3. SUGGESTED LEGISLATIVE CHANGES TO THE SIA, 1995

3.1 Recommended Changes to the *SIA, 1995* and Competing Considerations

3.1.1 Proposed Legislation Reflects Conceptual Recommendations. In this section, the Consultants discuss the proposed substantive changes to the *SIA, 1995*. However, it is important to note that as part of the mandate to review and revise the regulation of the securities markets in Trinidad and Tobago, several conceptual and structural changes have been recommended by the Consultants. The proposed changes include the evolution of the basis of securities regulation in Trinidad and Tobago from issuer-based jurisdiction to investor-based and activity-based jurisdiction, as well the separation of the policymaking, enforcement and adjudicative functions of the securities regulator. These changes are reflected in the proposed *SIA, 1995,* in particular, in the form of the Tribunal recommended to be established by Part II.A, but also through suggested amendments to the *Companies Act* that move "public company" regulation under the auspices of the *SIA, 1995.* While these conceptual and structural recommendations underlie the proposed changes to the *SIA, 1995*, in preparing this Interim Report, the Consultants have also been mindful of the objectives of the mandate and the themes and concerns discussed at the original meeting with the TTSEC's staff and market participants in September, 2002. As noted above, Schedule "B" includes the complete text of a revised *SIA, 1995* based on the recommendations of the Consultants.

3.1.2 Competing Policy Considerations. The mandate granted to the Consultants was to make recommendations on the Subject Legislation with a view to raising the level of securities regulation in Trinidad and Tobago to a level approaching international best practice. However, there have been a number of concerns which have been raised throughout the mandate and which the Consultants have considered in preparing the draft legislation and by-laws included in this Interim Report. Among these are the emerging state of the securities markets in Trinidad and Tobago; the need to balance market development with investor protection; the expertise and resources available in the country in securities regulation and related fields; and the need for a level playing field amongst securities market participants.

3.1.3 Balancing International Best Practice and Other Considerations Given the scope of the mandate, and these concerns, the Consultants are of the view that the proposed legislation and by-laws set out in this Interim Report provide a balanced approach for the capital markets in Trinidad and Tobago. They represent international best practice in most areas. In some areas the Consultants recommend incremental change in the direction of international best practice standards, while accommodating the competing concerns of market development and availability of resources, as well as the ability of the market to adjust to change (including the financial costs of complying with the proposed change). In these areas, international best practice is proposed to be achieved in stages in order to accommodate market

development. However, the Consultants recommend that international best practice in all areas of securities regulation should be the goal of the securities regulators in Trinidad and Tobago, but that implementation in stages may be the more prudent course of action for the near term in some areas. As a result, throughout this Interim Report, as appropriate, the Consultants make reference to areas where the recommendation may not currently represent international best practice, but where further changes should be implemented by the TTSEC as the capital markets in Trinidad and Tobago continue to grow and develop.

3.1.4 Recommendations Focus on Four Major Areas. It will also be noted that the mandate required the Consultants' to focus on four major areas of securities regulation in Trinidad and Tobago – CIS's, take-over bid regulation, asset securitization transactions and securities clearance and settlement systems. Recommendations with respect to each of these areas have been made by the Consultants, and are reflected in this Interim Report. However, in accordance with the more general mandate to conduct an overall review of the legislative framework for regulating the securities marketplace in Trinidad and Tobago, recommendations have been made in areas beyond these four core areas. As a result, each Part of the proposed *SIA, 1995* has been reviewed by the Consultants with recommendations being made in respect of each Part.

3.2 United States Sarbanes-Oxley Act Amendments

3.2.1 United States Sarbanes-Oxley Style Amendments Not Generally Recommended. Some commentators raised the issue of the *Sarbanes-Oxley Act* in the United States, and recommendations for implementing similar changes in Trinidad and Tobago. However, in the Consultants view, while the *Sarbanes-Oxley Act* may over time come to represent international best practice, it remains a legislative enactment in the largest and most highly developed capital market. This is not the current situation in Trinidad and Tobago where the market is comparatively quite small and still developing. Further, while similar changes are being considered in other markets, a consensus has yet to develop on some of the major changes. Therefore, with one exception, changes based on *Sarbanes-Oxley* type initiatives in Trinidad and Tobago have not been recommended generally, but should still be considered by the TTSEC as the market in the country continues to grow and develop. The exception is that it is proposed that CEO's and CFO's of reporting issuers be required to certify annual financial statements.

