societies and licensees under the FIA will remain prohibited from including placements with connected persons, as liquid assets.
- f. Currently, cash reserves can only be released as deposit liabilities are reduced. This means these assets are not available to a licensee which is experiencing a temporary liquidity crunch. This status quo will be retained under the Omnibus.

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<sup>55</sup> BCPs September, 2012

- g. Additionally Basel III incorporates two prudential liquidity ratios<sup>56</sup> designed to achieve two objectives, the first being to promote short-term resilience of a bank's liquidity risk profile by ensuring that it has sufficient high-quality liquid assets to survive a significant stress scenario lasting for one month; the second objective being to promote resilience over a longer time horizon (i.e. one year) by creating additional incentives for banks to fund their activities with more stable sources of funding on an on-going basis. Omnibus will incorporate the Basel III liquidity ratios once internal discussions are completed regarding implementation within the context of an existing statutory regime for liquid assets.

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<sup>56</sup> Basel III: International framework for liquidity risk measurement, standards and monitoring – December 2010 – Basel Committee on Banking Supervision; <http://www.bis.org/publ/bcbs188.pdf>

## **PART 5: CREDIT RISK MANAGEMENT, PROVISIONING AND RESERVES**

109. The main provision relating to this area in the law is the loan loss reserve and non-accrual of interest requirements at section 17 of the BA/FIA as well as the provisions of the Credit Classification Guidelines. The proposed revisions to the regime are set out below.

### ***Recommendations:***

110. The Omnibus will fold the key elements of the loan provisioning and ‘write offs’ aspects of the existing credit classification requirements, into regulations made under the Omnibus statute. These regulations will, inter alia address: –

- a. the criteria for and treatment of renegotiated facilities (for example period within which renegotiated facilities that were non-accrual should continue to be treated on a non-accrual basis), and
- b. the collateral requirements for credit facilities.

111. The existing requirements relating to credit classification will be expanded to outline the minimum standards that should be in place where credit facilities are to be extended to overseas borrowers (approaches in other jurisdictions will be considered). The credit classification regime will also address appropriate credit administration practices, including ensuring that credit facilities extended are made on the basis of arms’ length dealings<sup>57</sup> and after appropriate analysis of the customer’s creditworthiness, and that adequate records of all credit facilities extended are maintained.

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<sup>57</sup> This was a recommendation of the 2000 BCP Assessment. See also regulation 22 Bank of Jamaica (Building Societies) Regulations

112. The methodologies for credit classification will be addressed through the issue of binding regulatory Rules. The principal obligation to classify facilities extended will however be specified in the law.
113. The Omnibus will outline the DTI's obligation to ensure that where collateral is taken to secure credit facilities extended, the interest in the collateral is evidenced by the perfection of that secured interest.
114. The powers contained in section 39 of the BA/FIA (power to prescribe conditions on the extension of credit where secured by land) will be removed from the banking laws.
115. The Omnibus will expressly clarify that specified credit facilities, now specified exposures (refer *Part 1: Definitions* paragraph 43 above) include facilities that are fully cash secured, facilities extended to Central Government and facilities explicitly guaranteed by Parliament and which are a first charge on the Consolidated Fund<sup>58</sup>.
116. The Omnibus will outline the regulatory treatment for Securitization and Loan Sales (Portfolio loans) in Regulations. Securitization, Loan Sales and Loan Purchases will be subject to prior Regulatory sign-off requirements. Considerations for sign-off would for instance include conditions against which sales of loans with recourse will be allowed or permitted. The matter of syndicated loans will be addressed by Rules issued under the Omnibus statute which will also reflect that syndication transactions will be subject to notification requirements to the Supervisor by the lead DTI in the syndication transaction.

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<sup>58</sup> Risk weighting now applicable to GOJ FX denominated facilities implicitly restricts such lending to government to 10% of capital. Further consideration is being given as to whether section 13(6) (specified credit facilities) needs to be revised in light of this development. There is also the matter of the new BCP requirement that reflects that in relation to sovereign facilities denominated in foreign currency, countries must apply risk weightings to such facilities in accordance with jurisdiction's independently determined credit risk rating.

## **PART 6: DIRECTORS, MANAGERS AND OFFICERS**

117. The main obligation under the current law is the requirement of managers to provide information upon request by the Supervisor and in particular to provide any material information which relates to the ability of the DTI to pay its debts as they fall due<sup>59</sup>. It is recognized that the law needs to place greater emphasis on corporate governance and risk management requirements to promote more effective management of a DTI's operations, and accountability. This approach is consistent with the increased emphasis on corporate governance worldwide to promote transparency and accountability of Boards and Senior Management.
118. The Omnibus will establish the minimum requirements in relation to a DTI's and Financial FHC's corporate governance and risk management frameworks. However the DTI and the FHC will be obligated to ensure that the adequacy and appropriateness of measures implemented are commensurate with their respective operations and not just meeting the minimum requirements.

### ***Recommendations:***

The Omnibus will:-

119. Prescribe a minimum number of directors and specify the appropriate minimum percent of independent<sup>60</sup> directors;
120. Prohibit one individual from holding positions of Board Chairman and Chief Executive<sup>61</sup> Officer at the same time;

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<sup>59</sup> Refer section 27 of the BA/FIA

<sup>60</sup> The Basel Committee describes the key characteristic of independence as “*the ability to exercise objective, independent judgment after fair consideration of all relevant information and views without undue influence from executives or from inappropriate external parties or interests.*”

<sup>61</sup> Basel Principles for Enhancing Corporate Governance, October 2010 – Paragraph 46 – “*...to achieve appropriate checks and balances an increasing number of banks require the Chair of the Board to be a non-Executive except where otherwise required by law. ...*” Where the roles are not separated there must be appropriate measures in place to mitigate the risks of the roles being vested in one individual.

121. Mandate the establishment of the appropriate Board and Management committees to oversee key aspects of the DTIs' operations, which would include – Assets and Liabilities Management, Credit Administration, Risk Oversight, Audit functions and other Compliance functions (including AML/CFT).
122. Retain the mandate for managers and directors to advise the Supervisor of any material fact that indicates that the institution is or is likely to be unable to meet its obligations (per section 27(2) of the BA/FIA). Non-compliance will remain an offence. The applicable penalty will be reviewed and adjusted accordingly to ensure the penalty is effective, proportionate and dissuasive. (Refer *Part 22: Enforcement Actions*)
123. Incorporate an express obligation on managers and directors to report on matters that could materially affect the financial condition of the DTI and/or which could materially affect the reputation of the DTI (e.g. AML/CFT matters, levels of compliance, material developments, pending charges, etc.).
124. Mandate that the directors and managers of DTIs give prior advice of any significant transactions<sup>62</sup> (including transactions with connected parties) or significant events or circumstances that could affect the viability of the DTI. (Refer also *Part 10: Other Supervisory Approvals and Notifications*).
125. Impose a duty on the directors and managers of DTIs to advise the Supervisory Authority of any fraud or criminal act believed to have been committed by officers and employees of the institution or committed against the institution.
126. Mandate that the directors and managers of DTIs advise the Supervisory Authority of any dismissals or resignations from senior management or key positions and otherwise to advise of any circumstances that may render any director, manager or officer unfit for office and of appropriate steps being taken by the DTI in response to the situation.

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<sup>62</sup> It is contemplated here that a significant transaction would include a transaction which could cause a DTI to breach its prudential requirements; or a transaction which results in a change of ownership or control of the DTI.

127. Impose express obligations to maintain appropriate and adequate record-keeping systems including records of customer transactions, customer information, corporate decisions as well as of audit and other findings.
  
128. Incorporate appropriate indemnity from liability regarding confidentiality as regards any disclosures by any person or by their auditors made to the Supervisor, in pursuance of this Act, particularly in relation to the proposed mandate that DTIs disclose the belief that a fraud or financial crime has been committed, as recommended at paragraph 125 above. (Refer also to *Part 21: Secrecy and Information-Sharing*).
  
129. The statutory indemnity provisions contained in the BA and FIA relating to auditors<sup>63</sup> will therefore also be expanded to cover disclosures by directors, managers, officers and employees of DTIs.
  
130. Address the issue regarding Senior Managers and Officers in a financial group holding substantive multiple positions across entities. There are currently several examples of key officers holding dual positions in different group institutions. The law will clearly stipulate that substantive positions with an entity cannot be undertaken by the same person with any other entity nor can such persons undertake activities that makes them liable to another entity as an employee or agent, save in such temporary circumstances as the Supervisor may approve (e.g. functions or positions which result in issues such as conflict of interest arising). The Omnibus will take into account the role of the FHC in providing support across the financial group in areas such as enterprise risk management, Information Technology (IT) systems, Internal Audit, Human Resource Management (HRM), Compliance and Risk Oversight. Such support functions offered by the FHC to the financial group (as indicated above) would not be subject to this prohibition. It will be the responsibility of the FHC to ensure group compliance with this requirement.

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<sup>63</sup>Refer section 19A of the BA and FIA

Notwithstanding the foregoing, implementation will be governed by the basic criteria that group requirements must not take precedence over the interests of depositors.

131. Non-compliance with any of the foregoing mandates or requirements under this Part will result in sanctions being imposed on licensees and officers.

## **PART 7: GENERAL COMPLIANCE AND PROHIBITED BUSINESS**

132. It is recommended that this aspect of the Omnibus incorporate not only the existing prohibitions within the banking laws (refer section 13 of the BA/ FIA and Part V of the Bank of Jamaica (Building Societies) Regulations) but should also be expanded to treat with issues that have emerged since the formulation of the provisions in 1997.

### ***Recommendations:***

The Omnibus will contain provisions that:-

133. Prohibit the soliciting or advertising for deposits or other banking services in Jamaica, unless the entity is licensed under the Omnibus. This area will be carefully circumscribed to also address solicitations over the Internet and in the international media directed to Jamaicans or other persons resident in Jamaica. The law will also expressly criminalize illegal deposit-taking. (Refer to *Part 22A: Enforcement Action – Illegal Deposit-Taking*)

134. Prohibit the licensing or dealing with “virtual or internet banks”<sup>64</sup>. This would not affect the offering of internet banking services by DTIs.

135. Explicitly prohibit the licensing<sup>65</sup> of and dealings with shell banks<sup>66</sup>.

136. Retain the limitation on acquiring fixed assets (per section 10 of the BA/FIA and regulation 21(b) of the Bank of Jamaica (Building Societies) Regulations.). Remove the provision that permits fixed assets from which a DTI derives income in its capacity as

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<sup>64</sup> Banking operations which are not undertaken within a ‘brick and mortar’ establishment (i.e. virtual bank) and which operations are not connected with any ‘brick and mortar’ banking operation.

<sup>65</sup> BCPs, September 2012 - BCP 5 Licensing criteria

<sup>66</sup> Per current FATF R. 7 (which now treats with, inter alia, dealings with shell banks). FATF R.18 (fulsome discussion on shell banks) was not retained in the new FATF 40 Recommendations of February 2012 printed March 2012). The term is still defined under the new FATF 40 Recommendations to mean “*a bank that has no physical presence in the country in which it is incorporated and licensed, and which is unaffiliated with a regulated financial group that is subject to effective consolidated supervision. Physical presence means meaningful mind and body located within the country. The existence simply of a local agent or low level staff does not constitute physical presence.*”

lessor to be held as permissible fixed asset holdings; and clarify that all leases are to be treated as finance leases and therefore subject to the definition of credit facilities at and the pertinent statutory restrictions (at section 13 of the BA/FIA).

137. Clarify that permissible real property acquisitions (described at 13(1)(b)(i) of the BA/FIA) include premises for staff recreational and welfare (i.e. property acquired for foundation purposes; staff training, sports activities and day and after care facilities for children of staff members).
138. Retain the limitations on conducting any other business save in so far as may be necessary in the ordinary course of banking operations and services. (Refer section 13(1) of the BA/FIA). This provision will also be revised to clarify that, subject to supervisory approval or sign-off, permissible activities include activities such as joint marketing, co-branding, and offering locational services (e.g. kiosks) (See *Part 10: Other Supervisory Approvals and Notifications* below). This provision will also be expanded to include the offering of banking services through agency arrangements to facilitate financial inclusion (such as mobile financial services) in accordance with the supervisory framework;
139. Retain the provisions applicable to all DTIs relating to acquiring land in the satisfaction of debts (refer section 13(3) of the BA);
140. Retain the prohibition on dealing in credit facilities on security of own shares<sup>67</sup>, holding/parent company shares<sup>68</sup> or subsidiaries' shares, notwithstanding that this is permitted under the Companies Act, 2004. This prohibition will not extend to shares acquired by employees under ESOP<sup>69</sup>. However, this exception is not expected to extend to the shares made available to senior officers as part of compensation schemes.

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<sup>67</sup>Section 13(1)(c) BA and FIA

<sup>68</sup>Section 184 of the Companies Act may also require consequential amendment to exclude companies which are also licensees under the Omnibus, from the full operation of this section which allows a company to extend financial assistance in any form to, inter alia, assist with the purchase of its shares.

<sup>69</sup> Employee Share Ownership Plan (ESOP)

141. Retain the prohibitions on all unsecured credit to connected parties (per section 13(1)(d)(i) of the BA and FIA) and regulation 22(a)(i) of the Bank of Jamaica (Building Societies) Regulations, subject to the following qualifications: -
- a. Unsecured facilities to an independent Director of a licensee will be permitted to a level not exceeding the equivalent of one year's salary of the licensee's most senior officer. For these purposes, an independent Director means one who is not otherwise connected save and except for the fact that he is a director of the company. The statutory treatment for unsecured credit facilities to the immediate relatives of the independent Director will also accord with what currently obtains for the immediate relatives of officers and employees.
  - b. Retain the prohibition against the extension of unsecured credit to officers in excess of one year's salary (per section 13(1)(d)(ii) of the BA and FIA) and clarify that the provision is applicable to managing directors (i.e. persons who are both directors and officers). Officers will be defined to mean executive and managing directors, managers and the company secretary. The law will also reflect that this prohibition is also applicable to officers of building societies.
  - c. Provide for supervisory discretion to exempt certain bodies (e.g. government companies, statutory bodies and public bodies) from being deemed connected with a DTI solely by virtue of common directorship. This would permit supervisory discretion to be applied under specified counterparty exposures (as per section 13(6) of the BA/FIA re specified credit facilities).
  - d. Confer on the Supervisor the statutory power to impose a designation of "connected for the purposes of lending". This will allow the Supervisor to designate a status of "connected for the purpose of lending" in cases for example where a bank or its holding company takes an interest (i.e. 20% or more) in another company. Currently unless there are common directors, there may not be

grounds for otherwise treating with these entities as “connected for the purpose of lending”.

