

Center for Economic Growth



Office of Emerging Markets
Center for Economic Growth
Bureau for Global Affairs Field Support & Research
U.S. Agency for International Development
Washington D.C. 20523-0228

UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT

Uganda Capital Markets Development

**Communique of the Capital Markets
Authority of Uganda**

October, 1997

**USAID/Barents Group LLC
Financial Sector Development Project II
Contract No. PCE-0025-Q-00-307-00, Delivery Order #37**

William Haseltine



**2001 M Street, NW
Washington, DC 20036
USA**

Opinions herein are those of the author and so not necessarily reflect the policies or views of the Government of Uganda, USAID, Barents Group LLC or KPMG Peat Marwick

COMMUNIQUÉ
OF THE
CAPITAL MARKETS AUTHORITY
OF UGANDA

October 3, 1997

- Purpose:**
- 1) Inform the public that the Capital Markets Authority (herein the "CMA") and its Board of Directors (herein the "Board") are aware of necessary action in the areas described herein
 - 2) Give notice of proposed corrective action, *i e*, adoption of the proposed Public Offering Regulations (herein the "Regulations")
 - 3) Offer details regarding reasons for the proposed action
 - 4) Request public comment on proposed action by the Board

Distribution: Legal Subcommittee of the Board
Board of the CMA
Public

Intended Action: Adoption by the Board of the proposed Public Offering Regulations and Schedule A thereto

Prepared by: William B Haseltine, Special Adviser to the Capital Markets Authority

TABLE OF CONTENTS

	PAGE #
I. Executive Summary	3
II. Background	4
III. Description of the Proposed Public Offering Regulations.	
A. Overview	5
1. <i>Scope.</i>	
2. <i>Definitions.</i>	
B. Procedural Requirements.....	6
1. <i>Conduct of a Public Offering.</i>	
2. <i>Communications Allowable Prior to Publication of the Prospectus.</i>	
3. <i>Review of the Prospectus.</i>	
4. <i>Other Required and Allowed Matters.</i>	
a. <i>Required Dates.</i>	
b. <i>Forward Looking Statements.</i>	
c. <i>Opinions of Experts.</i>	
C. Civil and Criminal Liabilities	10
D. Procedural Matters	11
IV. Conclusion.....	12

I. Executive Summary.

The proposed Regulations are being considered for adoption by the CMA and the Board Uganda is rapidly moving toward development of a capital market system that will facilitate movement of savings into productive investments that can assist the development of private enterprise in the growing economy in Uganda The CMA is actively pursuing matters that will encourage and enhance this development

Essential to the expansion of a quality capital market with sufficient depth and liquidity to sustain and enable new growth and capitalisation by companies are comprehensive regulations that will be evenly applied throughout the marketplace The current laws regarding public offerings, which must be obtained primarily by reference to two statutes and one regulation,¹ are unclear regarding the precise procedures that a potential issuer must undertake The laws also are equivocal as to which institution or authority is responsible for their application and enforcement Even a thorough analysis of these laws and regulations leaves many questions unanswered regarding the exact requirements, both procedural and substantive, to be addressed by issuers, underwriters and other parties in the context of a public offering

The currently proposed Regulations will inject predictability and certainty into the process for initial public offerings The Regulations also cover offerings by companies that already have securities traded as well as privatisations that will involve public offers of securities Issuers will be able to ascertain in advance, and with some degree of certainty, exactly what are the steps they will have to undertake to accomplish a public offering This type of predictability is absolutely necessary to create a smooth and well-functioning market for securities in Uganda

Very little of the substantive requirements of existing laws are changed by the proposed Regulations The laws are simply organised, clarified and made more comprehensive in order to cover contingencies that can be expected to occur in an active public market The Regulations that are being considered by the CMA are authorised by provisions in the CMA Statute, which gives broad power to the CMA to adopt regulations concerning all aspects of public markets, including actions taken to promote their development Similarly, the Schedule to the Regulations does not so much modify the current similar Schedule to the Prospectus Regulations as it clarifies and enhances the required disclosures