3.3 Part I: Preliminary

3.3.1 Part I Changes. Part I of the *SIA, 1995* includes five significant recommended changes.

3.3.2 New Purpose Clause. The first significant recommended change is the inclusion of a purpose section as section 1 of the proposed *SIA, 1995*. A purpose clause helps to define the scope of the legislation and provides guidance in interpreting the *SIA*,

1995, particularly where matters of the "public interest" are concerned. The purpose statement is consistent with IOSCO's three objectives for securities regulation, namely – (i) the protection of investors, (ii) ensuring that markets are fair, efficient and transparent, and (iii) the reduction of systemic risk. The third suggested purpose set out in subsection 1(c) ("to facilitate the development of fair and efficient capital markets in the Caribbean region"), is unique to the particular situation in Trinidad and Tobago, but would be consistent with longer term goals of creating regional securities markets and regulation. In the Consultants' view, given the relatively small size of the individual capital markets in the Caribbean region and their current fragmented state, the goal of regional integration should be considered. To the extent that this is considered a future goal, it should, in the Consultants' view, be reflected in the proposed *SIA, 1995*.

3.3.3 The Definition of "Security". The second significant recommended change to Part I is to the definition of "security" which would now specifically include an "investment contract" (itself a new defined term in section 3[1]) and an "asset-backed security". This revised definition of "security" would have the effect of more clearly defining the jurisdiction of the *SIA, 1995*, and is consistent with international practice, particularly North American practice. The difficulty, as was noted by several commentators, is that no single definition of "security" will be able to encompass all investment vehicles, schemes, structures and plans which should be brought within the scope of the legislation. Securities markets continue to evolve, and new products continue to be developed and introduced to the investing public. Given that what constitutes a "security" is central to the application of securities legislation, the inclusion of the term "investment contract" clarifies the types of instruments that should be regulated by the TTSEC but which at first glance may not be readily identifiable or recognizable as a conventional "security" such as a share or a debenture. There is a significant body of case law in the United States, Canada and elsewhere interpreting the scope of the term "investment contract."

3.3.4 "Security" Includes Interests in Collective Investment Schemes. The definition of "security" now also includes "any interest" in a CIS. This recommendation is for clarification purposes so that there can be no ambiguity that shares, units, or other interests in a CIS, however it happens to be structured, are securities.

3.3.5 When Trading or Advising Occurs in Trinidad and Tobago. The third significant change is found in the new interpretive provisions of the proposed *SIA, 1995*. These provisions are designed to provide some certainty to the marketplace as to when either trading or advising activities take place in Trinidad and Tobago. They are intended to give effect to the Consultants' recommendation that the basis of jurisdiction of securities laws should evolve to investor-based and activity-based

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[1] "Investment contract" is defined in section 3 of the proposed *SIA, 1995* to include any contract, transaction, plan or scheme, whether or not evidenced by any document, instrument or writing, whereby a person invests money or other property in a common enterprise with the expectation of profit or gain based on the expertise, management or effort of others, and such money or other property is subject to the risks of the common enterprise.

jurisdiction from issuer-based jurisdiction (although in certain circumstances it is appropriate to exert jurisdiction where there is an effect on the local capital markets as discussed below).

3.3.6 Jurisdiction Based on Incorporation Outmoded. Jurisdiction over public companies based solely on incorporation or governance remains a by-product of a period when capital markets were far less internationalized than they currently are, and when capital raising was conducted primarily by locally incorporated companies in a local market. It is also representative of a period when the distinction between matters of company law and matters of securities law was much stronger, and when company law tended to be virtually the sole source of statutory regulation for public companies and offers to the public.

3.3.7 Jurisdiction Based on Investor Residency Recommended. The more modern concept is to regulate access to a jurisdiction's capital markets through its securities laws based on the location of the activity and/ or the residency of the investor. An issuer wishing to raise capital in a particular jurisdiction from residents of that jurisdiction, must subject itself to the local securities regulatory regime (including agreeing to submit to the jurisdiction for service of process and similar matters). The issuer need not be incorporated or governed by the law of the jurisdiction in which it seeks to raise capital. Rather, the jurisdiction asserts its authority on the theory that it can regulate the access of a person or company, foreign or local, to its residents and capital markets. Issuers may then choose to access capital or seek an exchange listing in the jurisdiction of incorporation or governance, or elsewhere, and expect to be subject to local securities laws where they list or offer shares to public investors. Local public issuers would be subject to the same requirements under the securities laws.

3.3.8 Effects-Based Jurisdiction Appropriate in Certain Circumstances. While residency-based jurisdiction is an apt approach for securities offerings, in other cases where an "offshore" transaction has an effect on the capital markets in Trinidad and Tobago, or local investors, it may also be appropriate to exercise jurisdiction. For example, a change of control of a company listed on the Stock Exchange may occur through an offshore purchase of a securities sufficient to control an issuer. The purchaser may acquire control (generally at a premium to the market price) without making a bid to residents of Trinidad and Tobago. In that case, local investors may be adversely affected if control changes hands without an equivalent offer being made to them.

