

Curaçao strengthens its financial supervisory laws

Bouke Boersma, attorney at Houthoff, New York

I. Introduction

1. Curaçao has strengthened its financial supervisory rules by, for the first time, regulating securities brokers, individual portfolio managers and money transfer companies. The Securities Brokers and Individual Portfolio Managers Act (*Landsverordening toezicht effectenbemiddelaars en vermogensbeheerders*) (the **Securities Brokers Act**) came into effect on June 17, 2017. The Money Transfer Act (*Landsverordening toezicht geldtransactieskantoren*) (**Money Transfer Act**) already entered into force on March 1, 2015. According to the explanatory notes to these Acts, the regulation of securities brokers and individual portfolio managers is primarily intended to protect the interests of investors, while the regulation of money transfer companies is aimed at combating money laundering and the financing of terrorism.
2. This article discusses the provisions that prohibit securities brokers, individual portfolio managers and money transfer companies, respectively, to act in or from Curaçao without a license from the Central Bank of Curaçao and St. Maarten (*Centrale Bank van Curaçao en Sint Maarten*) (the **Central Bank**), unless an exemption applies or these prohibitions are deemed to be non-applicable. This article will also outline the rules applicable to securities brokers, individual portfolio managers and money transfer companies that are active in or from St. Maarten, or, more to the point, the absence of such rules.
3. Curaçao formed, together with St. Maarten, Bonaire, St. Eustatius and Saba (the **BES-Islands**), the Netherlands Antilles until the Netherlands Antilles were dissolved on October 10, 2010. Since then, Curaçao is an independent country within the Kingdom of the Netherlands. The Kingdom further consists of the Netherlands, which includes the BES-Islands, as well as St. Maarten and Aruba. The Central Bank acts as financial supervisor for both Curaçao and St. Maarten. At the time of dissolution of the Netherlands Antilles, Curaçao and St. Maarten agreed that their financial supervisory laws will remain substantially the same, but that hasn't happened in practice; for example, St. Maarten has not yet implemented laws similar to the Securities Brokers Act or the Money Transfer Act.

II. SECURITIES BROKERS ACT

A. Prohibition to act as securities broker in or from Curaçao

4. Under the Securities Brokers Act, it is prohibited to be active as a securities broker in or from Curaçao without having obtained a licence from the Central Bank, unless an exemption applies. A "securities broker" is defined in the Securities Brokers Act as a person carrying out

activities as intermediary for clients with a view to the execution of securities transactions.¹ The explanatory notes to the Securities Brokers Act give the following examples of securities brokers: (1) persons that execute securities transactions in their own name or in the name of third parties, in both cases for the account of third parties; (2) persons, acting in the name of third parties, that request other securities brokers to execute securities transactions for the account of third parties; or (3) persons that refer clients to other securities brokers.

5. The Securities Brokers Act defines "clients" as all persons, other than professional market parties, to whom services are marketed, offered or provided. Professional market parties as defined in the Securities Brokers Act are investment funds, credit institutions, pension funds, securities brokers, individual portfolio managers, insurers, stock listed companies, companies whose assets exceed a certain threshold to be determined by the Central Bank², and other persons designated as such by the Central Bank (hereinafter referred to as **Professional Market Parties**). The criteria to determine which other persons can be designated by the Central Bank to qualify as Professional Market Parties have not yet been published. Consequently, a securities broker that only renders services to Professional Market Parties does not need to obtain a license from the Central Bank.

B. Prohibition to act as individual portfolio manager in or from Curaçao

6. Under the Securities Brokers Act, it is also prohibited to be active as an individual portfolio manager in or from Curaçao without having obtained a licence from the Central Bank, unless an exemption applies. An "individual portfolio manager" is defined in the Securities Brokers Act as a person carrying out on a discretionary basis the management of securities for clients, including executing securities transactions for the account of clients. A manager of an investment fund does not qualify as an individual portfolio manager.³

C. Exemptions and Non-Applicability of these Prohibitions

C.1 Licensed Curaçao financial institutions

7. Pursuant to Article 8(1) of the Securities Brokers Act, the prohibitions to act as securities broker or individual portfolio manager do not apply to credit institutions, insurance

¹ The Securities Brokers Act defines "securities" as: (i) share certificates, debt instruments, profit participation rights, founders' shares, option certificates, warrants and similar instruments; (ii) participation rights, options, futures, entries in share and debt registers, and similar rights, whether or not conditional; (iii) rights from agreements to set-off foreign exchange or price differences and tradable similar rights and instruments; and (iv) depository receipts and provisional certificates issued for the securities referred to above, but excluding instruments that are solely used as legal tender and apartment rights. This definition covers almost all equity and debt instruments and certain derivative instruments as well.