¹ Companies Act, 1961 (herein the "Companies Act"), Capital Markets Authority Statute, 1996 (herein the "CMA Statute"), and The Capital Markets (Prospectus Requirements) Regulations, 1996 (herein the "Prospectus Regulations")

II. Background.

As discussed above, the capital markets in Uganda are poised for rapid development. In recent years, democracy has taken hold in this country and its institutions are growing in expertise and reputation. Corresponding with these advancements, the government of Uganda is seeking to promote investment, both local and international, that will develop its commercial and industrial base, thus aiding enrichment of the general economy. One action that it has undertaken recently is the passage of the CMA Statute, which, *inter alia*, created the CMA and gave its mandate to promote the development of the capital markets. Another recent action was the implementation of the process of privatisation, as overseen by the Privatisation Unit (herein the "PU")². The PU's activities have been mandated by Parliament, and the success of its endeavors will result in much needed capital being injected into the economy via sale of all or portions of many large and small companies that currently are government-owned. This process will be facilitated by a comprehensive set of guidelines, promulgated by the CMA, that will set forth the procedures to be followed for the flotation of shares in these enterprises.

By passing the CMA Statute and creating the CMA, Parliament has envisioned an entity that will take the helm of the developing capital markets, guiding them into a position of predictability, profitability and liquidity that will enhance the capabilities of companies to raise much-needed capital to carry on their businesses. As evidenced by the experiences of many countries around the world, investors tend to come to markets where the playing field is level, free of procedural, political and legal uncertainties, with solid antifraud laws in place and where a strong and independent regulatory body oversees the marketplace to ensure fairness.

The current status of the laws governing the public offering process belies these worthy objectives in its inherent uncertainty of application and vagaries in scope. It is therefore incumbent upon the CMA to comprehensively revise the provisions dealing with these issues, gathering them into one comprehensive regulation and educating the public regarding these procedures. No wholesale changes to substance or approach is required, merely fine-tuning of procedures and clarification of responsibilities. Comments by qualified parties who will be affected by these Regulations are welcomed, and all constructive opinions will be considered before final adoption of these Regulations is accomplished.

² The Privatisation Unit has been charged with implementation of the mandates contained in The Public Enterprises Reform and Divestiture Statute, 1993, as amended.

III. Description of the Proposed Public Offering Regulations

A. Overview.

1. Scope.

The proposed Regulations are intended to provide a comprehensive blueprint for legal compliance in the preparation and execution of a public offering of securities in Uganda. All procedural requirements are set forth comprehensively, so that an issuer need not search through an array of statutes and regulations. All that will be required additionally is that a company or other issuer ensure that it is legally permissible under the laws governing the existence and conduct of the entity for it to conduct the anticipated offering.

The Regulations begin with a statement describing the authority of the CMA to adopt the Regulations. After that, a statement in Part I regarding the scope of the Regulations is set forth.³ This statement rescinds the Prospectus Regulations, since they are enhanced and superceded by the current Regulations.⁴ This section affirms that only *public offerings* are regulated by the Regulations set forth herein, not private placements. Only the antifraud provisions apply to private placements.⁵ This means that, while prospectuses need not be published nor the CMA consulted with respect to private placements, any type of fraud in the conduct of an offering of securities, whether public or private, is prohibited. The criminal provisions in Rule 602(c) are applicable to fraud committed in the context of either a public or a private offering. Similarly, offerings of government securities are exempt from the provisions of the Regulations, with the exception of antifraud rules.⁶

Finally, this section makes it clear that enforcement powers regarding provisions of the Regulations reside with the CMA.⁷ Since it is impossible to proceed with a public offering without concurrence of the CMA, it will have broad authority to seek compliance with the provisions of the Regulations. Violations that occur despite the oversight of the CMA will be referred to the proper criminal enforcement authorities.