142. In relation to the exemption of inter-DTI lending activities from existing statutory lending limits at section 13 (1)(f)(i) of the BA/FIA, this exemption will also be extended to the inter-DTI lending activities of building societies to synchronize this area of lending across all DTIs. This area will also be subject to consequential adjustments arising from the treatment in the Omnibus of counterparty exposures as against credit facilities. (Refer *Part 1: Definitions*, paragraph 43 above)
143. The statutory exemptions for lending limits will be retained and expanded as follows:-
- a. Specified credit facility (now counter party exposure): i.e. facilities that are cash secured, or loans to or guaranteed by Parliament to be retained;
  - b. An additional category of exemption (i.e. temporary exemption) may be necessary in certain cases (e.g. regarding unsecured lending or capital support to a subsidiary<sup>70</sup> in trouble where a parent DTI can adequately sustain such credit and recovery is likely). Such temporary exemption would require explicit Supervisory approval.
144. The Omnibus will incorporate the power of the Supervisor to vary the percentages relating to counter-party exposure limits by Notice published in the Gazette. (The current section 13 (1) refers to credit and investment limits.) The power to vary counterparty exposure limits would only be exercised in specified circumstances.
145. Overall and specific limits on investments (per section 13(1) (h) of the BA and FIA) will be retained however in the case of quoted equity if the accounting treatment is for the gains and losses to be taken through the profit and loss account and thereby becoming available for inclusion in capital base and distribution, then the necessary

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<sup>70</sup> To further review regimes which incorporate release of liquidity mechanisms that would be utilized by FHCs in such circumstances e.g. Barbados

reference for exposure limits will be market value. (Refer to *Part 1: Definitions, paragraph 43*). Additionally:

- a. The 50% limitation will be clarified to indicate that the 50% limit applies to all companies and/or undertakings in which the DTI has invested (i.e. in the aggregate);
  - b. The differential large counter-party exposure limits for building societies will be synchronized with those applicable to commercial and merchant banks;
  - c. The accounting and regulatory treatment of proprietary investments by licensed DTIs in mutual funds and other collective investment vehicles will be expressly addressed to reflect that the appropriate measurement for accounting purposes is market value and in relation to the regulatory treatment that these exposures will be subject to the statutory exposure limits that will be set out in the Omnibus.
146. The prohibition on ownership of non-regulated entities, will be removed and replaced with a prohibition on ownership of real sector entities (i.e. non-financial businesses), save as approved by the Supervisor. (Refer also to *Part 14: Consolidated Supervision and FHC Provisions* )
147. The prohibition on DTIs undertaking managed funds business within deposit-taking operations on behalf of customers and other third parties will be retained. Currently the Supervisory Standards of Best Practice (SBP) issued on this matter states that the only permitted trust activities are trustee duties relating to a trust established bona fide on behalf of a minor and as bare custodian. This will be retained in Omnibus. The law will also clearly reflect, that securities trading, for any purpose other than for general liquidity management is prohibited.
148. Non-compliance with the foregoing mandates and stipulations will result in sanctions being imposed on licensees.

## **PART 8: REGULATIONS, ENFORCEABLE PRUDENTIAL RULES AND SUPERVISORY STANDARDS OF BEST PRACTICE**

149. The essential criteria to BCP1 reflect that laws and regulations should provide a framework for the Supervisor to set and enforce minimum prudential standards for banks and banking groups. Under the existing laws (BA, FIA, BSA), the power to issue regulations is vested in the HMOFP. It is proposed that this regulation-making power remain with the HMOFP. However, in relation to the Bank of Jamaica's ability to issue binding prudential standards, the Omnibus will confer on the Supervisor, the power to issue enforceable prudential rules. These rules will be applicable to the regulated DTIs (i.e. industry wide) as well as rules may be specific to certain types of institutions.

### ***Recommendations:***

It is therefore recommended that:-

150. The principal Act and Regulations address the foundation and enabling aspects of the regulatory framework, in respect of which non-compliance will attract the broadest range of penalties (i.e. criminal, civil, administrative and regulatory). These penalties will range from custodial sentences and substantial fines, to barring persons from acting or becoming involved in the offer of banking services or ownership of a DTI, imposition and publication of administrative penalties and licence revocation. For instance licensing, branch operations, and capital adequacy<sup>71</sup> are matters that will continue to be addressed by Regulations. Regulations will also be developed to treat with activities designated to be banking type businesses (e.g. electronic money).

151. In relation to enforceable prudential rules, the substantive Omnibus legislation will expressly state that the BOJ can issue enforceable prudential rules. Enforceable prudential rules will address all prudential and operational requirements and matters critical to maintaining the financial soundness of licensees and complementary to the oversight of the foundation aspects of the regulatory framework including the

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<sup>71</sup>The Capital Adequacy Regulations will also be revised to reflect that the minimum capital level is an on-going requirement, and the level(s) which will trigger non-discretionary, escalated supervisory action when breached.

methodology to be applied in each case. Accordingly it is contemplated that enforceable rules will address the following matters: credit risk management; credit classification requirements; fit and proper assessment procedures; certain corporate governance matters (such as Board Functions, dual and multiple functions of senior officers) subject matters now covered under section 38 of the BA and FIA, FHC prudential obligations; Agency arrangements for financial inclusion (Refer to *Part 18A: Agent Financial Services, Branchless Banking and Agency Operations*); enforceable Code of Conduct; AML/CFT assessment procedures. The Omnibus or Regulations thereunder will expressly specify the penalties applicable in the event these prudential rules are contravened. In this regard, the penalties that will be applicable will reflect a range of administrative penalties extending from the issue of warning letters, enhanced monitoring mechanisms; increased reporting requirements; to the issue of Supervisory Directions, Cease and Desist Orders and the imposition of administrative fines.

152. The Supervisory Standards of Best Practice (SBPs) will continue to serve as interpretational advisories in key areas and will further serve to indicate expected prudential norms and conduct in respect of matters such as: –
- a. Corporate governance (covering matters that will not be addressed in binding prudential Rules);
  - b. Properly assessing the risks of new products and business areas, and ensuring that the Supervisor is kept abreast of these efforts and advised of the risk management processes that are expected to counter the risks accompanying the products and services.
  - c. Permissible outsourcing of activities and/or services.
153. Incentives will be built into the supervisory framework to encourage compliance with SBPs e.g. application of higher capital requirements on a licensee that does not conform to best standards; or denial of requests for approval of the offer of advanced products and services that pose higher risks to DTI operations.

## **PART 8A: REGULATORY IMPLEMENTATION OF MACRO-PRUDENTIAL MEASURES**

154. In December 2010 Cabinet approved the decision for the institutional responsibility for the stability of Jamaica's financial system to be assigned to the Bank of Jamaica, consistent with the global response to the recent global financial crisis and the route taken by most jurisdictions to locate this function within the respective central banks. The related amendments to the Bank of Jamaica Act will, among other things:
- a. Outline the mandate of the Bank of Jamaica in relation to the role of maintaining financial system stability;
  - b. Grant the necessary powers to the Bank of Jamaica to obtain information from financial and other relevant institutions that will allow for the assessment of risks to the financial system (including the powers of inspection and powers to demand information); and
  - c. Give the Bank of Jamaica the necessary powers to direct and impose measures to mitigate and control systemic risks (including the extension of emergency liquidity assistance; and powers to issue Prescriptive Rules, Standards and Codes pertinent to this oversight of the stability of the financial system).

### ***Recommendations:***

155. Given the foregoing, Omnibus will reflect enabling provisions to allow the Supervisory Authority to impose macro-prudential measures on the system as determined necessary under the financial stability function in response to arising systemic issues or arising risks to system stability, including loan to value (LTV) measures; special capital and/or liquidity requirements.

## **PART 9: REGULATORY AUTHORITY AND FUNCTIONS**

156. Full supervisory autonomy will be given to the Supervisor of Banks and accordingly the Supervisor will have the power to issue and revoke licenses, and issue enforceable prudential rules in addition to Standards of Best Practice. With supervisory autonomy approvals and notifications, powers and responsibilities currently exercised by the HMOFP (other than regulation making powers, vesting and the power to issue Ministerial Orders) will be exercised by the Supervisor. Supervisory indemnities under the Bank of Jamaica Act will be retained and amended accordingly to ensure appropriate coverage for the expanded mandate of the Supervisor (consequential amendments to the Bank of Jamaica Act will be necessary).

### ***Recommendations:***

157. The Supervisor's current functions in relation to DTIs will be retained (and enhanced in some cases) and extended to FHCs, which will now be subject to a licensing regime (see *Part 14: Consolidated Supervision and Financial Holding Company Provisions*). Accordingly, the Supervisory functions will include: -

- a. Powers to carry out inspections of books of DTIs, on such bases and frequency as the Supervisor deems appropriate to ensure compliance with both this Act and any other applicable statute relating to financial institutions (such as the Proceeds of Crimes Act, Terrorism Prevention Act and regulations under these laws). Inspections or examinations can also be targeted to deal with specific issues of concern at such intervals as deemed necessary;
- b. Power to carry out inspections or examinations of the FHC and any other member of the financial group which includes the DTI;
- c. Power to request information on or from any other member of the wider group (mixed conglomerates) which has a material bearing on the operations of the financial group;

- d. The power to collaborate with other domestic Regulatory counterparts to access and share information (including via on-site and off-site examinations) on any member of the financial group. The law will reflect that on-site examinations can be undertaken whether alone or with another domestic Regulatory counterpart (i.e. cooperation amongst domestic Regulatory Authorities);
- e. The power to facilitate regulatory cooperation for the purposes of implementing the financial stability functions of the Central Bank. The law will reflect that regulatory measures that may be necessary as a consequence of this cooperation can be undertaken separately or jointly with another Regulatory Authority. (Refer *Part 8A: Regulatory Implementation of Macro-Prudential Measures*);
- f. The power to collaborate with overseas Supervisory Authorities to access and share information (including via on-site and off-site examinations) on any member of the financial group which is located overseas. The law will reflect that on-site examinations can be undertaken alone or with another Supervisory or Regulatory Authority;
- g. Powers to summon management, directors, (currently section 29 (C) (3) of the BA/FIA) and auditors (currently section 29 (2)(e)) of the BA/FIA) of the DTI, the FHC and subsidiaries of the FHC;
- h. Powers to request any information relating to the DTI or the financial group from directors, managers or employees; (information in this case relates to any information in the possession of the DTI or FHC including that relating to a subsidiary of the financial group). The powers here will be subject to the consolidated supervisory framework being developed under the Omnibus;
- i. Power to impose regulatory sanctions on FHC and DTI;

- j. Widened power to share information and collaborate with any Supervisory Authority with a mandate for financial services regulation or any law enforcement<sup>72</sup> whether domestic or overseas<sup>73</sup> on the basis of the existing confidentiality safeguards;
- k. Power to obtain statistics and records relating to DTIs and related FHCs and financial group entities (Refer also to *Part 11: Examination and Prudential Returns, paragraph 171*);
- l. Power to approve DTIs’/FHCs’ expansion of operations whether overseas or locally and to ensure that there are appropriate arrangements in place that will facilitate effective cross border supervision;
- m. Retain the power to order the sale, transfer, disposition or wind-up of a subsidiary (per section 19(3) of the BA/FIA) of a licensee that may pose a risk to the licensee. Retain the power to order the termination of the relationship between the bank and other members of the group which pose a risk to the bank and member(s) of the group (per section 29 D (6) of the BA/FIA). The law will also ensure that these powers are applicable to all DTIs and FHCs.

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<sup>72</sup> New FATF Recommendation 2 – “...Countries should ensure that policy-makers, the FIUs, law enforcement authorities, supervisors and other relevant competent authorities, at the policy-making and operational levels, have effective mechanisms in place which enable them to cooperate...”

<sup>73</sup>A general information sharing provision with other Supervisory Regulators is contemplated as against restricting this power to share to jurisdictions in which there is an existing interest (Head office regulator) or presence (branches and subsidiaries of local licensees) for example where a jurisdiction is considering an application from the licensee or another member of the financial group of which a licensee is a part. This power will require consequential amendments to be effected to the BOJA as well.

## **PART 10: OTHER SUPERVISORY APPROVALS AND NOTIFICATIONS**

158. The following matters are the subject of supervisory approvals and prior notification requirements. Where not explicitly addressed in the law, these requirements will be codified in the Omnibus, whether in the Principal Act or as Supervisory Rules, as appropriate.

### ***Recommendations:***

159. Approvals: In addition to approvals specifically referred to in the Act, express Supervisory approval or ‘sign off’ is also necessary for any new businesses or products; new delivery channels; strategic alliances; joint ventures, co-branding initiatives<sup>74</sup> of licensees;
160. The restriction on the **use of the term “bank”** per section 12 of the BA will be retained; and a similar prohibition included in relation to the use of the term “*building societies*” and the term “*merchant bank*”.
161. Time frame for approvals: A standardized timeline of 60 days from the date of the receipt of all information requested will be included in the law for all applications other than applications for licences, mergers, acquisition of interests, requests for exemptions under *Part 7: General Compliance and Prohibited Business*, and fit and proper matters. All applications should be accompanied by the full details of the proposed product or activity, relevant contracts, due diligence documentation and summaries thereof and the relevant financial, legal and risk management assessments.
162. Prior Notification: The Omnibus will reflect that prior notification will be required from licensees (i.e. DTIs and FHCs) for matters such as variations on existing products, material changes in strategy or policy, equity investments of 5% or more of capital base (that does not result in “deemed control” where Supervisory approval would be required (refer *Part 14: Consolidated Supervision and Financial Holding Company*

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<sup>74</sup> These matters are currently addressed under the BOJ Corporate Governance Standards.

*Provisions*), major changes in operational areas (e.g. acquisition of core banking systems) and appointments of key managers and proposals for appointments to the Board of directors<sup>75</sup>. There also will be an express requirement in the law for notification to the Supervisor where a party is seeking to acquire a shareholding in a DTI (individually or jointly with another) of 5% or more, with periodic notification for further increases in shareholding thereafter (at increments of 5% or more). Currently the BOJ requires disclosures of all shareholders who control 5% or greater ownership stake in licensees via the Annual Personal Questionnaires (“PQs”). This PQ requirement will no longer be required for shareholdings of between 5% and below 10%. PQ requirements will now be applicable to significant interest holdings (i.e. shareholdings of 10% and over (refer *Part 1: Definitions*)). Timelines applicable to the requirement for prior notification will be addressed in the enforceable prudential rules.

163. Notification: The Supervisory Rules will reflect that prompt notification is required for dismissals or resignations of key managers (see *Part 6: Directors, Managers and Officers* and above), law suits brought against the institution or its officers, identification of cases of fraud and such other matters as the Supervisor may specify from time to time. Notifications to the Supervisor in these circumstances should be made as close to the occurrence of the event as possible.
  