² This threshold is still to be determined by the Central Bank.

³ For the definitions of "client" and "securities", please refer to the previous paragraph and footnote 1, respectively.

companies, investment institutions, administrators and trust companies that are already licensed in Curaçao, provided that acting as securities broker or individual portfolio manager is not prohibited or limited pursuant to such license, which is usually not the case. To qualify for this exemption, these financial institutions must have notified the Central Bank that they are also active as securities broker or individual portfolio manager before September 18, 2017.

C.2 Individual exemption for foreign institutions

8. Section 12(1) of the Securities Brokers Act provides that the Central Bank can grant an individual exemption from the prohibition to act as securities broker or individual portfolio manager in Curaçao to a foreign institution if the following cumulative conditions apply: (a) the foreign institution has its corporate seat in a country that exercises supervision that is deemed adequate by the Central Bank to safeguard the interests that are to be protected by the Securities Brokers Act;⁴ (b) the foreign institution submits a declaration from the foreign supervisor confirming it is subject to financial supervision; and (c) the Central Bank determines that issuing the exemption does not contravene the interests that are to be protected by the Securities Brokers Act.

C.3 De Minimis Exclusion

9. The parliamentary history to the Securities Brokers Act confirms that as long as a foreign institution does not actively approach Curaçao residents through the internet, telephone, television, fax, newspapers, magazines, direct mail, mailings, or other electronic or hard copy materials, the prohibitions to act as securities broker or individual portfolio manager without a license from the Central Bank do not apply. This is determined on a case-by-case basis by the Central Bank. Relevant factors to determine if a foreign institution actively approaches a Curaçao resident are the following: (i) the use of Papiamentu, English or Dutch in the communication;⁵ (ii) the target group of the communication includes Curaçao residents; (iii) the communication is addressed to Curaçao residents; (iv) information on the laws or fiscal regime of Curaçao is provided; and (v) the names of contact persons in Curaçao are included in the communication. In case the foreign institution provides services to Curaçao residents on a more than occasional basis, this will be an indication that the foreign

⁴ With respect to the Act on the Supervision of Investment Institutions and Administrators, the Central Bank has confirmed in the past that the following countries are deemed to have adequate financial supervision: the USA (if the institution is registered with the Securities and Exchange Commission), Jersey, Guernsey, the Netherlands, Luxembourg, the British Virgin Islands, the Bahamas, the Cayman Islands and Bermuda. Although the Central Bank has not yet confirmed that this list also applies to Section 12(1) of the Securities Brokers Act, I believe it is likely that the same jurisdictions will be deemed to have adequate financial supervision.

⁵ These are the three official languages in Curaçao. However, the use of English in any communication can in my view not be construed as evidence that a communication is targeted at Curaçao residents.

institution is actively approaching such residents and would need to obtain a license from the Central Bank. There are no thresholds to determine what constitutes providing services to Curaçao residents on an occasional basis. The parliamentary history indicates that the prohibition to act as a securities broker or individual portfolio manager without a license is intentionally worded broadly. Therefore, providing services to only a small number of Curaçao residents does not constitute a safe harbour in case a securities broker or individual portfolio manager would be actively marketing its services to Curaçao residents.

C4. Reverse Inquiry Exemption

10. The parliamentary history to the Securities Brokers Act confirms that the prohibition to act as securities broker or individual portfolio manager without a license from the Central Bank does not apply if the agreement to provide the relevant services is concluded with a Curaçao resident solely as a result of a reverse inquiry. However, if additional products or services are offered to an existing client without its prior request, the securities broker or individual portfolio manager cannot rely on the reverse inquiry exemption to the extent those additional products or services are concerned.

C.5 Effective Date

11. Pursuant to Section 127(2) of the Securities Brokers Act, the prohibitions discussed above will, with respect to companies that were already performing these activities before enactment of the Securities Brokers Act, only become effective at the later of a) one year after the date of entering into force, or b) the time the Central Bank has issued its decision on an application request for a license that was submitted within a year after the entering into force of the Securities Brokers Act, i.e. ultimately on June 17, 2018.