3.3.9 Deeming Trading and Advising in Trinidad and Tobago. Accordingly, the provisions proposed as subsections 3(3) (trading in Trinidad and Tobago) and 3(4) (advising in Trinidad and Tobago) are intended to give effect to these concepts by not making any distinction based on the origins of the person conducting the trading or advising activity. Rather, the important nexus is that the activity is conducted in Trinidad and Tobago, is aimed at persons in the country, or has an effect on the local securities markets. As well, the deeming provisions contemplate the use of modern communications systems, such as e-mail and the Internet. These provisions will help

to achieve the recommended conceptual change as well as to provide greater certainty to securities marketplace participants and their advisors as to the application of the proposed *SIA, 1995*. The more difficult question, as with many of the recommendations, is enforcement, particularly where offenders may be offshore Trinidad and Tobago. Here effective international co-operation is needed between the TTSEC and foreign securities regulators. The legal framework for entering into such co-operative agreements and arrangements is discussed in greater detail in Part II (Section 3.4) below.

3.3.10 "Offer to the Public", "Distribution", "Registrant" and "Market Actor". The Consultants recommend new and more consistent concepts and terminology in the proposed *SIA, 1995*. For example, given its interpretive difficulties, the concept of "offer to the public" has been removed from the *SIA, 1995* and replaced by a revised "distribution" concept (the reasons for which are discussed with other proposed changes to Part VI of the *SIA, 1995*). The "registrant" concept has been replaced by a "market actor" and a "self-regulatory organization" concept. (While both are required to be registered under the *SIA, 1995*, the obligations of market actors and self-regulatory organizations are substantially different, and characterizing both as "registrants" lead to, in the Consultant's view, interpretive difficulties.) As well, certain definitions from various Parts of the *SIA, 1995* have been consolidated in Part I, and new and revised definitions added in connection with the exemptions recommended in Parts V and Part VI for certain foreign issuers and the changes recommended to the market actor registration regime in Part IV.

3.3.11 Definition of "Reporting Issuer". Finally, the Consultants recommend amending the definition of "reporting issuer" so that a "reporting issuer" is as an issuer:

(a) that was a reporting issuer on ●, 2004;

(b) that has filed a prospectus and obtained a receipt for it under this Act;

(c) any of whose securities are listed on the Stock Exchange; or

(d) that is the issuer whose existence continues following the exchange of securities of an issuer by or for the account of such issuer with another issuer or the holders of securities of that issuer in connection with a statutory amalgamation or arrangement, or where existing issuers merge into one issuer, that continuing issuer, where one of the amalgamating or merged companies or the continuing company has been a reporting issuer for at least four months;

but does not include a government entity;

3.3.12 Reporting Issuers. It is important to make a few observations on the proposed revised definition. First, it does not include issuers which rely on the private placement exemptions to distribute securities in Trinidad and Tobago that are not otherwise reporting issuers (i.e. private companies will not become reporting issuers where they continue to rely on the exemptions from the prospectus requirement in Part VI). Second, it includes approved foreign issuers in that they would receive a receipt from the TTSEC for a foreign prospectus used to distribute securities in the

country. Finally, it provides that certain issuers will be deemed to be a reporting issuer on a certain day. This provision is intended to ensure that certain existing reporting issuers under the *SIA, 1995* remain reporting issuers under the proposed revisions. To the extent a reporting issuer is of the view it should no longer have that status because it was, for example, a quasi-government agency or had few public shareholders, it could apply to cease to be a reporting issuer under section 75 (ceasing to be a reporting issuer).

3.4 Part II: The Securities And Exchange Commission

3.4.1 Part II Changes. Part II of the *SIA, 1995* provides for the establishment of the TTSEC and sets out its functions, powers, constitution, and resources. The Consultants propose that the existing constitutional framework of the TTSEC remain essentially unchanged but a number of important changes are proposed to provide greater clarity, and transparency in respect of certain functions.

3.4.2 Functions and Powers of the TTSEC. The Consultants recommend, and this is reflected in sections 5 (functions of the TTSEC) and 6 (powers of the TTSEC) of the proposed *SIA, 1995,* that the functions and powers of the TTSEC, respectively, be more fully enunciated. This is consistent with IOSCO's first principle, namely that "the responsibilities of the regulator should be clearly and objectively stated."[2] In conjunction with the new proposed purpose statement suggested for section 1, the Consultants are of the view that the suggested revisions to these sections would significantly improve the understanding of the role of the TTSEC in the securities markets in the country, and respond appropriately to IOSCO's first principle.