³ See Part I, Rules 101 through 106

⁴ Rule 103

⁵ Rule 106

⁶ Rule 105

⁷ Rule 104

2. Definitions.

This section includes a definition for all major terms used throughout the Regulations. Application of this section to each occurrence of the words listed should be made to appreciate their meaning within the context of the Regulations. Particular notice should be given to the following definitions:

The definition of material should be noted carefully.⁸ Note that this term does not specifically identify elements of disclosure that will be required, but rather identifies a concept that it is the duty of the issuer to provide a truthful representation of all facts that an investor would like to know concerning the offering of securities. If an investor is being asked to place his or her money with an issuer, the investor reasonably will expect a positive return on that investment, and all information regarding whether this is likely or even possible must be disclosed.

It also should be noted that the parameters of what constitutes a "public offer" are not specifically set forth. Some guidelines are mentioned, but that is just what they are, and a factual determination of what may constitute a public offering will be determined finally by the CMA, with regard to all the factual circumstances surrounding the activity in question.

B. Procedural Requirements

1. Conduct of a Public Offering.

Part III contains rules regarding the communications that may be involved in a public offering. Two broad rules are set forth: a) no public offering may be made without delivery or publication of a prospectus that meets all the requirements of the Regulations,⁹ and b) there can be made communications in anticipation of an offering that do not in and of themselves comprise or contain a public offering.¹⁰ Therefore, such communications would not require publication and prior approval of a prospectus as set forth in these Regulations.¹¹ These situations are discussed below in part III B 2.

Rule 301 makes clear that every public offering must be preceded by or be conducted contemporaneous with the publication or delivery of a prospectus that meets the requirements of the Regulations. Rule 201(d) includes in the definition of prospectus any writing that is distributed to the public, any matter that is published in a newspaper or other broadly distributed forum, and any electronic media.

⁸ Rule 201(b)

⁹ Rule 301

¹⁰ Rule 302

¹¹ See Rules 301 and 401

2. Communications Allowable Prior to Publication of the Prospectus.

In today's fast moving economy, it is often necessary for an issuer to raise money for company purposes on a very abbreviated time schedule. The time that is necessary for an investor to analyse financial information prior to making an investment decision may be longer than a company would like, and any method for shortening this time while still protecting investors should be implemented.

Strict interpretation of these Regulations by lawyers, issuers and the CMA, together with potential financial and criminal penalties for violations thereof, may cause issuers to seek to avoid any communications with the public or other publicity regarding a potential public offering for which there has not yet been published a prospectus. This in fact would be the prudent course. However, it has been experienced in countries around the world that some prior notification of a pending offering may serve a valuable purpose of preparing the market for an offering that is imminent. Conversely, unsubstantiated rumours and speculation concerning an unannounced offering can have an adverse effect on the market when no solid information is available.

Therefore, it is in everyone's interest that certain communications be allowed prior to the actual commencement of a public offering. Rule 302 addresses this contingency. It describes the situations wherein an issuer may make certain information available to the public prior to publication of the prospectus, and not be in violation of Rule 301. Rule 302(b) sets forth types of information that *may* be included in such a communication. Not all of this information needs to be mentioned, but these are merely acceptable categories of information that can be included and that will not be deemed to be a public offering without a prospectus. However, Rule 302(c) sets forth information and a cautionary statement that *must* be included in any such communication in order to avoid a violation of Rule 301.

3. Registration Requirements.

The registration requirements for a prospectus that are set forth in the Companies Act¹² are expanded in Rule 401 to address the modern phenomena within Uganda of a stock exchange and the CMA. While registration pursuant to the Companies Act always was and shall continue to be required for administrative purposes, it is not and never has been intended to involve a substantive review of the content of the prospectus. The function of substantive review has been recognised as being necessary for the protection of investors, and as authorised by Parliament, will reside in the hands of experts in financial and market related matters at the CMA.¹³ The CMA will consider the advice of any stock exchange on which the publicly offered securities will be listed.¹⁴ However, the CMA will be the final authority

¹² Section 43

¹³ Rule 402(a)

¹⁴ See Rule 401(c)

in the determination of what will be required to be included in any prospectus. In reaching such a determination, the CMA will be bound by the provisions of the Regulations and the Schedule thereto.