164. The Omnibus will incorporate express notification obligations as regards any extraordinary statement on the financial condition of a DTI or on any material transaction or issue that could affect the DTI’s financial condition or reputation;

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<sup>75</sup> Board directors are required to undergo fit and proper assessments prior to appointment (refer Part 2A). This requirement will be addressed under the framework for Supervisory Rules.

## **PART 11: EXAMINATION AND PRUDENTIAL RETURNS**

165. The existing statutory provisions relating to examinations and submissions of prudential returns appear to have been effective in the past and will therefore be retained. The key reforms recommended relate to -

- a. the transfer of the remaining supervisory powers of the HMOFP to the Supervisor under this Part (particularly in the area of prescribing new forms and reporting to the Parliament on the Supervisory function which is now undertaken by the HMOFP);
- b. codifying the concept of risk based supervision in the regulatory regime;
- c. the treatment of inaccurate information as distinct from wilful intent to mislead;
- d. the treatment of late returns as against failure to submit returns;
- e. electronic reporting by institutions (See paragraph 166 below and *Part 12: Disclosure Requirements* below).

166. Jamaica's Electronic Transactions Act which incorporates express recognition of digital signatures has been in effect since April 2007. The electronic reporting provisions will allow for:-

- a. electronically generated prudential returns, audited financial statements and related correspondence to be accepted as the final documents.
- b. the electronically generated documents at (a) to be tendered into evidence upon a certificate being provided to the Court. A provision to this effect would perhaps state that in relation to such documents any copy or extract therefrom would be admissible in evidence in any court provided the copy is signed and certified as a

true copy or extract of the contents of such electronic documents by the officer to whose custody the original is entrusted (The Evidence Act could provide a useful precedent in this regard e.g. section 28 of the Evidence Act<sup>76</sup>)

- c. Outline the modalities of electronic reporting including the measures that will be used to ensure the security of the reports submitted electronically.

167. The law will incorporate provisions to expressly facilitate risk-based supervision. Accordingly, the provisions will ensure that the Supervisor has the flexibility to tailor the frequency and scope of examinations, returns and other information requirements according to the risk profile and systemic importance of the institution and key issues that are unique to the individual institution. Notwithstanding the foregoing, SIBs and SIFIs will remain subject to annual examinations. This would not however detract from the general prudential reporting requirements (e.g. capital adequacy returns, balance sheet and P&L statements), that are applicable to all DTIs and which will be applicable to FHCs. The law will also expressly require the filing of returns once a licence has been issued under the Omnibus. While operations may not have commenced, it is likely that steps preparatory to commencing operations would have been in process. Accordingly such an entity would for example have a balance sheet but may be filing 'nil' returns in relation to the other operating activities.

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<sup>76</sup> Section 28 – Evidence Act “Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists, any copy thereof or extract therefrom shall be admissible in evidence in any court of justice, or before any person now or hereafter having, by law or by consent of parties authority to hear, receive, and examine evidence : Provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the or is entrusted; and which officer is hereby required to furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding five cents for folio of ninety words.”

**Recommendations:**

**The Omnibus will therefore:-**

168. Revise the requirement for the Supervisor to examine the affairs of its licensees (per section 29 of the BA and FIA) at least once in each year, and provide feedback on the results of the examination to the entity's Board of Directors, to reflect that -
- a. The monitoring of licensees is an on-going process and includes a combination of on-site and off-site examinations;
  - b. Examinations will be informed by the analysis of the risks faced by licensees (based on solo operations and consolidated operations at the FHC level)
  - c. The frequency and scope of the on-site examinations will therefore be determined by the results of the foregoing risk analysis.
  - d. SIBS and SIFIs will remain subject to annual examinations
169. Require the Supervisor to prepare an Annual Report to Parliament on the operations of the Supervisory function and the overall financial condition of the deposit-taking system. In relation to reports to the HMOFP the Bank of Jamaica will continue to:
- a. report on the prudential data at the determined frequency;
  - b. provide Examination reports and other reports on material developments in relation to a particular licensee or the wider system;
  - c. report on the affairs of all DTIs (reports in this case would occur annually)

Reports by the Bank of Jamaica in relation to 170 a, b and c above will also be made in relation to FHCs.

170. Continue to make the obstruction of supervisory officers in carrying out their duties an offence;
171. Retain requirements for DTIs to make returns and revise these obligations to expressly include prudential returns as specified by the Supervisor (currently this power lies with the HMOFP), with further powers for the Supervisor to prescribe additional returns and amend the format for returns (perhaps by Supervisory Notice). These requirements will also be placed on FHCs. The Omnibus will also reflect that these returns i.e. (prudential returns and financial statements) may be filed electronically.
172. Revise the obligation to file returns and further information that may be requested to reflect that the obligation is to file accurate and timely returns and information. The persistent filing of inaccurate returns, the late filing of returns and the filing of returns that are materially misleading are matters that are not expressly addressed under the existing laws. Accordingly the Omnibus will create the following offences:-
- a. the persistent filing of inaccurate returns and information;
  - b. the filing of returns and information that are materially misleading; and
  - c. filing of returns outside the specified timelines
173. Currently, under the BA and FIA the failure to submit returns or information to the Supervisor is an offence which can be answered by the offender through payment of the voluntary penalty under the statute. It is therefore recommended that the law reflect that the administrative (or voluntary) penalty regime be revised as being applicable for offences amounting to the persistent filing of inaccurate returns. Standards for determining “persistence” may be addressed through the prudential rules that will be developed. Licensees who commit offences amounting to the filing of returns containing materially misleading information or omitting critical information will not be able to avail themselves of the voluntary penalty process. The offence of filing

returns that are materially misleading should be established if such returns or information contain materially misleading information or omit critical information.

174. Extend the provisions in paragraphs 168-170 above to FHCs.
  
175. Include a power to require DTIs and FHCs to submit amended returns and/or to require these persons to publish amendments to audited financial statements or other published data (e.g. quarterly stock exchange reports) where the data or reports previously published are materially inaccurate or misleading.

## **PART 12: DISCLOSURE REQUIREMENTS**

176. A key feature of the deposit-taking regulatory framework is the mandatory requirement for publication of accounting data pertinent to the financial condition of the DTI. This requirement has been supplemented by the Bank of Jamaica's discretionary publication of industry financial data that outline the key performance indicators. Publication of the financial data for DTIs occurs:-
- a. By the Bank of Jamaica on a quarterly basis (in relation to unaudited data including balance sheet of individual DTIs and data relating to key system indicators including assets, deposits, capital ratios, earnings performance and non-performing loan levels); and
  - b. By the DTIs on an annual basis (with regards to the audited financial statements).
177. These publication requirements will be retained.
178. Consideration will also be given to require the periodic publication of consolidated data by the FHC for a financial group including key indicators.

### ***Recommendations:***

#### ***The Omnibus will:***

179. Retain the obligation for DTIs to submit annual audited financial statements to the Supervisor;
180. Retain the requirement for DTIs to publish audited financial statements in daily newspapers with express provision reflecting that this publication will be permitted to be an abridged version (viz. Auditor opinion, balance sheet; profit and loss and other comprehensive income and cash flow statements) provided the publication clearly reflects that the full version is available electronically on the DTI's website as well as at head office and branch locations;

181. Extend the submission and publication requirements at paragraphs 179 and 180 above to FHCs (i.e. to apply to all licensees under the Omnibus legislation);
182. Extend the submission requirements at paragraph 179 above to members of the financial group through the FHC;
183. Retain the discretion of the Supervisor to publish unaudited data comprising assets and liabilities, in such frequency or form as it sees fit in newspapers and any other medium (e.g. website), and expand the parameters of matters published in this regard to publication of unaudited financial data;
184. Expressly permit the Supervisor to require the publication by licensees (DTIs and FHCs) of any matter deemed necessary such as: –
  - c. Disclaimers, late submissions, omissions, subsequent events, or the fact of the imposition of regulatory sanctions as part of the audited statements; and
  - d. Other disclosures of a prudential nature in line with pillar III of Basel 2 (market discipline), e.g. regulatory actions.

**PART 13: ACCOUNTS AND AUDITORS (EXTERNAL)**

185. The existing legislative provisions relating to auditors will be retained in the Omnibus statute. However a key issue that must be expressly addressed is the power of the Supervisor to object to the appointment of an external auditor. This will be addressed in the Principal Omnibus statute and in the regulations thereunder.

***Recommendations:***

*The Omnibus will:*

186. Retain the obligation regarding the preparation of annual audited accounts;
187. Retain the requirement that institution's accounts be prepared in accordance with international accounting standards adopted by Jamaica, except where directed otherwise by the Supervisor. The regulatory position on the preparation of accounts can be addressed through the issue of enforceable Supervisory Rules;
188. Retain the obligation of Auditors to report on matters that could materially affect financial conditions of DTIs. This obligation will be expanded to require auditors to report on matters that could materially affect the reputation of DTIs (e.g. AML/CFT matters, levels of compliance; material developments; pending charges; etc.);
189. Require DTIs to promptly report the fact of the removal (whether through termination by expiration or for cause) of the Auditor to the Supervisor and the reasons for such removal;
190. Require the Auditor to promptly report the fact of the termination of a contract and the reasons for such termination;
191. Give the Supervisor the power to object to any prior or subsequent appointment of auditors that do not meet key criteria and the power to direct the removal of appointees;

192. Mandate that audit firms must be independent of any entity being audited to ensure fair audit. The key criteria for objectivity will be incorporated into the laws;
193. Outline a process to deal with appeals from the objections or determinations of the Supervisor;
194. Outline procedures to govern the processes for the Supervisor's objections to the appointment of new auditors or re-appointment of existing auditors who do not meet key criteria and for the removal of such appointees;
195. Retain the Supervisor's power to request a special targeted audit or examination; and for the costs of such exercise to be for the account of the licensee in respect of which the special audit or examination is to be commissioned;
196. Permit the Supervisor to request auditor's confirmation of any material or specific transaction (e.g. capital injection, transfer of assets etc.), with the costs of such confirmation being for the account of the DTI involved;
197. Retain the Supervisor's powers to summon auditors, and extend the Supervisor's powers to include a power to review auditors' working papers;
198. Extend the requirements at paragraphs 186 to 197 above to FHCs.

## **PART 14: CONSOLIDATED SUPERVISION<sup>77</sup> & FINANCIAL HOLDING COMPANY (“FHC”) PROVISIONS**

199. The Consolidated Supervision provisions of the BA, FIA and BSA were promulgated in 1997 and 2002 and will be strengthened by enhancing and upgrading the framework. In this regard, the Omnibus will both substantively outline the supervisory framework that will be applicable to effect consolidated and conglomerate supervision as well as introduce the regulatory framework for a financial holding company regime.
200. The Omnibus will reinforce the existing requirements for consolidated supervision. This means that section 29B and C of the BA/FIA and 75B of the BSA requirements will be retained. The Omnibus will also expand the parameters of supervision to incorporate conglomerate supervision. Where the DTI is a part of a group, the Omnibus will reflect that the Supervisor will have the power to require restructuring of that group if it is not established in a supervise-able form.
201. Consolidated/Conglomerate supervision will apply once a DTI is not a stand-alone entity, that is:–
- a. Where a DTI is either wholly or majority owned by a legal person that is its ultimate holding company or the immediate subsidiary of the ultimate holding company;
  - b. Where a DTI is controlled wholly or partially, directly or indirectly by a legal person notwithstanding less than majority shareholdings. (It should be noted that control can also be deemed where the circumstances warrant, refer *Part 1: Definitions*, paragraph 45);
  - c. Where a DTI is directly and/or indirectly owned and/or controlled by members of a connected group (refer *Part 1: Definitions*, paragraph 52);

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<sup>77</sup> Basel Core Principle 12 requires supervisory authorities/regulators of financial institutions to ensure they are able to assess all significant aspects of the operations of the financial institution, its subsidiary, affiliate or branch or other entity regarding safety, soundness, market conduct with a view to obviating systemic risks. (See also the pending CARICOM FSA (Part III)) (Consolidated Supervision October 2006 was formerly addressed under BCP 24)

- d. Where a financial group exists. (i.e. Where more than one financial entity, including a DTI, operates in Jamaica as members of the same group, that group will be deemed a financial group and will also be subject to the FHC supervisory regime (i.e. consolidated supervision - see discussion below)).
  - e. Where a mixed conglomerate structure exists, (i.e. a group which includes a DTI and at least one ‘real sector’ member). This definition means that the existing statutory wording which is now applied to mixed conglomerate structures will be revised<sup>78</sup>.
202. The foregoing revisions will be designed to provide for supervise-able structures and to afford the Supervisor the ability to better regulate and supervise financial groups and to obtain a broad perspective of the financial condition of the wider group within which the DTI exists in order to assess the risk this may present to the DTI. Accordingly, the wording of the current restructuring requirements at section 29D of the BA/FIA and section 75B of the BSA will be revised to address the structures discussed above at paragraph 201 (a) – (e). However where the structure incorporates cross border parents and affiliates such that effective supervision may not be possible or practicable, the Omnibus will incorporate appropriate ring fencing provisions to ensure the local operations are protected. So that where for example, the DTI is a part of a wider mixed or financial group whose parent is not regulated, the Supervisor would insist that the FHC be the immediate subsidiary of the ultimate group parent or be held directly by the immediate subsidiary of the ultimate group parent. This requirement would not be imposed where the wider banking group is ultimately held by a regulated DTI.
203. The proposed consolidated supervisory framework will extend to conglomerate supervision (i.e. oversight of the wider conglomerate within which a banking entity or financial group falls). It should be noted that while the BCP requirements for

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<sup>78</sup> (Currently section 29D (1) of the BA and FIA speaks to - a corporate group involving a DTI and at least one company which is not a supervised financial institution. Supervised financial institution is currently defined in the BA and FIA as an institution regulated by BOJ or FSC or in the case of a foreign institution, an institution which is regulated or supervised by an authority which undertakes supervisory functions similar to those undertaken by BOJ or FSC))

consolidated supervision target ‘banking groups’ (defined as a bank and its offices, subsidiaries, affiliates and joint ventures, both domestic and foreign), the additional requirements under the BCP provide that where countries allow ownership of banking companies, the Supervisor should have the power to review the activities of parent companies and of companies affiliated with parent companies to determine the safety and soundness of the bank. The additional requirements further reflect that the Supervisor should have the power to establish and enforce fit and proper standards for owners and senior management of parent companies. This will therefore require the supervisory authority to identify and verify the ultimate natural beneficial owner of parent companies or legal structures.

204. The Omnibus will also clearly provide for the overarching power of the Supervisor to take action in cases where the structure of the group is deemed by the Supervisor to be opaque and/or “*unsupervisable*”. The law will therefore expressly reflect the options available to the Supervisor to encourage compliance (such as the suspension of regulatory approvals for pending applications from the DTI or append the requirement to restructure the group as a conditionality of the regulatory approval for pending applications). Additionally, Basel essential criteria stipulate that a licence should not be granted to a foreign bank seeking to establish an operation (whether by branch or subsidiary) unless it is established by the home country Supervisor that the foreign bank is subject to a consolidated supervisory framework (BCP 5).