3.4.3 Clarifying Functions of the TTSEC. In particular, it is recommended that section 5 (functions of the TTSEC) be amended to provide that the functions of the TTSEC include: (i) protecting the integrity of the securities markets against improper practices, (ii) promoting an understanding by the public of the securities markets and the benefits, risks and liabilities associated with investing in securities and financial products, and (iii) co-operating and providing assistance to regulatory authorities in Trinidad and Tobago or elsewhere.

3.4.4 Other Changes to Part II. The other suggested changes of note to Part II of the *SIA, 1995* are found in section 19 (consultations with other agencies) and in entirely new sections 32 (filing of documents with TTSEC) and 33 (public availability of filed documents), discussed below.

3.4.5 Importance of International Regulatory Co-Operation. The importance of co-operation among international securities regulators cannot be underemphasized in the modern world of internationalized securities markets. As IOSCO has pointed out: "The inability to provide regulatory assistance can seriously compromise efforts

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[2] International Organization of Securities Commissions, "Objectives and Principles of Securities Regulation", February 2002.

towards effective securities regulation. Domestic laws need to remove impediments to international co-operation." The TTSEC must be a part of this co-operative effort at the levels of compliance, investigation and enforcement. To that end, the Consultants recommend a clearer statement in section 19 (consultation with other agencies) that the TTSEC can enter into formal memorandum of understanding with any agency of a foreign government, foreign securities regulator or other regulatory body which regulates the financial services industry, in order to further the purposes of the *SIA, 1995*.

3.4.6 Filing Materials with the TTSEC. New proposed sections 32 (filing of documents with the TTSEC) and 33 (public availability of filed documents) address an entirely different concern – the availability of material information in the securities marketplace. From a legislative perspective, proposed section 32 is designed to clarify for market actors and reporting issuers how they are expected to file materials with the TTSEC. Under the draft General By-Law, continuous disclosure documents required to be filed by a reporting issuer under Part V and securityholding disclosure reports required under Part IX would also have to be filed in paper format and electronically. Given the technical issues surrounding electronic filings, while the Consultants recommend this format, consideration should be given to a delayed implementation of the recommendation with respect to electronic filing so that appropriate systems can be developed.

3.4.7 Public Availability of Filed Materials. From a policy perspective, the change in section 33, being the requirement for the TTSEC to make all documents filed with it public (subject to an exemption where disclosure would not be in the public interest), is intended to raise the level of information available to the securities markets thereby increasing transparency, efficiency and fairness. In addition, it should be noted that it is proposed that the TTSEC may also make filings with it available by posting them to its Internet website. However, it should be noted that not all documents provided to the TTSEC will be made publicly available. The definition of "file" means documents provided to the TTSEC that are required to be filed under the proposed *SIA, 1995* or a by-law that requires filing. Accordingly, the TTSEC will not be obligated to make public documents which are not "filed" pursuant to a requirement of the revised legislation. Documents which are provided or delivered to the TTSEC but are not otherwise required to be filed with the TTSEC under the proposed *SIA, 1995* or the by-laws would not be subject to the public disclosure obligation. The recommended text of the *SIA, 1995* and the draft by-laws have been deliberately drafted with this distinction in mind, so that documents which should be made public, are required to be "filed" with the TTSEC.

3.5 Part III: The Trinidad And Tobago Stock Exchange And Other Self-Regulatory Organizations

3.5.1 Part III Changes. The Consultants are recommending only a few substantive changes to Part III of the *SIA, 1995*. Other changes to Part III have been made to make the distinction between the rights and obligations of the three types of self-regulatory organizations – stock exchanges, clearing agencies, and associations of securities companies - clearer in a number of sections.

3.5.2 New Settlement Assurance Fund. Revised subsection 61(2) (formerly section 48) contains a new requirement upon clearing agencies to establish a settlement assurance fund to address the failure-to-pay of its participants. The rationale for this recommendation is discussed in greater detail in the later discussion under Part VIII (section 3.10)– Simplified Clearing Facilities.

3.5.3 Rights of Appeal in Connection with Self-Regulatory Organizations. Rights of appeal have also been modified with respect to applications for registration as a self-regulatory organization. Section 38 of the proposed *SIA, 1995* now permits an aggrieved applicant to appeal a registration decision of the TTSEC to the Tribunal. (As discussed later in Chapter Four, the Tribunal would also act as a first instance body for the civil prosecution of a number of offences under the proposed *SIA, 1995*, including market manipulation offences.) However, applications to become members of a self-regulatory organization under revised section 56 (formerly section 43) continue to be appealable to the TTSEC (renumbered section 57). As well, complaints by any person against a self-regulatory organization or a member under revised section 63 (formerly section 50) are also heard at the TTSEC level, as are disputes between members of a self-regulatory organization under revised section 64. Given that the TTSEC would not be the first instance adjudicator in these circumstances, no appeal would be available to the Tribunal, although rights of judicial review would remain open to parties. The rationale for this recommendation is discussed in greater detail in Chapter Four of this Interim Report which sets out the Consultants' recommendations in respect of the Tribunal.

