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Corporate & Securities | Alert

July 2015

Little Known Florida Statute Affects Securities Issuers That Do Business in Cuba

While diplomatic relations between the United States and Cuba continue to normalize, issuers of securities sold in Florida should be mindful of a little-noticed but long-existing Florida statute that requires them to disclose any business activities in Cuba. Passed in 1992, Section 517.075 of the Florida Statutes states that "[a]ny issuer of securities that will be sold in [Florida] pursuant to a prospectus must disclose in the prospectus if the issuer or any affiliate thereof . . . does business with the government of Cuba or with any person or affiliate located in Cuba." Fla. Stat. § 517.075(1). Both "person" and "affiliate" are defined broadly to cover practically any connection that a business might have with Cuba. Fla. Stat. § 517.021.

If the statute applies, the issuer must disclose: (1) the name of the person, affiliate, or government with which the issuer does business and the nature of that business; (2) a statement that the information is accurate as of the date the securities were effective with the U.S. Securities Exchange Commission (SEC) or the Office of Financial Regulation, whichever is later; and (3) a statement that the current information regarding the issuer's business dealings with Cuba may be obtained from the Office of Financial Regulation. Fla. Stat. § 517.075(2).

Though seemingly innocuous, the Florida statute provides a private right of action for anyone—regardless of whether they bought securities from the accused issuer— to seek the imposition of a fine or an injunction, or both. If an action is brought by a purchaser of securities from an issuer found in violation of the statute, the issuer is subject to damages of up to $5,000. Fla. Stat. § 517.075(6)(a). If an action is brought by someone other than a purchaser of the securities, the issuer may be fined $5,000, the proceeds of which will go into the general revenue fund. Fla. Stat. § 517.075(6)(b).

It is important to note for issuers that have already sold securities in Florida and may look to enter the Cuban market that the statute applies retroactively. Thus, an issuer that has previously sold securities in Florida pursuant to a prospectus

must issue a disclosure if or when it decides to commence engaging in business with the government of Cuba, or with any person or affiliate located in Cuba, regardless of whether any new securities will be issued in the future. Fla. Stat. § 715.075(3).

Despite the Florida statute's broad reach, there are ways to avoid the required disclosures. For example, the statute does not apply to "securities or transactions that are exempt from registration under federal or state law or to investment companies registered under the Investment Company Act of 1940 . . ." Fla. Stat. § 517.075(8). Under this exception, issuers of securities sold in Florida pursuant to an exemption from registration under SEC or Florida regulations do not need to disclose any of their business ties to the government of Cuba or any person or affiliate located in Cuba.

In addition to the safe harbor provision provided by the statute, good arguments exist to support the proposition that the statute is unconstitutional under the U.S. Constitution:

- In *Odebrecht Const., Inc. v. Sec., Fla. Dept. of Transp.*, the U.S. Court of Appeals for the Eleventh Circuit found that a Florida statute banning companies that have any ties to Cuba from bidding on public works contracts was unconstitutional because it conflicted with federal law and trampled on the president's right to dictate foreign policy toward Cuba.
- Additionally, other Florida statutes dealing with Cuba have been deemed unconstitutional because foreign policy-related state legislation is held to be reserved for the U.S. Congress and the president.
- In this instance, the SEC has its own requirements for the disclosure of business related to state sponsors of terrorism. While the area in which this provision conflicts with federal laws and regulations is probably limited, Cuba's recent departure from the state sponsors of terror list creates a strong argument that Section 517.075 violates the Supremacy Clause of the U.S. Constitution.

Despite the strong possibility that the statute may be unconstitutional, it has yet to be judicially challenged. Businesses that are active in the Cuba and Florida markets are still required to comply with the statute. To date, affected companies with registered securities sold in Florida have noted their compliance with the statute in their SEC filings. It appears from these filings that issuers may choose to continue making the disclosure in order to avoid a fight with the Florida regulators or a disgruntled shareholder in civil litigation that might actually be motivated by other factors.

For those companies that have issued securities in Florida pursuant to a prospectus, the Florida Office of Financial Regulation (which is the Florida agency tasked with administering and enforcing the Florida statute) has created a "Disclosure of Business Activities in Cuba Form," which can be found on the agency's website. Issuers of securities in Florida that are interested in entering the Cuban market should certainly be aware of this statute's disclosure requirements should they ultimately choose to enter that market.

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