Therefore, according to Rule 401, any proposed prospectus must be submitted prior to publication or distribution (and therefore prior to any public offering¹⁵) to the Registrar, the CMA and any stock exchange or other trading facility on which the securities will be listed or quoted for trading. This will require a substantive review only by the CMA, however, technical defects may be noted by the registrar and defects relating to compliance with listing requirements may be noted by the exchange or trading facility.

Rule 402 sets forth time requirements within which the CMA staff must review the proposed prospectus and communicate with the issuer regarding their findings. The staff will review the prospectus for legal compliance with the Regulations, and for logical and substantive consistency and clarity. Findings of this review will be communicated to the issuer pursuant to Rule 402(b).

In response to this communication from the CMA staff, the issuer has two options as set forth in Rule 402(c). The issuer may either amend the proposed prospectus in compliance with the comments raised by the CMA staff or, if it feels strongly that it would prefer not to amend, it may present the legal or logical basis for its difference of opinion to the CMA. The procedures for this are set forth in Rule 402(c)(2). If the issuer cannot resolve the difference of opinion with the staff of the CMA, it may request a hearing with the Board. The procedures for this are set forth in Rule 402(d). A final finding by the CMA Board must be complied with by the issuer prior to publication of the prospectus, however, review of this finding may be made upon request to the proper judicial authority if the issuer so desires. Obviously, this will involve a delay that the issuer must consider prior to making this decision.

¹⁵ See Rule 301

4. Other Required and Allowed Matters.

a. Required Dates.

Finally, in addition to the substantive matters required by Schedule A, certain other matters are required to be included, such as the date of the prospectus¹⁶ The most current information available to the issuer must be included in the prospectus regarding all matters, and under no circumstances may the most current financial information that is included be more than 9 months old¹⁷

b. Forward Looking Statements.

Forward looking statements would be allowed to be included in prospectuses under the conditions set forth in Rule 505 Prospectuses are intended to state factual and relevant information to assist potential investors in making a decision as to whether to invest in the securities being offered Obviously, forward looking statements are predictions of future events, and therefore are not factual Often, however, forward looking statements are useful in making such an investment decision, since a company may have genuine reasons for optimism that are not reflected in the financial statements and other current information that will appear in a prospectus

In such cases, limited projections may be included in a prospectus according to the provisions of Rule 505 Issuers should seriously consider the bases upon which they offer such projections, ensuring that sufficient reliability and certainty exist for their optimistic outlook If insufficient bases exist, issuers may be liable for misrepresentations at some point in the future

c. Opinions of Experts.

If any prospectus includes a description of matters that is based upon opinions given by experts such as engineers, valuers, accountants or others, the entire statement of such experts must be summarised in the prospectus¹⁸ A fair summary would include any assertions of uncertainty as well as rosy predictions Any negative or potentially negative findings by the experts must be summarised in order to give potential investors all the information they need in order to make an informed investment decision

As well, the identification of the expert, and a brief summary of the expert's qualifications regarding the ability to make the statements being relied upon should be included Any agreement or preexisting relationship between the expert and the issuer should

¹⁶ Rule 501

¹⁷ Rule 502

¹⁸ Rule 506(a)(1)

be identified¹⁹ Finally, a statement should be given indicating that the expert has consented to the use of the opinion in the prospectus²⁰ The full opinion and consent will be required to be submitted to the CMA as an exhibit to the prospectus²¹

C. Civil and Criminal Liabilities.

1. Civil Liability.

The Regulations provide explicitly for civil and criminal liability for failures to comply with the provisions thereof in the context of public offerings Civil liabilities exist for redress in a court of competent jurisdiction²² Civil liabilities will exist for the use of false or misleading statements in the offer or sale of securities in connection with a public offering Note that according to the language of Rule 601(a), it is not essential to establish liability that the statement in question was actually made to or received by the aggrieved party It would be sufficient to show that such a false or misleading statement was made and that it caused the market price of securities to be affected adversely to the interests of the person bringing the action