3.5.4 Part III Standards Consistent with IOSCO Principles. In respect of Part III generally it should be noted that the legislation currently provides for standards that are consistent with IOSCO principles. In particular, self-regulatory organizations remain subject to the oversight of the TTSEC in their sphere of activities including in reviewing and approving changes to the rules of a self-regulatory organization (now proposed section 53), requiring changes to the rules of a self-regulatory organization in order to comply with the *SIA, 1995* (now proposed section 54), and as an appeal body for decisions made by the self-regulatory organization.

3.5.5 A Single Stock Exchange and a Single Clearing Agency. A policy issue which is not addressed in Part III or the *SIA, 1995* generally, and which should be considered, is the extent to which, as a policy matter, the *SIA, 1995* should make it clear that the Stock Exchange and the Central Depository would be the only recognized stock

exchanges and clearing agencies in the country. Similar processes have occurred elsewhere. In Hong Kong, existing stock exchanges have been consolidated into a single exchange and in Canada, the former Vancouver, Alberta, Winnipeg, Toronto and Montreal stock exchanges have been consolidated into a single stock exchange for equities trading (with a junior and senior market). Given the size of the market in Trinidad and Tobago, the Consultants would find it difficult to justify multiple organizations of this nature, yet, an application procedure exists under Part III of the *SIA, 1995* by which persons may apply to be recognized by the TTSEC as a clearing agency or stock exchange. The Consultants recommend that a public consultation process be conducted as to whether the Stock Exchange and the Central Depository should be the only organizations recognized as securities exchanges and clearing agencies under Part III. As part of this consultative process, consideration should also be given to whether to allow existing foreign stock exchanges (including from other Caribbean countries) and alternative trading systems, to operate in Trinidad and Tobago. If, following public consultation, there is support for the single (domestic) exchange and single clearing agency policy, amendments to the *SIA, 1995* may not be necessary to effect this decision. Instead, a notice, policy statement or other directive could be issued by the government of Trinidad and Tobago or the TTSEC to the effect that no other entities would be recognized under Part III as securities exchanges or clearing agencies, except perhaps for foreign stock exchanges or alternative trading systems which may be permitted entry into the country. Finally, such a policy decision, if taken, should be predicated upon the institutional strengthening of the Stock Exchange and Central Depository to ensure that both institutions have adopted and have in place international best practice standards given the nature of the institutions.

3.5.6 Change in Phraseology to "Authorized Market Institution". Finally, the TTSEC may want to consider replacing the term "self-regulatory organization" with the term "authorized market institution" in the *SIA, 1995*. This new term, it is suggested, may more accurately capture, and be more reflective of, the nature of the activities of stock exchanges, clearing agencies, and associations of securities companies.

3.6 Part IV: Registration Of Market Actors

3.6.1 Part IV Changes. The Consultants are recommending two important changes to Part IV of the *SIA, 1995*. The first is technical and structural in nature and involves placing much of the detail of the registration of market actors into by-laws.[3] The second is substantive and involves modifying the current registration regime to provide for the registration of individuals, separate and apart from companies.

3.6.2 Need for Effective Subordinate Legislation such as By-Laws. The Consultants recommend that much of the technical detail of securities regulation in Trinidad and

[3] A similar recommendation was also made by Terry Chuppe in the Inter-American Development Bank's 2001 "Diagnostic Study of the Securities and Exchange Commission and Securities Industry of Trinidad and Tobago."

Tobago be left to by-laws. Fundamental to a modern and effective securities regulatory regime is the ability of the regulator to respond in a timely, concerted and effective manner to changes in the securities markets. Investment products change and are developed rapidly. New transactions and structures are constantly evolving. The form, type and variety of market misconduct activity is ever unfolding. The speed of the changes, in particular, requires the need for ever specialized binding rules and by-laws to be developed and enacted. As a result, many jurisdictions have given the authority for creating and enforcing subordinate legislation (whether characterized as "rules" as in Ontario and the United States, or "by-laws" as in Trinidad and Tobago) to their securities regulatory authority. This has been justified on numerous grounds, including that the legislative body lacks the time to be responsible for the passage of all legislated law in complex democratic and economic systems, that primary legislation becomes less accessible and understandable if all matters of law are "crowded" into it, that subordinate legislation provides a forum for managing detail which cannot be fully appreciated or conducted in primary legislation, and that if the legislative body were required to work out all of the details, the enactment of legislation (which is needed in the public interest and to preserve the public good) would be delayed.