205. The framework will also address post licensing restructurings that could impede effective consolidated supervision of a financial group<sup>79</sup>.

#### 206. Financial Groups

The current requirement for entities within a financial group to be regulated or supervised, will be revised to reflect that financial groups shall include all financial

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<sup>79</sup> See Basel Paper regarding “Parallel Owned Banking Structures” 2003 by the Basel Committee

services<sup>80</sup> offered within a group involving a DTI, whether or not the financial service is regulated or supervised. Therefore where a financial service falls within a mixed group, a restructuring of the group would be necessary to ensure that this financial service is held within the financial sub-group. This will be effected by the requirement for inclusion of all financial services within the financial group. In this scenario the licensee would be required to obtain prior Supervisory approval before a financial service could be excluded from the financial sub-group and maintained within the wider group. The Supervisory framework will also outline the requirements to address any additional risks posed to the DTI and the wider financial group, e.g. deemed capital requirements for the unregulated/unsupervised members (such as micro finance providers and lease financiers). The Omnibus will therefore also include a definition of ‘financial services’.<sup>81</sup>

207. The FHC framework will apply where:

- a. In Jamaica more than one financial entity (including a DTI operation whether branch or subsidiary) operate as members of the same group (refer to paragraph 210(a) below);
- b. Regionally or globally more than one financial entity (including a DTI operation in Jamaica whether branch or subsidiary) operate as members of the same group;
- c. A DTI (being the only financial entity of a group operating in Jamaica) with ownership and/or control of financial entities regionally or globally;
- d. A “stand-alone” DTI operates in Jamaica with ownership and/or control of financial entities regionally or globally.

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<sup>80</sup> The provision to allow support services to the financial group (i.e. section 29E BA and FIA; section 75C BSA) will be retained.

<sup>81</sup> Under the revised FATF 40 Recommendations (February 2012- Published March 2012) the financial services that are recommended for inclusion in a jurisdiction’s AML/CFT framework include acceptance of deposits and other repayable funds from the public, lending (consumer credit; mortgage credit; factoring with or without recourse; finance of commercial transactions including forfeiting); money or value transfer services, financial guarantees and commitments; trading in (money market instruments; foreign exchange; exchange, interest rate and index instruments; transferable securities; commodity futures trading); participation in securities issues and the provision of financial services related to such issues; individual and collective portfolio management.

208. The requirement that the regional or global holding structure reflects that an appropriate FHC regime exists regionally or globally and that effective consolidated supervision is being undertaken, would extend to any instance where a DTI in Jamaica is a member of a wider cross border group.

209. Under the FHC framework the role of the FHC (under which all financial entities in a group will fall) includes maintaining adequate capital for the operations of the financial group, managing the financial group risks on an enterprise or group wide basis and complying with periodic reporting and other prudential requirements. The FHC may be a non-trading holding company, or an operating DTI or a financial entity regulated by the FSC<sup>82</sup>. Where the FHC is an operating entity, that entity is charged with additional responsibility for the effective oversight of the entire group as part of its own corporate governance responsibility. This includes setting the general strategy and policies of the financial group and its subsidiaries and for determining what governance structure would best contribute to an effective chain of oversight for the group as a whole. The FHC function is therefore a separate and specific responsibility which is distinct from the management and oversight of an operating FHC's core operations.

210. Operations in Jamaica - The FHC:

- a. must be the holding company of the domestic financial group (including any cross-border subsidiaries/holdings of that Jamaican FHC) in which the DTI is held; and
- b. must be licensed as a FHC under the Omnibus statute;

The Basel Standards require that consolidated supervisory oversight should occur at every ownership level of the group structure within any one jurisdiction. Accordingly all financial entities within a group domiciled in one jurisdiction should be consolidated in that jurisdiction.

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<sup>82</sup> See also footnote 94

211. Where a financial entity is also a FHC it will be subject to licencing and supervision by both its functional regulator as well as Bank of Jamaica for the FHC activity (for example if the FHC is a FSC licensee, that FHC would be subject to regulations and supervision by both the FSC and Bank of Jamaica). The FHC will also be subject to prohibitions similar to those applicable to DTIs, however these would be implemented on a consolidated basis with respect to the consolidated group's exposures. Accordingly, there will be collaboration between the regulatory authorities in implementing this aspect of the regime as well as coordinating of resolution of financial entities which pose or which may pose a threat to the financial group. It is contemplated that as Supervisor of the consolidated group involving a DTI, the Bank of Jamaica will take the lead role in coordinating crisis resolution efforts in the financial group<sup>83</sup>.

212. Jamaica's FHC framework would not be applicable:-

- a. where a DTI is the only financial entity operating in Jamaica as a member of a regional or global financial group, and does not itself have any ownership or controlling interests in any financial entity. However, that holding structure which includes a local DTI should reflect that an appropriate FHC regime exists regionally or globally and that effective consolidated supervision is being undertaken in relation to the regional or global financial group within which this DTI falls;
- b. where a DTI operates in Jamaica as the sole member that offers financial services in a group, (mixed conglomerate). However that DTI must be held by the ultimate parent for the group.

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<sup>83</sup> Joint Forum – Principles for the Supervision of Financial Conglomerates – Principle 1 – Comprehensive Group-wide Supervision - Paragraph 1.3, Page 10

**Recommendations:-**

213. Currently section 29C of the BA and FIA allows the Supervisor to obtain information on any member of the wider group (inclusive of the financial group within a mixed conglomerate group in paragraph 201 (d) above. Section 29 of the BA and FIA also grants the Supervisor powers of inspection and examination of financial entities falling within the financial group. It is recommended that the Omnibus retain these powers<sup>84</sup> and extend these powers to the FHC;
214. The Omnibus will retain the Supervisor's powers under section 29C of the BA and FIA to summon the management or directors of a company that is part of the wider group as described at paragraph 157(g) above;
215. It is also recommended that the Supervisor be granted the power to require a special audit to be undertaken of any member of the wider group (where that member is or has obtained financing or other benefit, whether the financing or benefit is or has been obtained directly or indirectly from the DTI or FHC)<sup>85</sup>. Such audit would be at the expense of the ultimate parent and this power would be invoked where the Supervisor forms the view that a member of the wider group is or could be posing an imminent threat to the DTI or FHC;
216. The Omnibus will retain the Supervisor's power to order restructuring of the group in any case where the nature or structure of the group prevents effective consolidated supervision;<sup>86</sup>

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<sup>84</sup> September 2012 BCP 12 Essential criteria 1 – *“The Supervisor understands the overall structure of the banking group and is familiar with all material activities (including non-banking activities) conducted by entities in the wider group, both domestic and cross-border. The Supervisor understands and assesses how group-wide risks are managed and takes action when risks arising from the banking group and other entities in the wider group, in particular contagion and reputation risks, may jeopardize the safety and soundness of the bank and banking system.”* (Consolidated Supervision October 2006 was formerly addressed under BCP 24)

<sup>85</sup> Century case against the GOJ (CNB placement at Bahamian bank and undisclosed hypothecation to secure obligations for real sector affiliates to the DTI).

<sup>86</sup> September 2012BCP 12 Essential criteria 1

217. The Omnibus will retain the Supervisor's power to require restructuring of a mixed conglomerate group (as defined in paragraph 201 (d) above) such that the DTI and other financial services operations are held by the FHC. The power will also expressly speak to requiring the incorporation of a FHC where necessary;<sup>87</sup>
218. The Omnibus will retain the mandate<sup>88</sup> that where a group includes a DTI and it is required to restructure, this process should not exceed one year from the directive to restructure without the Supervisor's written approval. Where the owners of a DTI fail to comply with the restructuring directive the Supervisor will be empowered to direct either the disposition of their holdings in financial entities that have not been brought within the financial group, or for the reduction of their controlling interest in the DTI (i.e. to less than 20% of shareholdings);
219. The Omnibus will grant the Supervisor the powers to impose regulatory sanctions including the temporary management of the DTI in cases where the required restructuring at paragraphs 216 or 217 is not effected (refer BCP EC 2); and/or where the disposition directive at paragraph 218 is not effected. Currently non-compliance with the directive to restructure constitutes an offence for which on conviction a DTI would be liable to a fine not exceeding \$2,000,000.00. It is proposed that the sanctions for non-compliance also be directed to the FHC where applicable, and also be applicable in the event the disposition directive is not complied with by the owners of the DTI. The fine will also comprise an initial penalty (of a sufficiently dissuasive level) as well as a daily fine for each day of continuing non-compliance, which should motivate greater compliance amongst licensees and will also require the Supervisor to act decisively in addressing problem licensees;
220. Retain the provision that states that, companies may be deemed part of a group where they are in significant relationships with a DTI<sup>89</sup>. In this regard the Supervisor may

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<sup>87</sup> September 2012 BCP 12 essential Criteria 1(Consolidated Supervision October 2006 was formerly addressed under BCP 24)

<sup>88</sup> Section 29D(2) BA FIA

<sup>89</sup> Section 29D(6) BA/FIA

direct the termination of such relationships<sup>90</sup>. This power will be expanded to include other legal arrangements which are or may be deemed to be part of such a group. This power will also be applicable in relation to companies or other legal arrangements with significant relationships with FHCs;

221. Retain the power to order the disposal, sale or dissolution of a subsidiary or interest in an affiliate of the DTI<sup>91</sup> and will expand to apply this power to the FHC. The Supervisor will also be given the power to take any other action (against the DTI and/or the FHC) where transactions between or relations with members of the wider group may endanger the financial condition of the financial group or the DTIs within that group.

222. Provide that an existing body corporate may continue as a FHC with the approval of the Supervisor. In such cases, the limitations on the overall activities of the FHC will be subject to special exemptions (i.e. transitional arrangements) which will also be subject to terms specified by the Supervisor (see for e.g. Canada Bank Act section 687<sup>92</sup>);

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<sup>90</sup> September 2012 BCP 12 EC 1) (Consolidated Supervision October 2006 was formerly addressed under BCP 24); Section 29D(6) BA/FIA

<sup>91</sup> Existing 19(3) & 29D(6) BA and FIA

<sup>92</sup> Where a body corporate is continued as a bank holding company under this Part,

(a) the property of the body corporate continues to be the property of the bank holding company;

(b) the bank holding company continues to be liable for the obligations of the body corporate;

(c) an existing cause of action or claim by or against the body corporate or any liability of the body corporate to prosecution is unaffected;

(d) a civil, criminal or administrative action or proceeding pending by or against the body corporate may continue to be prosecuted by or against the bank holding company;

(e) a conviction against, or any ruling, order or judgment in favour of or against the body corporate may be enforced by or against the bank holding company;

(f) a person who, on the day the body corporate becomes a bank holding company, was the holder of a security issued by the body corporate is not deprived of any right or privilege available to the person at that time in respect of the security or relieved of any liability in respect thereof, but any such right or privilege may be exercised only in accordance with this Act; and

223. Outline the considerations relevant for licencing as the FHC (see Canada Banking Act section 675<sup>93</sup>). These would be similar to the approval requirements for a bank;

224. Provide that special conditions may be incorporated in the terms of the licence or approval of the FHC. In the context of the potential for contagion or reputation risk where the principals of a DTI have defaulted or are at risk of defaulting on obligations secured by the shares of a DTI, one such special condition will be a mandate that the charging or otherwise pledging of a DTI's shares be preceded by prior notification to the Supervisor<sup>94</sup>, particularly where such charge or pledge could result in issues relating

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(g) the by-laws of the body corporate, except those that are in conflict with this Act, continue as the by-laws of the bank holding company. 2001, c. 9, s. 183.

<sup>93</sup>675. Before issuing letters patent to incorporate a bank holding company, the HMOFP shall take into account all matters that the HMOFP considers relevant to the application, including

(a) the nature and sufficiency of the financial resources of the applicant or applicants as a source of continuing financial support for the bank that is proposed to be its subsidiary;

(b) the soundness and feasibility of the plans of the applicant or applicants for the future conduct and development of the business of the bank that is proposed to be its subsidiary;

(c) the business record and experience of the applicant or applicants;

(d) the character and integrity of the applicant or applicants or, if the applicant or any of the applicants is a body corporate, its reputation for being operated in a manner that is consistent with the standards of good character and integrity;

(e) whether the bank holding company will be operated responsibly by persons with the competence and experience suitable for involvement in the operation of a financial institution;

(f) the impact of any integration of the businesses and operations of the applicant or applicants with those of the bank holding company and its affiliates on the conduct of those businesses and operations; and

(g) the best interests of the financial system in Canada.

- i. 1999, c. 28, s. 69;
- ii. 2000, c. 12, s. 6;
- iii. 2001, c. 9, s. 183.

<sup>94</sup> This item will need to be considered against the other mitigating mechanism that is proposed for the Omnibus re: dominant shareholding restrictions (a Canada based approach). This item will also need to be assessed with a view

to safety and soundness and change of ownership (which in turn are related to inter alia fit and proper matters)<sup>95</sup>. Where the persons involved are fit and proper but the ownership change or change in effective control occurs without Supervisory approval, the sanction imposed will be a monetary fine. A similar requirement will be applicable for shares of the FHC. In such cases the Omnibus would also incorporate a mechanism for appropriate supervisory action to be taken if after prior notification, the Supervisor forms the opinion that such charge or pledge could result in issues relating to contagion for and/or change of ownership of, the DTI and/or FHC. The Omnibus would also incorporate a mechanism to allow for the orderly transfer of ownership or of significant holdings in the DTI and/or FHC in satisfaction of debt, subject however to satisfaction of the fit and proper requirements applicable. The mechanism will also allow for an orderly disposal of shares in the event the new transferee does not meet the statutory fit and proper requirements;

225. Provide that all licences to FHCs be gazetted;
226. Require the audited financials of FHCs to be published annually (supervisory ability to publish unaudited financials for licensees will also be extended to FHCs (see *Part 12: Disclosure Requirements* above);
227. Place limitations on activities of FHCs<sup>96</sup> - (refer BCPs, September 2012, BCP12 Consolidated Supervision, EC 6). So for instance FHCs will be prohibited from:-
  - a. Taking deposits (in the case of non-DTI FHCs);
  - b. Holding controlling interest (whether ultimate or intermediate) in real sector;

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to ensuring that Jamaica's competitiveness is not unnecessarily restricted which can impact the authorities' ability to resolve crisis institutions.

<sup>95</sup> September 2012 BCP 12 Essential criteria 2 – “The Supervisor imposes prudential standards and collects and analyses financial and other information on a consolidated basis for the banking group, covering areas such as capital adequacy, liquidity, large exposures, exposures to related parties, lending limits and group structures.” (Consolidated Supervision October 2006 was formerly addressed under BCP 24)

<sup>96</sup> This has been guided by APRA's Guidelines on the Prudential Supervision of Conglomerates 2000; See also footnote 52.