D. St. Maarten

12. Regulations similar to the Securities Brokers Act have not yet been implemented in St. Maarten and it is not clear when implementation can be expected. Consequently, acting as securities broker or individual portfolio manager in or from St. Maarten is currently not regulated.

III. REGULATION OF MONEY TRANSFER COMPANIES

A. Prohibition to act as money transfer company in or from Curaçao

13. Section 2(1) of the Money Transfer Act prohibits anyone from acting as a money transfer company (*geldtransactiekantoor*) in or from Curaçao without a license, unless the Central Bank has granted an individual exemption or this prohibition is deemed not to apply. This

prohibition does not apply to a foreign exchange bank (*deviezenbank*) that has received a license from the Central Bank.

14. Section 1 of the Money Transfer Act defines a "money transfer company" as anyone who makes it its business to execute money transfers on behalf or at the request of third parties, or acts as intermediary with respect to the entering into of money transfers. "Money transfers" are defined as the receipt of money or valuable goods in connection with a money transfer, for the purpose of transferring such money or goods to a third party, or paying or promising to pay money or goods after receipt of such money or goods, provided such money transfer constitutes a separate service. The parliamentary history to the Money Transfer Act clarifies that attorneys, civil-law notaries and insurance brokers who receive and transfer funds to third parties in the performance of their profession are not money transfer companies.
15. The prohibition included in Section 2(1) of the Money Transfer Act also applies to money transfer intermediaries. The parliamentary history defines "money transfer intermediaries" as follows: a) in its own name but for the account and risk of such third party executing money transfers; b) in the name of a third party and for the account and risk of such third party executing money transfers; c) as proxy for third parties arranging money transfers with intermediaries; or d) referring third parties to money transfer intermediaries.
16. Section 4 and 5 of the Money Transfer Act provide certain conditions that must be met by a money transfer company in order to obtain a license from the Central Bank. Importantly, the money transfer company must submit a bank guarantee issued by a credit institution licensed by the Central Bank in an amount of up to NAG 50,000 (which is equivalent to USD 27,985) to secure claims lodged against the money transfer company by its customers or others.⁶ Strangely, the articles of association of the money transfer company must provide that the money transfer service is limited to services rendered to natural persons.

B. Individual exemption

17. The Money Transfer Act provides that the Central Bank can grant an individual or general exemption from the license requirement included in the Money Transfer Act upon written request if, among other things, it deems that the soundness and reputation of the financial markets of Curaçao are otherwise sufficiently protected.

C. De Minimis Exclusion

⁶ Central Bank, Admission Requirements for Money Transfer Companies operating in Curaçao, August 2015, p. 1.

18. Section 2(1) of the Money Transfer Act also applies to foreign money transfer companies that are active in Curaçao. However, the Central Bank has confirmed that this prohibition will be deemed not to apply as long as a foreign money transfer company would not be actively approaching the Curaçao market through advertising or performing other activities with the purpose of obtaining a significant market share in Curaçao.⁷

D. St. Maarten

19. Section 8 of the Articles of Association of the Central Bank provides that the Central Bank supervises money transfer companies on the basis of rules to be laid down in an act, i.e. the Money Transfer Act for St. Maarten. However, as a Money Transfer Act has not yet been enacted in St. Maarten and is currently not even pending before the parliament of St. Maarten, the activity of transferring money is not a regulated activity in St. Maarten.
20. The Foreign Exchange Regulations Curaçao and St. Maarten (*Regeling Deviezenverkeer Curaçao en Sint Maarten*) (the **Foreign Exchange Regulations**) provide that residents are required to obtain a license from the Central Bank for most foreign exchange transactions with non-residents, regardless of their activities.⁸ The Central Bank has in response to a question whether money transfer companies are regulated in St. Maarten, responded on its website that "*all money transfer companies operating in St. Maarten require permission from the Central Bank to provide money transfer services. A money transfer company is required to obtain an authorization to carry out transactions mentioned in article 10 paragraph 1 of the Foreign Exchange Regulations in order to provide money transfer services in St. Maarten. The legal framework to regulate these companies is still pending in St. Maarten.*" On April 1, 2009, the predecessor to the Central Bank announced that it will not issue any foreign exchange licenses to money transfer companies before enactment of the Money Transfer Act for St. Maarten⁹, so that effectively they cannot operate in St. Maarten.
21. The soundness of the Central Bank's policy can be questioned. As already noted, the activity of transferring money is currently not regulated in St. Maarten. The Foreign Exchange Regulations purport to regulate foreign exchange transactions with non-residents and cannot be used for a different purpose, i.e. preventing money transfer companies from operating in

⁷ Please refer to paragraph 8 for an explanation of the *de minimis exclusion*.