Similarly, civil actions will exist for material omissions of fact in a prospectus²³ These are elements of disclosures that should have been included in order to present a fair picture of the company's business It is not necessary in such a case to show that any actually false statements were made, merely that by not providing further appropriate information, the effect of the statements that were included was that a misleading presentation was made, causing the aggrieved party to consummate a transaction that resulted in damages

¹⁹ Rule 506(a)(2)

²⁰ Rule 506(a)(3)

²¹ Rule 506(b) *See also* paragraph (g) of Schedule A, Part 500

²² Rule 601(c)

²³ Rule 601(b)

2. Criminal Liability.

Criminal liability also extends to statements and omissions described above that may result in civil liability²⁴ Further, it shall be a criminal action to offer securities without compliance with Rule 301 of the Regulations, which requires use of a prospectus²⁵

Rule 601(c) contains a broad antifraud provision which actually extends beyond the requirements of the Regulation According to the mandate given the CMA by Parliament to develop and enhance a well functioning securities market, and in recognition of the fact that such a market can only exist both domestically and internationally if fraud is eliminated to the highest extent, this provision has been included It merely prohibits all fraudulent activities in the connection with the offer or sale of any securities at any time The language of this Rule is broad enough to enable enforcement authorities to bring criminal actions against perpetrators of any fraud on the marketplace However, it is not unlimited in scope, and does not lend itself to overreaching or abuse by regulators

Specific fines and terms of imprisonment will be set forth in Rule 601(d) These provisions will fully recognise the authority given the CMA in the CMA Statute, and will reflect the punishments authorised therein Actual prosecution will be handled by an appropriate government agency, which will bring any matters referred by the CMA before a criminal court of competent jurisdiction as set forth in this Rule

D. Procedural Matters.

The final part of the Regulations deal with matters that may arise during the conduct of a public offering²⁶ The first contingency that is dealt with is that of an issuer who is in the midst of an offering and decides that it would like to offer more securities than originally intended

Two alternatives are presented for an issuer in this circumstance in Rule 701 and 702 The first alternative, presented in Rule 701, is that the issuer may first complete the current offering, then wait for a "cooling off" period This period is designed so that the market can digest the original offering and prices will adjust and stabilise After the cooling off period, a new offering may be commenced

The other alternative, presented in Rule 702, may be used for the purpose of offering additional securities during an offering, or for the purpose of making any other material changes to the terms of an ongoing offering Specific procedures are set forth that are designed to protect the public in such a case First, the current offering must be halted since

²⁴ Rule 602(b)

²⁵ Rule 602(a)

²⁶ Part VII

it can no longer proceed based on the terms set forth in the current prospectus. Second, a rescission offer must be made whereby all acceptances of the first offer may be canceled at the option of the investor, and if canceled, the moneys deposited must be returned promptly.

Finally, a new prospectus must be prepared. Prior to its publication, it should be submitted to the CMA for review. The process will then go forward in a manner similar to that outlined in Rule 402.

IV. Conclusion.

The need for a comprehensive and effective system of regulation that will insert predictability and fairness into the process of conducting a public offering within Uganda is obvious. The CMA has been charged by the Parliament of Uganda with oversight and development of a strong and efficient capital market in this country that will facilitate the increase of industry and commerce. The responsibilities of the CMA include promulgation of rules and regulations that enhance likelihood of success of this process.

The CMA is considering whether these goals can best be achieved by adoption of these Regulations. It encourages submission of observations and comments from all interested parties who may have constructive ideas that will assist in the process. Comments should be submitted promptly, as action on these proposed Regulations is imminent. The goal of the CMA is to establish regulations that will consistently protect and educate investors throughout Uganda, assisting capital formation and redirection of savings into profitable investments that will aid in building and developing the economic advancement of our country.