3.6.3 Detailed Registration Requirements in General By-Law. This principle is now reflected legislatively in proposed Part IV of the *SIA, 1995*. In particular, the detailed criteria to be satisfied to obtain registration as a broker-dealer, investment adviser, or underwriter, or as an individual, appear in the General By-Law and are specifically discussed in Section 5.5 below. As well the General By-Law also prescribes the majority of continuing compliance obligations on market actors.

3.6.4 Part IV Establishes Basic Requirement to Obtain Registration. It is recommended that primary legislation contain the prohibition against carrying on a business in the securities industry without registration and the basic requirement upon a person to obtain registration in a category of market actor. The detailed requirements for proficiency, capital adequacy, and experience, among other criteria, would be in by-laws so that they can be adjusted from time-to-time by the Minster on the recommendation of the TTSEC in response to changing needs in the marketplace. It should be noted that initially, the criteria for registration as a market actor in these categories will be substantially similar to the current requirements set out in sections 54, 56 and 59 of the *SIA, 1995*. Existing By-Laws No. 14 to No. 38, which address matters such as record-keeping by market actors, would also be included in the General By-Law. However, there are a number of changes, in particular, the new requirement on applicants for registration as a broker-dealer, investment adviser, or underwriter to be a company.

3.6.5 Proficiency Requirements for Market Actors. While the basic registration criteria are largely unchanged, over the longer term the Consultants recommend that the minimum proficiency criteria, set out in the proposed General By-Law, be amended to include additional education requirements for individual market actors. These educational requirements may be met, depending on the category of registration, by

taking courses and exams offered overseas such as the Canadian Securities Course offered by the Canadian Securities Institute, equivalent exams offered in the United States and organized by the National Association of Securities Dealers, Inc., or the SFA Registered Persons Examination organized by the Securities and Futures Authority in the United Kingdom. However, before such educational requirements are prescribed by by-law, the appropriate infrastructure needs to be developed in Trinidad and Tobago so that market actors will have readily accessible means to complete such courses, or alternatively, the fact that a person had completed the courses overseas could be recognized. In the meanwhile, registrants should be readily able to satisfy the proficiency requirements set out in the General By-Law which are substantially the same as existing requirements.

3.6.6 Company Registration. Proposed subsection 65(1) of the *SIA, 1995* sets out the basic obligation on a person to obtain registration in one of three simplified categories (see paragraph 3.6.9 below) where they carry on business, or hold themselves out as, or engage in any act, action or course of conduct in connection with, the business activities requiring registration. The latter requirement expands the existing language of section 53 of the *SIA, 1995* by broadening the activities which would require registration. This, in the Consultants' view, is justified to ensure that if a person engages in any matters of activity related to being a broker-dealer, investment adviser or underwriter, that person becomes obligated to obtain registration. However, individuals who would otherwise attract the obligation to register under subsection 65(1) will be unable to do so, as the General By-Law (Part IV, Divisions II and III and IV) only permits registration of companies in these categories. Individuals would be registered as directors or senior officers or as registered representatives of a corporate market actor.

3.6.7 Financial Institutions. Given that financial institutions are subject to the oversight of the Central Bank, they would be exempt from the requirement to register as an underwriter or investment adviser. However, where the financial institution carries on the business activities of a broker-dealer, it would need to be registered. As the General By-Law only permits the registration of companies where their principal business activity is a registerable activity, broker-dealer activities of a financial institution would need to be conducted through a separate company.

3.6.8 Rationale for Company Registration. Many jurisdictions do not permit businesses to carry on activities requiring registration as sole-proprietors, partnerships or unincorporated persons. Unincorporated businesses are generally considered to be an inappropriate business structure for conducting registerable activities. The problems are particularly evident in the case of a sole-proprietorship, for example, where the sole proprietor is not able to supervise the business because of old age or illness or where he becomes insolvent. In addition, investors' funds may also be tied up in the estates of the sole-proprietor if he or she dies, particularly if he or she dies intestate. Accordingly, individuals who want to commence business activities for which registration is required under subsection 65(1) will be required to establish and

register a company first, and then register individually under proposed subsection 65(3).

3.6.9 Simplified Categories of Company Registration. The Consultants also recommend that company registration be required for only three types of activities – those related to being a broker-dealer (a revised defined term in section 3), an investment adviser, or an underwriter. It is recommended that the category of "securities company" be removed as it is largely duplicative of the broker-dealer category. This reduces the number of categories from the current six by consolidating broker-dealer into one category and by deleting the trader category. Persons formerly registered as traders would be registered as "registered representatives" of their registered firm under the General By-Law.