⁸ In case foreign exchange transactions relate to the purchase of goods, no foreign exchange license is required under Section 10, paragraph 1 of the Foreign Exchange Regulations; foreign exchange licenses are only required for capital transactions.

⁹ This announcement has been repeated by the Central Bank on January 13, 2016.

St. Maarten.¹⁰ In my view, the Central Bank refusal to grant any foreign exchange licenses to money transfer companies constitutes an abuse of power (*détournement de pouvoir*).¹¹

22. The Central Bank's policy with respect to St. Maarten money transfer companies was recently challenged in court. On September 26, 2013, the Central Bank refused to issue a foreign exchange license that El Mas Rapidito Courier N.V. ("**EMR**"), a St. Maarten money transfer company, had applied for in 2000 (!). EMR had over the years received several warnings from the Central Bank that it did not have a license to act as money transfer company and acted in violation of the Foreign Exchange Regulations. On January 4, 2017, the Central Bank published a warning against EMR on both its website and in two local newspapers that it "*is not licensed by the Central Bank to offer money transfer services and is consequently acting in violation of [the Foreign Exchange Regulations].*"
23. EMR initiated a lawsuit against the Central Bank before the Court of First Instance for St. Maarten. On February 3, 2017, the Court of First Instance¹² criticized the Central Bank's policy to not grant any foreign exchange licenses as long as a law similar to the Money Transfer Act has not entered into force. The Court of First Instance ordered the Central Bank to decide anew an application by EMR for a foreign exchange license and, within 10 days of receipt of the new application, publicly announce that it has received a new license request from EMR. Given the stated policy of the Central Bank, it is possible that the judgment of the Court of First Instance will be a Pyrrhic victory for EMR. However, in my view the Central Bank should change its policy and grant a license to any St. Maarten money transfer company that satisfies the requirements that will be set out in a law similar to the Money Transfer Act.

IV. CONCLUSION

24. With the enactment of the Securities Brokers Act and the Money Transfer Act, Curaçao has made good progress in filling gaps in its financial supervisory laws, but more works needs to be done. For example, the offering of securities, including shares but excluding participation rights in investment funds, in or from Curaçao is not currently regulated. Another shortcoming is that the financial supervisory laws of Curaçao do not provide for a special

¹⁰ That the Central Bank's policy is questionable can be illustrated by pointing out that foreign money transfer companies that are active in St. Maarten without establishing a branch are not required to obtain a foreign exchange license as the Foreign Exchange Regulations only apply to residents of St. Maarten.

¹¹ According to the registry for money transfer companies kept by the Central Bank, the Central Bank has granted exemptions under the Curaçao Money Transfer Act to four money transfer companies that have at least one of their sole office in St. Maarten. Remarkably, the Central Bank seems to tolerate that these companies are (also) active in St. Maarten, as this seems to be in violation of its own stated policy.

¹² *El Mas Rapidito Courier N.V. v De Centrale Bank van Curaçao en Sint Maarten*, ECLI:NL:OGEAM:2017:4.

duty of care (*zorgplicht*) that financial companies must observe *vis-à-vis* their customers, although a special duty of care exists on the basis of case law.

25. St. Maarten has not yet enacted laws similar to the Securities Brokers Act or the Money Transfer Act. Unlike Curaçao, St. Maarten has also not yet implemented the Act on the Modernization and Harmonization of the Financial Supervisory Laws (*Landsverordening actualisering en harmonisatie toezichtlandsverordeningen Centrale Bank van Curaçao en Sint Maarten*). Given that the Central Bank has responded to this lack of legislation by flat-out refusing to issue licenses to St. Maarten money transfer companies, that situation is problematic for money transfer companies that are operating in St. Maarten and their clients, which face unnecessary legal uncertainty. The St. Maarten legislator would be wise to quickly remedy this situation by enacting a law similar to the Money Transfer Act.