- c. Trading in financial instruments (other than for hedging purposes for own account and for the purpose of managing group cost of capital and funding) in the case of FHCs that are not also FSC licensees<sup>97</sup>;
  - d. Using the shares of the DTI as collateral without prior notification to the Supervisor. (NB. Owners of the FHC will be subject to a similar requirement regarding the shares of the FHC);
  - e. In the case of a non-operating FHC, conducting any business not ancillary to its core role as holding company for the financial group;
228. Outline the responsibilities of the FHC (refer BCPs - September 2012 BCP12: Consolidated Supervision). These will include the following -
- a. Raise capital for the Group, maintain adequate capital to support operations of group members as may be prescribed by the Supervisor, including Aggregate Group Capital (refer Part 1: Definitions, paragraph 38 above). The FHC will also be subject to specific capital adequacy requirements;
  - b. Provide a commitment relating to preserving the financial stability of the Group and the DTIs therein (this would be a condition of the FHC licence);
  - c. Ensure the compliance of all regulated members of the Group with their governing statutes;
  - d. Ensure compliance with any Directions issued by the Supervisor under Part 14: Consolidated Supervision and Financial Holding Company Provisions;
  - e. Ensure the provision of Audited Financial Statements annually for the FHC and its subsidiaries (consolidated and individual as appropriate), and any further

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<sup>97</sup> It is noted that with this policy the settled framework may reflect that FSC licensees may not satisfy the conditions to become FHCs.

accounting data on the Group's activities as may be required by the Supervisor<sup>98</sup>;

- f. Hold permissible group assets (see *Part 7: General Compliance and Prohibited Business* above discussion regarding prohibitions on DTIs);
- g. Maintain appropriate policies to enhance transparency, develop group risk management procedures to, inter alia, ensure arms-length dealings and prudent exposure limits<sup>99</sup> throughout the group;
- h. Provide the Supervisor with such prudential and any other reports as the Supervisor may require on the operations of the FHC and its subsidiaries from time to time (e.g. risk management reports which should outline the measures taken to identify and manage risks within the DTIs and throughout the group. Such reports would be required to be submitted on possibly a quarterly basis or more frequently if required by the Supervisor)<sup>100</sup>;
- i. Provide notification to the Supervisor of any events or circumstances that could affect the stability of the group including prior notification of any material changes or expected changes in risk profiles of group entities<sup>101</sup>.
- j. Ensure compliance with fit and proper requirements that are applicable to the substantial (immediate through to ultimate) beneficial shareholders, directors and managers and key officers of FHCs and its subsidiaries.

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<sup>98</sup> Section 29C(3) BA and FIA

<sup>99</sup> DTIs under S29D of the BA and FIA

<sup>100</sup> Section 29C (2)(c), (d) and (e) BA and FIA.

<sup>101</sup> Section 29 C (2) BA and FIA

229. Extend to FHCs, the proposed revised fit and proper requirements relating to changes in effective control, substantial interest, as well as require notification for acquisition of shares of 5% or more as well as any subsequent increases of 5% or more. The law will also reflect that it is an offence for a transfer of, or significant change in ownership (20% and over) or effective control of the FHC to occur without prior notification to, and approval of, the Supervisor.
230. Mandate the FHC to notify the Supervisor of any information it may have or become aware of, that may materially affect the fitness and propriety or suitability of a major shareholder or party with actual or deemed controlling interest in the FHC.
231. Incorporate provisions that speak to the governance framework at the FHC level including the role of the Board, accountability and transparency matters, group policies such as risk management and compensation;
232. Incorporate provisions to enable the FHC to access AML/CFT information from group members and to require the FHC to conduct AML/CFT risk management on an enterprise wide level.
233. The law will further mandate that the directors and managers of operating FHCs promptly advise the Supervisory Authority of any dismissals from senior management or key positions and reasons for such dismissals and otherwise to advise the Supervisory Authority of circumstances that may render any director, manager or officer unfit for office and of appropriate steps being taken by the FHC in response to the situation.
234. Retain exemptions<sup>102</sup> applicable to foreign FHCs regarding DTIs already subject to consolidated supervision in an overseas jurisdiction and where there are appropriate

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<sup>102</sup> Section 29D(10) exemption from fit and proper and reporting requirements of 29C where Supervisor satisfied that overseas holding company is subject to similar fit and proper requirements and consolidated supervision, and sharing of information between regulators.

arrangements in place for the exchange of information between supervisory authorities<sup>103</sup>.

235. Ensure that as far as is applicable, all sanction powers under the statute that relate to DTIs will also apply to FHCs;

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<sup>103</sup> See S29D (9) (10) of BA and FIA. There will be a consequential amendment to the BOJA to expand the regulatory cooperation provisions to allow for more effective information sharing. **(See Part 9 above)**

## **PART 15: REGULATION OF CHANGES IN OWNERSHIP OR EFFECTIVE CONTROL**

236. The current statutes provide a reasonable framework for the monitoring of changes in ownership or effective control. This framework, through the consolidated supervision provisions, takes into account the requirement for fitness and propriety up to the ultimate ownership level (and the possibility of reliance on overseas supervisors in such areas). However, the law will now expressly incorporate a mechanism<sup>104</sup> to allow for the appropriate custodian arrangements and orderly transfer of ownership in accordance with the fit and proper requirements applicable to substantial and significant shareholders (jointly or severally) or persons with effective control, in circumstances where a change of effective control that has not been assessed by the Supervisor occurs. The mechanism<sup>105</sup> will also allow for an orderly disposal of shares in the event the new transferee does not meet the statutory fit and proper requirements. The Supervisor will also have the ability to take temporary management of the DTI for the purpose of placing the shares in escrow and disposing of the shares from the shareholder who has not met the statutory fit and proper criteria.

237. The law will also reflect that a transfer of, or material change in ownership or effective control of the DTI or FHC requires prior notification to, and approval by, the Supervisor<sup>106</sup>. The law will therefore retain the obligation of seeking prior approval, which is placed on the person who enters into an arrangement that will result in the transfer of, or material change in ownership or effective control of a DTI (refer section 20 BA/FIA). The law will extend this obligation to persons intending to enter into such arrangements involving the shares of the FHC. The law will further require persons seeking to enter into any such arrangements to provide prior notification of this intention to the Supervisor. Licensees will also be obligated to notify the Supervisor of

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<sup>104</sup> September 2012 BCP 6 Essential Criteria 5 – “The Supervisor has the power to take appropriate action to modify, reverse or otherwise address a change of control that has taken place without the necessary notification or approval.”

<sup>105</sup> Refer Part 14: Consolidated Supervision and FHC Provisions, paragraph 225 of this Omnibus Consultation Paper

<sup>106</sup> September 2012 BCP 6 Essential criteria 2 – “There are requirements to obtain supervisory approval or provide immediate notification of proposed changes that would result in a change in ownership, including beneficial ownership, or the exercise of voting rights over a particular threshold or change in controlling interest”.

any information they may have or become aware of, that may materially affect the fitness and propriety or suitability of a major shareholder or party with controlling interest in the DTI or FHC.

***Recommendations:***

It is therefore recommended that the Omnibus:

238. Retain the requirement for the approval of the Supervisor to be obtained as a prerequisite for any agreement or arrangement that will or will potentially result in a change in the effective control of a DTI;
239. Extend the requirement at paragraph 238 above to any agreement or arrangement that will result in a change in the effective control of a FHC;
240. Retain the requirement for the approval of the Supervisor to be obtained as a prerequisite for any agreement or arrangement that results in a transfer or acquisition of a substantial ownership interest in a DTI (threshold level for approval to be retained at 20%, refer *Part 1: Definitions*). The Omnibus will clarify that acquisitions that will result in holdings at or above the 20% threshold whether through bequests, debt satisfaction or other means will also be subject to Supervisory approval and mechanisms for custody and/or disposal.
241. Extend the requirement at c) above to FHCs.
242. Outline the minimum considerations that apply in circumstances where ownership or effective control is proposed to be changed. The key element here (apart from the specific fit and proper and financial resources issues), being the “*supervisability*” of the final group structure that will emerge. Special considerations that will apply in cases relating to cross border acquisition will also be included. (Applicable to *Parts 14: Consolidated Supervision and FHC Provisions* and *Part 17: Branches and Representative Offices*)

243. Outline the minimum considerations that will apply in cases relating to substantial acquisition of interests in a DTI and/or FHC.
244. Retain the procedures for the application process pertaining to the proposed transfers of business or assets of DTIs such as the requirement for shareholders' authorization, schemes of transfers, etc. per the BA and FIA and requisite regulations thereunder<sup>107</sup>.
245. Impose notification requirements<sup>108</sup> for acquisitions of shareholdings in a DTI or FHC amounting to or exceeding 5% of issued share capital.
246. Prohibit the acquisition of effective control or substantial interest by any overseas entity that is subject to confidentiality laws that do not permit supervisory access. This prohibition will also apply where the application is made by an overseas entity which is not subject to a regime of prudential supervision or supervision of a nature and standard deemed appropriate by the Supervisor and where the arrangements for the receipt of information by the Supervisor are not satisfactory.
247. Expressly state that acquisitions or transactions undertaken which result in a change of ownership or effective control will be subject to Supervisory action as indicated above if these occur without prior approval from the Supervisor and where the persons involved are not fit and proper. (See also Part 14: Consolidated Supervision and FHC Provisions, paragraph 225). Where the persons involved are fit and proper but the ownership change or change in effective control occurs without Supervisory approval, the sanction imposed will be a monetary fine.

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<sup>107</sup> The Banking (Amalgamations and Transfers) Regulations, 1997; The Financial Institutions (Amalgamations and Transfers) Regulations, 1997

<sup>108</sup> See 2000 BCP Assessment page 22 (See also September 2012 BCP 6 EC 2)

## **Part 16: GENERAL MARKET CONDUCT ISSUES**

### ***Recommendations:***

248. It is recommended that the Omnibus clearly reflect that a DTI's acquisition of shares in a non-DTI that would trigger the market conduct provisions under the Securities laws applicable to such dealings cannot be effected without Supervisory approval. Such approval will be informed by, among other things:-

- a. in the case of listed entities, sign off from the JSE that the acquisition does not amount to a 'take over' and will not trigger 'take over' requirements under the rules of the JSE;
- b. whether the proposed acquisition or investment will result in a level of voting power that can be utilized independently to influence the policies etc. of the non-DTI in respect of which the voting power is held;
- c. Whether the acquisition will hinder effective implementation of corrective measures in the future (i.e. for orderly resolution of the DTI or financial group in which the DTI is held)<sup>109</sup>
- d. Whether the DTI has adequate financial managerial and organizational resources to handle the proposed acquisition or investment<sup>110</sup>, and
- e. Whether the proposed acquisition or investment will expose the DTI or financial group to undue risks or hinder effective supervision<sup>111</sup>.

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<sup>109</sup> BCPs, September 2012 BCP 7 (Major Acquisitions) – “The Supervisor has the power to approve or reject (or recommend to the responsible authority the approval or rejection of), and impose prudential conditions on, major acquisitions or investments by a bank, against prescribed criteria, including the establishment of cross-border operations, and to determine that corporate affiliations or structures do not expose the bank to undue risks or hinder effective supervision. Major Acquisitions was previously addressed in October 2006 BCP at BCP 5

<sup>110</sup> September 2012 BCP 7 (Major Acquisitions) Major Acquisitions was previously addressed in October 2006 BCP at BCP 5

- f. The foregoing will be equally applicable to proposed acquisitions or investments by FHCs.

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<sup>111</sup>BCPs, September 2012 BCP 7 (Major Acquisitions) Major Acquisitions was previously addressed in October 2006 BCP at BCP 5

## **PART 17: CORPORATE AND GROUP RESTRUCTURINGS (Including Mergers and Amalgamations)**

249. Currently mergers and amalgamations in the banking sector require Ministerial approval. The current provisions in the BA and FIA taken together with the (Merger and Amalgamation) Regulations under the BA and FIA provide a reasonable framework for this area and will be retained in the Omnibus with the requirement for Ministerial approval being revised to the approval being obtained from the Supervisor of Banks.
250. The Omnibus will also provide for the power of the Supervisor to request external auditors' confirmation that all obligations under the proposed or completed scheme of merger, restructuring or transfer have been met.

### ***Recommendations***

The revisions contemplated will therefore -

251. Retain the requirement for approval for Mergers or Transfer of Business;
252. Retain the requirement for approval for voluntary restructurings and expand the requirements to reflect that restructured groups must be 'superviseable' and approved by the Supervisor as discussed under Part 14: Consolidated Supervision and Part 15: General Market Conduct Issues above;
253. Retain the procedures relating to applications for Mergers, Restructurings and Re-Organizations and Transfers of Business (per the BA, FIA and BSA);
254. Provide for the Supervisor's ability to request auditor's confirmation that obligations have been met;

*Consultative Paper on Proposed Enhancements to the Legislation for the Deposit-Taking Sector*

255. Expand the section 33 provisions of the BA/FIA which only speak to the mergers and amalgamations between FIA licensees and banks to allow mergers and amalgamations between any type of DTI;
  
256. Retain vesting order provisions (per the BA and FIA) for applications under this Part of the law. The vesting of assets will remain subject to Ministerial Orders.

**PART 18: BRANCHES (Branches of Local Banks and Local Branch Operations of Foreign Banks) & REPRESENTATIVE OFFICES**

257. Currently the establishment, closure and relocation of **branches** are subject to Ministerial approval. Changes to this area will see the requirement for Ministerial approval being revised to the approval of the Supervisory Authority.
258. The Omnibus will also clarify that the offering of ABMs constitutes banking business. The requirements applicable to the establishment of ABMs will accordingly reflect that the establishment of ABMs or ABM facilities are restricted (with the exception of credit unions) to local DTIs and, in the case of DTIs operating locally, is subject to prior notification to the Supervisor and receipt of the Supervisor's non-objection. The Omnibus will also clarify that the establishment of ABMs or ABM facilities is not the equivalent of branch operations.
259. In relation to the establishment of branches and sub-branch operations (by whatever name) by local DTIs the Omnibus will reflect that these will continue to require the approval of the Supervisory Authority (which on passage of the Omnibus will be revised from the HMOFP to the Supervisor of Banks).
260. The Omnibus will expressly outline the differentiation between the activities of branches and representative offices
261. As regards the matter of the establishment of local branches by foreign DTIs, considerations that will factor into the approval of such operations will include matters such as the treatment of deposit insurance coverage for the deposits held by the local branch operations of the overseas DTI. Currently the local branch operations of an overseas bank are subject to ring fencing provisions under the existing Banking laws<sup>112</sup>. Under the Deposit Insurance Act, financial institution means a bank licensed under the BA; a financial institution licensed under the FIA, a building society licensed under the BSA; a person designated by the HMOFP under section 2 of the BOJA to be a

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<sup>112</sup>Section 26 BA and FIA

‘specified financial institution’. It is possible the Deposit Insurance Act may require further amendments to make it explicit that coverage includes coverage for the deposits held by the local branch operations of foreign DTIs.