3.6.10 The Individual Registration Requirement. Subsection 65(3) (individual registration) sets forth the new obligation on directors, senior officers and employees of a subsection 65(1) (company registration) market actor to obtain registration. Registration of individual participants in the securities industry is a basic component of the regulatory structure in almost all developed securities markets, including the United States, Canada, the United Kingdom and Hong Kong. Registration of individuals grants a regulator the opportunity to supervise the individuals actively engaging with the public, and to ensure that they have a suitable character, educational qualifications, and experience. To ensure that individuals do not engage in regulated activities with the public unless suitably registered, subsection 65(4) of the proposed *SIA, 1995* prohibits any individual from performing any function, or engaging in any act, action or course of conduct, in connection with, or incidental to, the business activities of a broker-dealer, investment adviser, or underwriter, unless registered.

3.6.11 Exemptions From the Individual Registration Requirement. A modern securities firm has many employees which do not engage in the regulated activities of the firm. In recognition of this, proposed paragraph 65(5)(a) (individual registration exemption) exempts employees whose functions are administrative in nature from the individual registration requirement. As well, proposed paragraph 65(5)(b) operates to exempt non-executive directors from the individual registration requirement as well. However, the identity and background information on non-executive directors would be required to be disclosed to the TTSEC on an initial application for registration by the firm as this will impact on the fitness and properness for registration of the firm. Any change in the information (proposed paragraph 70(4)(b)) (notification of certain changes by market actor) would be required to be notified to the TTSEC within five business days.

3.6.12 Terms and Conditions. The TTSEC is specifically empowered in proposed subsection 66(2) (terms and conditions of registration) to impose limits on any registration, including the duration of the registration and the types of securities for which the market actor can conduct business. This power, in addition to the general exemptive power discussed elsewhere in this Interim Report, will provide flexibility

to the TTSEC in administering the market. For example, a company may only wish to be registered to deal in a certain type of security (e.g. debt securities or CIS securities). With the proposed powers, the TTSEC could limit that company's registration, and because the registration would be limited to a certain type of security, exempt that particular market actor from educational or other requirements imposed on market actors which are not applicable to its narrower business activities.

3.6.13 Information Requirements. The Consultants also propose a specific provision (proposed subsection 66(8)) confirming that a market actor would have to file an annual return with the TTSEC, providing current information on the market actor along with a prescribed fee. The General By-Law also provides for a quarterly filing for corporate market actors confirming, among other things, that the market actor continues to maintain the required capitalization levels. Finally, proposed subsection 70(4) requires market actors to notify the TTSEC of certain changes including changes in directors and the status of employees, the opening of branch offices, and the failure to maintain prescribed capitalization levels.

3.6.14 Directors and Substantial Shareholders of Market Actors. The Consultants are also recommending an oversight power for the TTSEC in respect of directors and substantial shareholders of market actors (section 68). Under this provision, no person could be a director of a market actor, or own voting securities carrying more than 10% of the votes in the market actor, unless approved by the TTSEC.

3.6.15 Transitional Provisions – Brokers and Investment Advisers. Transitional provisions suggested for section 67 of the proposed *SIA, 1995* are intended to effect an orderly implementation of the proposed revised market actor registration regime.[4] Currently, a number of individuals are registered under the *SIA, 1995* as brokers, and one as an investment adviser. Under the proposed registration system, such individuals would have to carry on those activities through a corporate vehicle, and would instead be registered in an individual category as a director or senior officer of the registered corporate market actor. As well, current broker and securities company registrants will need to be re-registered as broker-dealers under the more simplified categories described above. To effect this, section 67 (transitional provisions) of the proposed *SIA, 1995* operates to deem existing brokers to be broker-dealers (paragraph 67(3)(a)) for a period of twelve months following the enactment of the revised registration requirements. Paragraph 67(3)(c) operates to the same effect for investment advisers. After the twelve month period elapses, any person not appropriately registered as a broker-dealer or investment adviser under subsection 65(1) (company registration) ceases to be registered (subsection 67(4)). Accordingly, in this 12-month period individual brokers and investment advisers would need to create a company and apply for registration in order to carry on the existing business.

[4] The Consultants note that the transitional provisions have been drafted on the basis that the recommendations set forth in this Interim Report would be implemented by amending the existing *SIA, 1995*, rather than be repealing the existing legislation and replacing it with a new Securities Industry Act.

3.6.16 Transitional Provisions – Other Market Actors. Other current markets actors (securities companies, traders, underwriters and dealers) would also have twelve months to comply with the revised registration requirements. However, the Consultants understand that with respect to securities companies and underwriters, all current registrants are companies. These entities would simply have to re-register within the twelve month time frame under subsection 65(1) (company registration) with the securities companies registering as broker-dealers. Finally, traders, all of whom are currently individuals, would be required to obtain individual registration as a "registered representative" under the General By-Law, and the broker-dealer with whom they are employed would need to obtain registration under the revised provisions. In both cases, the twelve month transitional period would be available.