262. On the issue of foreign bank branches (i.e. local branches of foreign DTIs):
- a. The law will revise the current minimum prudential criteria for establishment of a (domestic) branch by a foreign bank and the services that can be offered by such a branch.
  - b. Foreign banks are currently subject to a higher level of subscribed capital than domestic banks in order to ensure there is sufficient minimum capital to cover its Jamaican branch, Head office and other operations elsewhere. Accordingly foreign banks must hold subscribed capital of not less than J\$250million<sup>113</sup> whereas domestic banks must hold subscribed capital of not less than J\$80million<sup>114</sup>. The Omnibus will no longer refer to both a subscribed capital and minimum capital requirements. The law will only refer to the minimum capital requirements to commence operations and will synchronize the capital requirements for the local branch operations of foreign banks and for local banks so that the law will reflect that minimum start-up capital requirements for a DTI will be the Jamaican dollar equivalent of UD2million. (refer *Part 3: Capital and Reserves* above)
  - c. Domestic branch operations of a foreign bank are subject to the same minimum start-up capital requirements as domestic banks, i.e. J\$60 million. This is reflected in the banking laws as assigned capital requirements for the Jamaican branch operations of a foreign bank, and as paid up capital requirements for locally incorporated banks. The assigned capital (i.e. minimum start-up capital) for local branch operations of foreign banks must be held in Jamaica in the form of unencumbered assets. This requirement

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<sup>113</sup> This minimum subscribed capital level will be revised (see Part 3 above)

<sup>114</sup> This minimum subscribed capital level will be revised (see Part 3 above)

will be retained. The law will also expressly require local banks to ensure that the minimum start-up capital is held in Jamaica in unencumbered assets. The JMD amount of minimum start-up capital requirements will be revised as discussed in *Part 3: Capital and Reserves* above.

- d. Additionally there are issues of governance in foreign bank branch situations where the supervisory authority lacks reach to the overseas head office directors (i.e. the “mind and management” directing the operations of the branch). This poses particular difficulties for the Supervisor in circumstances where key policy and management decisions are taken outside of the jurisdiction. This is a growing issue (both in branches and subsidiaries) as decision making becomes centralized across cross-border groups.

263. The regime therefore will seek to ensure that where branches of foreign banks are licensed in Jamaica, at a minimum:

- a. Their management must have the appropriate authority to address regulatory concerns regarding the branch;
- b. The Host regulator must have the ability to ensure that the operations of the branch are sufficiently ring fenced to allow for resolution of obligations in the event the foreign Head Office of the branch becomes insolvent or subject to prompt corrective action;
- c. The Host Regulator will have the power to dictate when corrective action must be taken in relation to branch operations;
- d. Clear processes for the resolution framework that will be applicable to these local branch operations of foreign banks (i.e. deposit insurance coverage; decisions for operations to be closed or placed under alternative management; appointment of

receivers; vesting of assets; resolution by the State or Government (i.e. taxpayers) or other resolution).

- e. The law will also clearly outline the regulatory requirements for the operation of branches of foreign banks, where circumstances may require, such as governance arrangements<sup>115</sup>.
- f. The minimum paid up capital requirement applicable to foreign bank branch operations will remain synchronized with the minimum paid up capital requirements that are applicable to domestically incorporated banks.

The foregoing should serve to provide greater protection to depositors of the local branch operations in the case of the insolvency of the foreign Head office<sup>116</sup>.

264. The alternative position under consideration is that cross border branches should not be permitted and all future licensing of an overseas party should require the establishment of a subsidiary.

265. **Representative Offices**<sup>117</sup> - are offices that do not conduct financial business but which operate solely for marketing purposes. The definition will expressly reflect this and it is

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<sup>115</sup> See definition – assigned capital and risk management report. See also Part 3 (Capital and Reserves) and Part 14 (Consolidated Supervision and FHC Provisions )

<sup>116</sup>Section 26 of the BA and FIA provides some protection in that the section currently provides that the realizable assets of a foreign bank which relate to the Jamaican operations shall be deemed to be the assets of the branch operating in Jamaica.

<sup>117</sup> **Functions of representative offices in the UK (source –[www.fsa.gov.uk](http://www.fsa.gov.uk))**

Representative offices of overseas institutions perform a limited range of functions. These could include, but are not restricted to:

- developing and maintaining relationships with correspondent banks to support head office activities;
- increasing the institution's profile within the market place and acting as a point of contact and source of information on the institution;
- reporting to head office on business trends and opportunities in the UK; and
- providing information to head office about developments in financial markets, tax matters and changes in the supervisory regime in the UK.

A Representative Office must not -

- a) set up a representative office in the UK unless it has given at least two months' notice to the FSA;
- b) use a name for the activities conducted by it in the UK if we have objected to its use because the name is misleading to the public or otherwise undesirable; and

further proposed that the law also be revised to specifically recognize and permit the establishment of representative offices subject to Supervisory approval (instead of Ministerial approval).

***Recommendations:***

Accordingly it is recommended that the Omnibus clearly reflect that:

266. Foreign banks and other DTIs remain subject to prior Supervisory approval to establish branch offices and representative offices locally. The law will also clarify that foreign banks will only be able to undertake their banking and other financial services locally through the approved branch operations;
267. Local branch operations of foreign DTIs will continue to be subject to ring fencing requirements and in that regard the law i.e. the Omnibus (and Deposit Insurance Act via consequential amendment) will clarify that the coverage of deposits will be in relation to the Jamaican branch operations of the foreign DTI. The Omnibus will also clarify that the local branch operations will be subject to all prudential requirements similar to locally incorporated DTIs.
268. Foreign banks and other DTIs require Supervisory approval of the local Supervisor and overseas Regulator/Supervisor to establish Representative Offices locally and these offices will be subject to AML and other regulatory requirements (as appropriate);
269. Representative offices are only for marketing purposes and may not take deposits, make loans, or physically undertake any banking business or any other business or take any action that could imply<sup>118</sup> the representative office can offer or undertake any banking service or banking business;

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iii) use a banking name for the purposes of section 67 of the Banking Act unless the name is used with the description 'representative office' (on, for example, letterheads and outside their premises).

<sup>118</sup> The thinking here is that the representative office should be restricted to undertaking marketing and promotion of services offered in the local operations of the foreign DTI.

270. Local DTIs require the approval of the Supervisor and overseas Regulator or Supervisor (where applicable) to establish Branch offices overseas;
271. Local DTIs require the approval of the Supervisor and overseas Regulator or Supervisor (where applicable) to establish Representative Offices overseas;
272. Considerations relating to a local DTI's establishment of a branch or subsidiary overseas include the usual regulatory requirements applicable to DTI operations locally including the AML obligations under the Proceeds of Crime (Money Laundering Prevention) Regulations); so for e.g. the requirement for all overseas operations (branches, subsidiaries) to adhere to the higher AML standard between those imposed by the host country or the Jamaican standard, will be extended to the establishment of Representative offices overseas.
273. A local DTI may only establish a branch or subsidiary in another jurisdiction where the Supervisor is satisfied that the mechanisms for the receipt of information relating to the operations of that overseas branch or subsidiary, as well as the resolution mechanisms in place (including deposit insurance coverage where applicable) in the overseas jurisdiction, are in place.
274. The establishment of ABMs or ABM facilities constitutes banking business and will be subject to prior notification to the Supervisor and receipt of the Supervisor's non-objection and any applicable Standards of Best Practice.

## **PART 18A: AGENT FINANCIAL SERVICES, BRANCHLESS BANKING AND AGENCY OPERATIONS**

275. The Bank of Jamaica recognizes the importance of the agency function in facilitating financial inclusion, accordingly the Omnibus will allow DTIs to deliver certain ‘traditional’ banking services through non-bank entities by way of agency arrangements. The Supervisor will conduct fit and proper assessments and AML/CFT reviews of owners and managers of agents. This measure is considered imperative given the critical role that agents will play in the delivery of banking financial services – i.e. serving as an entry point to the formal banking system and having access to account holders’ funds as well as access to their confidential financial information. While the DTIs will retain overall responsibility for the activities of their agents under these arrangements, the agents will themselves be subject to a regulatory and supervisory framework that will include the recommended elements outlined below.

### ***Recommendations:***

276. Conditions precedent on being authorized by the Supervisor as bank agents of DTIs will include the following criteria:

- a. Successful operation of the agent for a minimum period of three (3) years;
- b. Agents must have a sufficiently broad customer base;
- c. Meet minimum fit and proper criteria for owners (10% and over voting power); directors and managers;
- d. Legally registered as a body corporate to operate in Jamaica and have a history of complying with tax and other statutory obligations as a legal Jamaican body corporate;
- e. Demonstrate the capacity to carry out certain aspects of basic AML/CFT measures (such as collection of relevant customer data) on the DTI’s behalf;

notwithstanding the foregoing, the ultimate responsibility for undertaking Customer Due Diligence (CDD) remains that of the DTI.

- f. Have the capacity and capability (without reliance on outsourcing arrangements<sup>119</sup>) to prudently manage and execute the functions under the mobile service agreement – (including having the minimum computer hardware and software requirements and capacity including personnel, resources and control systems to handle electronically transmitted data in an adequate and safe manner);
- g. Must be able to adhere to the same confidentiality constraints as the DTI(s) with which they have partnered, and the DTI must also have the capacity to enforce or ensure compliance of the confidentiality obligations;
- h. Must operate within thresholds specified by the Supervisor (e.g. J\$ equivalent of USD\$1,000 for cash transactions). (Customers who wish to operate accounts in excess of these thresholds will be required to enter into formal arrangements directly with DTIs.) It should be noted that the agency facilities will only be authorized to undertake transactions in JMD at this time.

277. Bank agents will be subject to the same sanctions and penalties (that would be applicable to DTIs) where the regulatory parameters of the agency arrangements are breached. Bank agents will also be:-

- a. Subject to monitoring by the partnered DTI which will assume liability for the agent's activities, and;
- b. Subject to on- and off-site reviews by, and at the determination of the Supervisor.

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<sup>119</sup> Agents will not be allowed to outsource any aspect of the financial services service that they provide.

278. Agents must operate within their contractual arrangements with their principals as well as the legal framework that will be established for the delivery of banking financial services. These arrangements will be subject to Supervisory sign-off. However, this will not preclude DTIs from fulfilling their responsibilities with respect to these services being offered through agents. DTIs will therefore remain legally and financially responsible for all the activities that agents carry out on their behalf, as well as for their compliance with legal and regulatory requirements, including those relating to AML/CFT;
279. DTIs will be required to implement their own criteria and develop internal guidelines for establishing agency relationships and on-going monitoring beyond those established by the Supervisor;
280. The range of permissible activities in which agents may be engaged will be specified and will include for example:
- a. Cash deposits and cash withdrawal (within specified limits);
  - b. Cash payment of bills and loan repayments;
  - c. Transfer of funds;
  - d. Balance enquiries;
  - e. Collection of documents from customers for services or facilities (such as account opening and loan applications etc.);
281. The technical aspects of permissible agent activities including those that relate to the delivery channels (e.g. mobile/card based etc.) will be addressed by way of binding Prudential Rules.

## **PART 19: SPECIAL PROVISIONS FOR BUILDING SOCIETIES**

282. The incorporation of the deposit-taking provisions relating to building societies into a consolidated statute takes into account the fact that with minor differences the prudential framework is the same. The deposit-taking provisions applicable to the regulatory regime subject to oversight by the BOJ and the HMOFP will be removed from the BSA and along with the provisions of the Bank of Jamaica (Building Societies) Regulations, folded into the Omnibus with the appropriate revisions as discussed throughout this paper. Following this the BSA will either be repealed in its entirety or retained with amendments to effect updates to the non-deposit-taking obligations of building societies. This latter determination will be informed by the requisite research and recommendations of the Ministry of Finance. If the BSA is to be repealed the Ministry will advise on the revised incorporation regime for building societies. If the determination is that the BSA excluding the deposit-taking regulatory regime is to be retained, then the Ministry will advise on the extent of upgrades that will need to be effected to the BSA to address the constitutional and administrative obligations of building societies.)
283. The law will also treat with any area of building societies operations not currently addressed under the existing BSA/Bank of Jamaica (Building Societies) Regulations (for e.g. unclaimed monies – section 40 of the BA and FIA). Currently there is a dual regime residing within the BSA (i.e. the deposit-taking operations which fall under the HMOFP and the non-deposit-taking operations which do not fall under the HMOFP). A policy determination will be necessary to determine whether the BSA will be repealed or retained. Until then the specific areas that are particular to the non-deposit taking aspects of building societies including rights and liabilities of members, the legal effect of the rules of a society, the right to request the appointment of an investigator by members and the power of a society to make payments in the event of the death of a member, will continue to reside in the BSA. If the decision is in fact taken to repeal the BSA then these matters would need to be retained in an alternative regime.

284. Deferred Capital Arrangements

In relation to the provisions pertaining to the deposit-taking obligations of building societies, the Omnibus will retain the deferred capital arrangements that were introduced in 1995 to allow for capital accretion when the supervisory regime for building societies was established. However going forward, deferred shares will not be included in Tier 1 capital (i.e. regulatory capital, refer Part 1: Definitions, paragraph 58) and therefore will not be eligible to be used in the computation of the primary ratio. These deferred shares however, will be eligible to be included in Tier 2 capital used in the computation of risk weighted capital adequacy ratio. Appropriate transitional arrangements will be incorporated in the framework to allow for smooth implementation.

285. If the BSA is to be retained it is recommended that the administrative and constitutional framework listed below at a) – i) be relocated to an appropriate authority such as the Office of the Registrar of Companies. In this regard the provisions treating with registration at the Deputy Keeper of the Records; and the powers of the Deputy Keeper of the Records (re: investigations; sharing of information etc.) will be repealed and replaced by provisions reflecting that these powers and functions will reside in the new Authority.

- a. Incorporation procedures and requirements;
- b. Returns to be filed with Deputy Keeper of the Records;
- c. Registration Requirements, amendments of Rules;
- d. Proprietary and Mutual Societies; Demutualization procedures;
- e. Conversion from a society to a company;
- f. Rights of Members;
- g. Powers of Deputy Keeper of the Records (re: investigations)
- h. Special provisions relating to dissolution;
- i. Sharing of information between the Deputy Keeper of the Records and the Supervisory Authority.

**PART 20: SPECIAL PROVISIONS FOR MERCHANT BANKS (formerly known as “Licensees under the FIA”)**

286. The Omnibus will -

- a. Retain the prohibition on demand deposits (or similar products);
- b. Retain the prohibition on joining clearing without regulatory approval;
- c. Expressly incorporate the processes regarding the conversion from merchant bank to another type of DTI.

## **PART 21: SECRECY AND INFORMATION-SHARING**

287. The secrecy provisions<sup>120</sup> currently applicable to DTIs will be expanded to afford greater flexibility and to allow for emerging trends relating to centralization and de-centralization of functions within groups. Thus, for example a supervisory approach will be developed to specifically deal with matters such as outsourcing and consultancy that may require release of confidential information as well as the centralization of data or the use of back up facilities through third parties that will also require the release of information. A further issue to be determined is the necessary release of information for commercial purposes (e.g. due diligence exercises).

### ***Recommendations:***

Accordingly it is recommended that the Omnibus: –

288. Reflect that the overall obligation for secrecy in relation to customers' information be retained.
289. Remove the limitations in the BOJA as to the Regulators with whom information can be shared to enable more effective sharing of information with regulatory counterparts (both local and foreign); (See also Part 9 above).
290. Expand the specific statutory exemptions to the customer confidentiality obligations of the BA/FIA and the BSA<sup>121</sup> to allow for intra-group sharing of information to take into account anti-money laundering requirements and the trend towards centralization (which activities may include the undertaking of cross border activities) and the requirement that groups address their risks on a solo as well as a consolidated basis. This means information such as loan information could also be shared intra-group.

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<sup>120</sup> Section 45 of the BA and section 44 of the FIA; section 85 of the BSA

<sup>121</sup> Fourth Schedules to the BA section 45; FIA section 44, and Eighth Schedule to the BSA section 85

291. The secrecy obligations of the statute will be extended to any person to whom information is released (such as consultants and proposed purchasers) who may not be subject to any other statutory duty of confidentiality.
292. Widen the power to share information and collaborate with any supervisory authority with a mandate for financial services regulation or regulatory counterpart or any law enforcement whether domestic or overseas on the basis of the existing confidentiality safeguards. (Refer also to *Part 9: Regulatory Authority and Functions*, paragraph 157(j)).
293. Offences for breaches (per the BA; FIA; BSA and Bank of Jamaica (Building Societies) Regulations) will be retained with the penalties being revised to ensure compliance with international best practice requirements and standards that speak to penalties being effective, dissuasive and proportionate<sup>122</sup>.
294. Omnibus secrecy provisions will not affect disclosures to Supervisory Authorities or Law Enforcement as regards the reporting of an offence under any statute;
295. Expressly incorporate indemnity protections regarding required disclosures to the Supervisor. The wording of the indemnity will be synchronized with the wording of the indemnity provisions in the POCA (i.e. protection from criminal, civil and administrative liabilities) and made applicable to officers of financial institutions as well as their auditors<sup>123</sup>. The scope of this provision will also extend to past employers who may be required to make disclosures in the course of fit and proper investigations.

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<sup>122</sup> See for example recommendation 35 of the revised FATF 40 Recommendations (issued February/March 2012) (previously addressed at 17 of the FATF 40 + 9 Recommendations); See also September 2012 BCP 11 (Corrective and sanctioning powers of the Supervisor) formerly addressed as Corrective and Remedial Powers in October 2006 BCP at BCP23)

<sup>123</sup> In relation to the auditors of DTIs, the existing provisions in the DTI laws speak only to protection from being held criminally liable for breach of the duty of confidentiality, and as such did not adequately address the possibility of civil liability.

*Consultative Paper on Proposed Enhancements to the Legislation for the Deposit-Taking Sector*

296. Indemnity provisions will be incorporated for DTIs and officers of these institutions as regards disclosures made under the Omnibus provided that the disclosures are lawful and made in good faith.

297. The requirements at paragraphs 288 – 296 above will also be extended to FHCs.

## **PART 22: ENFORCEMENT ACTIONS**<sup>124</sup>

298. The current framework for enforcement has been developed over a long time and to some extent it has been effective. However, the regime will be expanded and clarified, as regards the exercise of critical powers.

### **299. Corrective Action**

The Supervisor has determined that **strengthening the framework for corrective action** would be appropriate in the Jamaican context. The rationale is that non-discretionary intervention on an early, structured basis (prior to the absolute dissipation of an institution's regulatory capital), should result in lower costs to the Deposit Insurance Scheme and also the Public Sector. The fact of a predetermined point of intervention is also said to motivate bank owners to re-capitalize their institutions prior to reaching the trigger point. The determination of the appropriate trigger ratios would take into account, among other things, international standards such as the Basel II and Basel III capital frameworks and the adequacy of institutions' risk management regimes. The ratios that would be considered to be the trigger points would have to be carefully assessed as well as the time frame after which Temporary Management (refer *Part 23: Temporary Management* below), would be taken. The trigger mechanism would not prejudice the Supervisor's powers to take any other action provided by law to mitigate a crisis either before or after the date on which the shortfall is discovered. (so for e.g., a fall in primary ratio at a point below 3% would trigger the temporary management mechanisms.) Notwithstanding the foregoing the Supervisor will retain the discretion to specify and enforce institution specific capital ratios above the statutory minimum which will continue to be informed by, inter alia, the level of soundness of an institution's risk management framework.

### **301. New Enforcement Mechanisms and Sanctions**

Introduce enforcement mechanisms and sanctions for new offences such as illegal deposit-taking. (Refer to *Part 22A: Enforcement Action: Illegal Deposit-Taking*)

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<sup>124</sup> BCPs, September 2012 BCP 11 (Corrective and sanctioning powers of supervisors) formerly addressed as BCP 23 (Corrective and remedial powers of the supervisor) under October 2006 BCP

302. Enforcement Measures Targeting Licensees' Breaches of provisions

- (a) The current suite of enforcement tools will be expanded to include intermediate level regulatory sanctions (such as warning letters), to augment the current range of powers and further revised to revamp the penalties framework to ensure that penalties are effective, proportionate and dissuasive.
- (b) The procedure for the imposition of fines for non-compliance with the obligation to file returns has been underutilized primarily because most transgressions which occur (e.g. late submissions of returns; and submission of inaccurate returns) are not express offences in the existing law. The existing offence in the law is failure to file returns. Omnibus will therefore include as offences both the failure to make accurate returns and the submission of returns outside the statutory reporting period (Refer also to *Part 11: Examination and Prudential Returns*).
- (c) Interventionist actions such as temporary management require for example, that such action be taken when the institution's capital base is less than the amount required by the BA, FIA or regulations thereunder, or Bank of Jamaica (Building Societies) Regulations or where the value of the institution's assets is substantially less than the amount of its liabilities. Whilst there are other circumstances that would lead to earlier supervisory action (e.g. breach of a Supervisory direction), there may be value in allowing for the imposition of regulatory sanctions in cases where DTIs breach certain prudential ratios or limits. These sanctions would comprise minimum level actions, but the law will not preclude the Authorities from taking more drastic action at an earlier stage if conditions warrant. (See *Executive Summary, paragraph 33*)
- (d) This would mean effecting the following changes such as:

- i. The strengthening of sanction powers and adding new powers as appropriate (for e.g. additional provisions to allow for offences to be addressed through payment of voluntary administrative fines; issuing statutory warning letters and so forth);
- ii. More fulsome description of other powers (see for e.g. *Part 8: Regulations, Enforceable Prudential Rules and Supervisory Standards of Best Practice, Part 9: Regulatory Authority and Functions and Part 10: Other Supervisory Approvals and Notifications*);
- iii. More transparent procedures relating to the taking of sanction actions (i.e. codification of the ladder of enforcement);
- iv. Expressly reserve a power to the Supervisor to require a licensee to publish the fact that sanctions have been imposed through making the requisite disclosures for e.g. in the audited financial statements and/or other publications.

***Recommendations:***

Accordingly it is recommended that the Omnibus:-

303. Structure the enforcement regime to align more closely with the international requirements for timely supervisory action.
304. Expand the enforcement tools to include references to statutory warning letters, and the imposition of monetary penalties for breaches of any regulatory order or direction.
305. Retain the monetary penalties (voluntary penalties) provisions including the procedures for imposing fines; (In this regard the Omnibus will specifically accord the Supervisor power to impose administrative sanctions for certain breaches e.g. late submissions of returns (refer *Part 11: Examination and Prudential Returns*).

306. Clarify that the penalties at paragraph 305 above may be extended to the officer/(s) having responsibility for the area of operation and/or knowledge of the breach.
  
307. Review the penalties applicable for offences and amend accordingly to ensure that penalties are effective, proportionate and dissuasive.

## **PART 22A: ENFORCEMENT ACTION – ILLEGAL DEPOSIT-TAKING**

### **Illegal deposit-taking<sup>125</sup>**

308. The Bank is of the view that to effectively combat the activities of UFOs, there needs to be significant reforms relating to the powers of the financial regulatory Authorities to investigate, enforce sanctions and effect resolution of these schemes.
309. The Bank will be given the power to deem instruments or transactions to be deposits or deposit-taking business. This would remove any potential ambiguity as to whether an instrument is a deposit or not.
- a. The menu of the Bank's investigatory powers should be expanded to cover the following:
  - b. Production and inspection orders obtained via Court Order (including Orders re telecommunications providers);
  - c. Power to summon and/or subpoena witnesses;
  - d. Power to take statements (which statements should be admissible in evidence in applications to obtain investigatory orders at a. above);
  - e. Search Warrants both for evidentiary purposes and seizure of documents;
  - f. Power to require information from public entities;
  - g. The investigatory provisions of the law should also ensure that civil standards of proof are clearly stated to differentiate these cases from the criteria that govern criminal cases.

### **Enforcement Measures targeting Illegal Deposit-taking Activities**

310. The Bank considers that some of the salient powers exercisable by the Bank under section 25 of the BA/FIA should be exercisable against parties engaged in illegal deposit taking (such as issuing Cease and Desist orders).

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<sup>125</sup> Unlicensed Financial Operations

311. It is also the Bank's view that the criminal penalties for the offences of carrying on banking business without a licence (section 3(1) of the BA) and any related ancillary offence (including soliciting for deposits illegally (see section 3(1) of the FIA) should be retained and extended to expressly capture activities amounting to illegal deposit-taking.
312. The enforcement mechanisms that will target illegal deposit-taking should rely more heavily on civil proceedings to protect the public interest (restitution, injunctive measures, disgorgement of assets) and to complement or supplement the criminal prosecution process. It is also the Bank's view that criminal proceedings under this section (and any other criminal provisions) should be capable of being pursued in parallel with any administrative or civil proceedings instituted by the Supervisory Authority.

***Recommendations:***

313. Incorporate new enforcement mechanisms to deal with unlicensed financial operations (i.e. illegal deposit-taking) to include the following:-
- a. Issue of a short term Cease and Desist Order against the entity or individuals for a period (e.g. 15 days);
  - b. Ability to apply to the Courts for an injunction to restrain a party/(ies) from conducting illegal deposit-taking business and/or to confirm an existing Cease and Desist Order;
  - c. Ability to apply to the Court to seek punitive damages against an illegal deposit-taking operation;
  - d. Ability to apply to the Courts to seek disgorgement/restitution of funds by the illegal deposit-taking operation;
  - e. Ability to apply to the Courts to restrain/freeze assets (including funds held in bank accounts) owned or controlled by an illegal deposit-taking operation. This would have to operate with the usual mechanisms for undertakings and application of the standards of proof that are usual in injunction cases. In the first instance, the Bank should have the power to apply to the Courts on an ex parte

basis for an interim injunction. At the expiry thereof, to extend the period of the injunction, the Bank would have to serve notice on the affected party, who would have an opportunity to participate in the proceedings;

- f. Power to apply to the Courts for the appointment of receivers on the volition of the Supervisor whether on behalf of investors/creditors or not;
- g. Power to apply to the Courts for liquidation or winding up of a corporate entity involved in illegal deposit taking.

## **PART 23: TEMPORARY MANAGEMENT**

314. The provisions of sections 25 of the BA and FIA<sup>126</sup> have operated well as regards the process of taking temporary management. It also has the very strong attraction of having been endorsed by the Jamaican Court of Appeal and the Judicial Committee of the Privy Council in the UK in the case of **Century National Bank v. Omar Davies and others**<sup>127</sup>. It is therefore not intended to dramatically change the mechanisms for the taking of temporary management. The amendments proposed in this regard would simply:

- a. increase the discretionary grounds under which Temporary Management may be taken;
- b. insert certain objective triggers for the non-discretionary taking of temporary management;
- c. insert provisions that relate to the taking of temporary management of a branch of an overseas institution<sup>128</sup>.

315. The Supervisor has determined that notwithstanding a reasonably effective remedial framework, a strengthening of the Supervisory corrective and sanctioning framework would be appropriate. The circumstances (e.g. breaches of minimum ratio requirements) that would be reflected in the law as the trigger points for the imposition of non-discretionary Supervisory action would have to be carefully assessed in the context of a regime which already has an established Temporary Management framework. The trigger mechanism would not prejudice the Supervisor's powers to take any other action provided by law to mitigate the crisis either before or after the date on which the shortfall or material deficiency is discovered.

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<sup>126</sup>See also regulation 64(d) of the BOJ (Bldg. Soc.) Regulations

<sup>127</sup> Privy Council decision 16 March, 1998

<sup>128</sup> Since the 2008 global financial crisis regulators are requiring living wills approaches to be addressed by institutions which are systemically important and which have cross border operations. Eg. UK (The Banking Act, 2009) and USA (Dodd-Frank Wall Street Reform and Consumer Protection Act). These approaches generally impose requirements on multinational operations of SIFIs and ensure there is an orderly requirement for winding up. Establishment by branches could therefore be discontinued based on these mandates.

**Recommendations:**

Accordingly it is recommended that the Omnibus:-

316. Substantially retain the existing procedures for Temporary Management; (i.e. Where the Supervisor believes that a DTI is or appears likely to become unable to meet its obligations or that any of its conditions specified in paragraphs 5,6,7,8,9,10,11 or 12 of Part A of the BA/FIA exists; where the DTI gives false or misleading information for a licence application; where a DTI continues to take deposits in violation of a direction; where a DTI gives false statements of their affairs, or refuses or neglects to make returns or produce books records or other documents to an authorized officer; where a DTI refuses to permit inspection by an authorized officer; where there is contravention of any cease and desist order or any directions; where the value of the assets is substantially less than its liabilities; where a DTI gives notification of its proposal to surrender its licence, where a DTI ceases to carry on banking business, and where there is the appointment of a receiver.(Refer section 25 (6A,) BA, FIA)) . The circumstance of a DTI failing to commence banking business within 6 months will no longer result in Temporary Management being taken. The law will instead reflect that in such a case, that person would face having the licence revoked for failure to commence operations within a specified time of the licence being granted (refer to *Part 2: Licensing* above).
317. Expand the grounds for taking Temporary Management. The draft CARICOM Banking and Financial Institutions Act is instructive. Guidance could therefore be taken from section 46 of the **Draft Banks and Financial Institutions Act** prepared by the CARICOM Legislative Drafting Facility<sup>129</sup> (February 2005 version), with necessary

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<sup>129</sup> The grounds under the Draft Banks and Financial Institutions Act for the supervisory taking of “possession” are:

- (i) the capital of the financial institution is substantially exhausted or impaired or the financial institution’s condition is otherwise unsound with no reasonable prospects of its timely restoration;
- (ii) the business of the financial institution is being conducted in an unlawful or imprudent manner;
- (iii) the continuation of the activities of the financial institution is detrimental to the interests of its depositors;
- (iv) the licence of the financial institution has been revoked in accordance with section 10 [of the draft Banks and FI Act] ;

consequential amendments as regards terminology, section references and applicable circumstances. So for example an additional circumstance which could require the taking of temporary management could be where the financial institution engages in activities that could lead to insolvency (e.g. Poor risk management activities such as imprudent investments in non-earning assets, or poor asset liability management). In addition to this, a further circumstance for taking temporary management could be where a DTI's minimum capital level falls below the statutory minimum. In this regard temporary management mechanisms would be coordinated with the proposed framework to implement a non-discretionary sanctioning regime.

318. In relation to local branch operations of foreign banks, the existing banking laws already incorporate provisions which seek to 'ring fence' the assets of such operations and has been successfully applied by the Jamaican Authorities. It is therefore not proposed to seek to extend the parameters of the temporary management measures as a resolution mechanism for local branch operations of foreign banks. Instead the licence will be revoked where there is severe statutory impairment or insolvency. The mechanisms to deal with the Temporary Management of a DTI which is the subsidiary of an overseas entity appears to be largely adequate, and the law may only need to be revised to ensure adequate information-sharing mechanisms exist in the law to facilitate appropriate co-ordination with the home country supervisor. (Refer *Parts 9: Regulatory Authority and Functions* and *Part 14: Consolidated Supervision and FHC Provisions above*)

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- (v) the financial institution is carrying on banking business in [state] without a licence;
  - (vi) substantial dissipation of the financial institution's assets or earnings has occurred as a result of the violation of any law or regulation, or unsafe or unsound banking practices;
  - (vii) the financial institution's assets do not appear sufficient to satisfy its depositors, creditors and other liabilities;
  - (viii) the financial institution appears unable to meet its obligations and pay its depositors' demands in the normal course of business;
  - (ix) the financial institution wilfully conceals from the Bank its books, records or accounts, or refuses to permit the Bank to inspect its affairs or otherwise obstructs such inspection; or
  - (x) the financial institution engages in any act, transaction or course of conduct which is likely to cause insolvency.

**PART 24: VESTING AND RECONSTRUCTION**

319. The issue of Government's vesting of shares for the purpose of effecting a restructuring or compromise of creditors has also worked well. It is not considered that reforms to the law would require substantive changes to this regime, particularly as certain constitutional aspects of the vesting provisions have been carefully settled.

## **PART 25: LIQUIDATION (VOLUNTARY AND INVOLUNTARY)**

320. Currently, the laws relating to the insolvency of DTIs (Banks and FIA licensees) are stated to be subject to the Companies Act with regards to winding up and those specified under the BSA with respect to societies. It is noted that Jamaica's corporate insolvency framework is currently undergoing comprehensive review<sup>130</sup>. The view may well be taken that the framework for the insolvency of DTIs should not differ significantly from the framework applicable to companies generally, save and except for the fact that the Supervisor may apply to the court for winding up under the provisions of the BA, FIA and BSA. This is already included as an adjunct to the provisions relating to both temporary management (section 25(6) A of the BA/ FIA, regulation 64 of the Bank of Jamaica (Building Societies) Regulations) and restructuring pursuant to the making of a vesting order (section 25D BA/ FIA).

321. The voluntary winding up provisions as contained in the BA and FIA appear to be adequate to ensure that the Supervisor is kept abreast of the proceedings. The provisions applicable to building societies will therefore be synchronized as far as possible with those currently applicable to licensees under the BA and FIA.

322. A related issue is that pertaining to the voluntary surrender of a licence. This does not present a difficulty where the entity did not commence operations. However, where it did commence operations, the entity will still have to adopt one of the winding up avenues provided by the law. In the case of a surrender prior to the commencement of operations, the Supervisor would request an auditor's confirmation of the repayment of all debts.

### ***Recommendations***

It is therefore recommended that the Omnibus:-

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<sup>130</sup> i.e. The Insolvency Review Sub-committee of the Justice Reform Committee of the PSOJ.

323. Make express reference to the procedures applicable to the liquidation or winding up processes under the Companies Act whilst retaining the right of the Supervisor to make an application in the appropriate circumstances (e.g. Temporary Management).
324. Make express reference to any Insolvency Rules that may be in place. It is also recommended that such Insolvency Rules incorporate provisions that establish the priority of depositors (in the case of uninsured deposits i.e. those not covered by JDIC<sup>131</sup>) in any order of distribution established by the Rules which involve or impact DTIs.
325. Make it clear that licences are deemed to be automatically revoked upon the commencement of any liquidation proceedings and would trigger Temporary Management, if deemed necessary.
326. Reflect that the Supervisor retains the right to request a licensee's external auditors' confirmation of the repayment of the debts incurred by the licensee upon a voluntary liquidation.
327. Reflect that the Supervisor retains a role in the case of Receiverships of any licensee (i.e. DTI or FHC) or member of the financial group and is at a minimum, apprised in the case of a receivership of any member of the financial group. The Omnibus should also reflect that the Supervisor may access information from any liquidator or receiver in this regard.

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<sup>131</sup> (See also section 17 of the Deposit Insurance Act)

## **PART 26: CUSTOMER ISSUES**

328. Under this section, certain specific customer-related issues would be addressed.
329. The Omnibus will incorporate provisions for an enforceable Code of Conduct to govern the activities of Licensees and their responsibilities to customers. The Supervisor would be charged with enforcing compliance with this Code (refer to *Part 26A: Enforceable Code of Conduct*).
330. However it is also noted that the enforceable Code of Conduct will not operate as a replacement of, or substitution for, existing substantive consumer protection mechanisms i.e. Fair Trading laws and regulatory body and the Consumer Protection laws and regulatory body. Nor will it preclude the establishment of a specialized statutory body (e.g. financial services consumer protection agency) to deal with the full range of financial services consumer protection issues in the event a determination is made that such a policy action is warranted. A comprehensive regime treating with the broader matter of safeguarding of consumer interests with the offer of financial services (i.e. deposit-taking and non-deposit-taking; regulated and possibly unregulated e.g. moneylenders) is also required and is being pursued<sup>132</sup>. Such a regime would necessarily incorporate some level of public awareness initiatives which would be designed to improve the financial literacy of the general populace.
331. Such a regime would complement the existing framework covering substantive consumer protection mechanisms i.e. Fair Trading laws and regulatory body and the Consumer Protection laws and regulatory body; and code of conduct mechanisms that are in place for FSC licensees.

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<sup>132</sup> The Minister of Finance has mandated the Bank of Jamaica to explore a framework that would incorporate such a comprehensive approach for the protection of consumers of financial services and make appropriate recommendations.

***Recommendations***

It is therefore recommended that the Omnibus:-

332. Incorporate provisions addressing an enforceable Code of Conduct;
  
333. Incorporate provisions outlining the Supervisor's role in oversight of the industry's compliance with the Code;

## **PART 26A: ENFORCEABLE CODE OF CONDUCT**

334. The enforceable Code of Conduct will outline DTI's key responsibilities to their customers particularly as regards notification of key matters contained in contracts, truthful advertising, notification requirements prior to the taking of action that may be detrimental to a customer's interest, and their resolution mechanisms for customer related issues.
335. The Code will also address the implementation of standardized protocols across the industry and provide for powers to address breaches of these protocols. It is not intended that these powers will seek to alter or interfere with the contractual arrangements between a deposit-taking licensee and its customers, save to the extent of the provisions of the Code.
336. The enforceable Code of Conduct will not operate as a replacement of, or substitution for, existing substantive consumer protection mechanisms i.e. Fair Trading laws and regulatory body and the Consumer Protection laws and regulatory body. Nor will it preclude the establishment of a specialized statutory body (e.g. financial services' consumer protection agency) to deal with the full range of financial services consumer protection issues in the event a determination is made that such a policy action is warranted.
337. Oversight of compliance with the Code will be incorporated in the Supervisor's examination processes (i.e. on-site and off-site assessments). DTIs will be required to provide information covering customer related matters which will include continuation of submissions in relation to fees and charges for banking services, as well as other additional reporting requirements that may arise in this regard (such as customer complaints statistics). Non-compliance with the Code may result in an adverse rating for a DTI under standard supervisory assessments.

**Recommendations:**

338. The mandates in this area will therefore cover DTIs’:-

- a. Obligations to notify customers of proposed variations in documentation terms and conditions pertaining to banking services and products and reasonable notice periods as relevant;
- b. Use of fair clear language in contracts and communications with customers;
- c. Duty to draw customers’ attention to key terms;
- d. Duty to provide customers with all information relating to customers’ business with DTIs; (In this regard customers should be provided at least annually with a detailed status of their accounts with DTIs.)
- e. Duty to implement customer complaint dispute resolution processes (including built in timelines for addressing and responding to customer complaints; allow for nominees who can represent customers in the process, and to provide dedicated officers to address Code of conduct issues and complaints);
- f. Duty to publish statistics on customer complaints at least annually;
- g. Duty to provide the Supervisor with statistics on customer complaints on the required cycle and in the manner determined by the Supervisor;
- h. Duty to make generic competition information covering fees and charges for banking services<sup>133</sup> available to consumers on a quarterly basis;
- i. Obligations to ensure adequate resources are in place to deal with Code of Conduct issues.

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<sup>133</sup> Currently published annually by the BOJ

339. The Omnibus will also reflect that:-

- a. the Code will constitute rules under the Omnibus statute;
- b. Administrative sanctions will be imposed where there is non-compliance with, or breaches of the Code;
- c. Grievances which arise in relation to a DTI's adherence to the Code and which are not resolved directly with the DTI, must be referred to the Supervisor for resolution. In this regard the framework will, among other things, speak to mechanisms for referrals to the Supervisor, timelines within which the Supervisor must respond to such referrals and the nature of grievances which can be accommodated by this process, and
- d. Where grievances are not resolved after resolution to the Supervisor then such matters can be referred to the courts.

## **PART 27: OFFENCES**

340. This paper assumes that the Omnibus will retain the offences that accompanied the substantive obligations (now set out at Third Schedule to the BA<sup>134</sup> and FIA and the relevant Schedule to the BSA and the Fourth Schedule to the Bank of Jamaica (Building Societies) Regulations). These offences will be replicated in the new statute (with appropriate adjustments regarding penalty levels and role of Supervisory Authority), perhaps by way of a Schedule of Offences.

341. The following offences<sup>135</sup> will also be retained under the Omnibus statute:

- a. Misleading, false or deceptive statement to invest money on deposit;
- b. Culpability of Directors, Officers, Managers where an offence committed by a body;
- c. corporate is proven to be committed with the consent or connivance of these persons;
- d. Minimum “*catch all*” offence<sup>136</sup> for any breach for which an offence is not now specified;

### ***Recommendations:***

342. The Omnibus will retain all existing offences and also incorporate the following new offences, including: –

- a. The submission of late returns and information;
- b. The persistent submission of inaccurate returns and information;

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<sup>134</sup> Carrying on business without a licence; obstructing an authorized officer in the performance of his duties; incurring deposit liabilities in excess of prescribed amount; acting in a managerial capacity while debarred; permitting debarred persons to be involved in the management of the bank, FIA; or building society; engaging in prohibited business; failure to make returns; failure to submit or exhibit or publish last audited balance sheet and profit and loss account; failure to make report to Supervisor; failure to comply with requirement of Supervisor for audit or examination; failure to provide consolidated balance sheet and profit and loss account; failure to comply with a direction or cease and desist order; failure to comply with directions; failure of shareholder to provide information to HMOFP; manager failing to provide information on the licensee’s financial position; failure to notify BOJ of resolution for voluntary winding up; furnishing false information in any statement, deed or declaration in relation to amalgamation or transfer of licensee; fraudulently inducing persons to invest, licensee official making unauthorized disclosures; failure to comply with Directions to restructure.

<sup>135</sup> Refer section 42 of the BA and FIA

<sup>136</sup> Refer section 42(3) BA and FIA

- c. Illegal deposit-taking;
  - d. Fraudulent inducement to make deposits;
  - e. Fraudulent misrepresentation that a person is licenced under this Act;
  - f. Actions that give the perception of being an authorized DTI;
  - g. Misleading, false or deceptive statement to induce the making of deposits;
  - h. The submission of returns that are substantially inaccurate or misleading;
  - i. Undertaking dealings with shell banks;
  - j. Undertaking unauthorized agency DTI services;
  - k. Operating or offering DTI services without having a physical presence in Jamaica (e.g. Virtual or internet DTI services);
  - l. Breaches of the mandates outlined under Part 6 of this paper (Directors, Managers and Officers) and
  - m. Breaches of the FHC provisions.
343. The HMOFP's powers to amend the Schedules of penalties by way of Order subject to affirmative resolution will be retained.

## **PART 28: TRANSITIONAL**

344. The Omnibus will incorporate clear transitional arrangements that may be necessary and will retain statutory discretion for the Supervisor to vary the timelines for conforming to the new regime under the Omnibus. The Omnibus will also include a “sunset” provision that involves the substantial review of the legislation after a predetermined period (e.g. 7 years) to determine on changes in conditions, policies or regulatory structures. The sunset provision will not however prevent earlier reviews and revisions from taking place as deemed necessary.<sup>137</sup>

### ***Recommendations***

It is recommended that the Omnibus:

345. Incorporate transitional arrangements that will allow appropriate time for any changes that may have to be made as regards any new requirements, as well as treating with Regulations under the three deposit taking statutes, which may have to remain in effect until the Omnibus statute (and any regulations thereunder) are passed.
346. Retain the provisions requiring Supervisory approval to effect amendments to Incorporation documents;
347. Incorporate sunset provisions that will require a comprehensive review of this statute to be undertaken periodically (e.g. every 7 years).
348. Incorporate savings provisions to ensure that any act previously carried out under the previous statutes will remain valid and legally enforceable.

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<sup>137</sup> BCPs, September, 2012 BCP 1 EC 4 – Banking laws, regulations and prudential standards are updated as necessary to ensure that they remain effective and relevant to changing industry and regulatory practices. These are subject to public consultation, as appropriate. (Formerly addressed in October 2006 BCP at BCP 1Ec 3)