3.6.17 Temporary Registration. A second significant change to proposed Part IV is new subsection 65(6) which is intended to give effect to the temporary registration of foreign individuals.

3.6.18 Rationale for Temporary Registration. There are at least two policy rationales for granting temporary registration to individuals engaging in brokering or investment advising activities. First, it would provide investors with expertise and investment products which may not be available in the local securities markets. Second, local market actors may arrange for temporary assignments to Trinidad and Tobago of professionals working with affiliates or with unrelated companies with which the local market actor has established a business venture, in each case where such affiliate or unrelated company is regulated in an approved foreign jurisdiction.

3.6.19 Minimum Qualifications for Temporary Registration. An application for temporary registration under subsection 65(6) would have to meet the following key requirements which are set out legislatively in the General By-Law:

- the applicant would have to be an individual of at least 21 years of age who is not a resident of Trinidad and Tobago;
- the applicant must not be registered under subsections 65(1) or (3) of the *SIA, 1995* in a regular category of market actor;
- the applicant's employer would have to be registered in the category of "investment adviser" and/ or "broker-dealer" (or equivalent) under the securities legislation of a designated foreign jurisdiction, and such registration(s) would have to be in good standing;
- the applicant would have to be an employee, officer, director or partner of a registered broker-dealer, or investment adviser (or equivalent) in the designated foreign jurisdiction; and
- the applicant would have to file a letter from a registered broker-dealer or investment adviser under the *SIA, 1995*, stating that the market actor agrees to sponsor the applicant.

3.6.20 Sponsorship. The sponsoring "market actor" would be liable for the actions of the temporary market actor as if such person were ordinarily employed by the sponsor. This is set out in subsection 21(4) of the proposed General By-Law.

3.6.21 Simplified Process For Temporary Registration. Under a simplified registration process, the applicant for temporary registration under proposed subsection 65(6) would file the following documents with the TTSEC:

- an application form certifying that the applicant meets the criteria for the category of "temporary broker-dealer/ investment adviser" which would, among other things:

  a) name the broker-dealer, or investment adviser (or equivalent) in the approved foreign jurisdiction;

  b) name the sponsoring firm; and

  c) disclose the dates that the individual intends to engage in advising or brokering activities in Trinidad and Tobago, and to notify the TTSEC of any changes to such dates;

- the letter from the sponsoring market actor registered under the *SIA, 1995*;

- a copy of evidence of registration in the designated foreign jurisdiction; and

- a prescribed filing fee.

3.6.22 Time Limits for Temporary Registration. Unlike categories of registration in subsection 65(1), subsection 65(6) temporary market actors would be limited by by-law in carrying on business, or holding themselves out as, broker-dealers or investment advisers in Trinidad and Tobago, for not more than thirty calendar days in any calendar year. The thirty calendar days need not be consecutive. For example the temporary registrant could visit Trinidad and Tobago four times in a calendar year with each visit lasting 7 days.

3.6.23 Granting of Temporary Registration. The General By-Law also requires that the TTSEC grant the temporary registration or deny the temporary registration within fourteen calendar days of the application. The TTSEC has the power to deny the application on the same basis that it would be permitted to deny an application for registration in any other category. The General By-Law also defines those jurisdictions which are "designated foreign jurisdictions" for purposes of the *SIA, 1995* (section 5). This concept is utilized in a number of other parts of the proposed *SIA, 1995*, including Parts V and VI regarding exemptions from the disclosure and prospectus requirements for approved foreign issuers. These requirements are discussed in detail later in this Interim Report. The Consultants would suggest that a foreign jurisdiction be prescribed as a "designated foreign jurisdiction" where the securities laws and regulatory oversight are of a standard at least equal to that in Trinidad and Tobago, and could include, initially, the United States, Canada,

Australia, Hong Kong, Singapore and the United Kingdom. Section 5 of the General By-Law sets out additional jurisdictions which have been accepted for a substantially similar purpose in Canada, and which the TTSEC may wish to consider.

3.6.24 Temporary Registration and "Suitcase Brokers". One matter which temporary registration is meant to partially address is the issue surrounding "suitcase" brokers. Suitcase brokers are individuals who reside in a jurisdiction outside of Trinidad and Tobago and who travel to the country or communicate by phone, email and other means with residents of Trinidad and Tobago for the purpose of selling investment products not registered locally. By definition, these individuals are not registered with the TTSEC under the *SIA, 1995* to perform these functions. There are two areas of concern raised by the activities of these individuals – one focused on the investor (and investor protection) and the other on the industry and its participants.

3.6.25 Lack of Investor Protection. At the investor level, the "suitcase broker" may not be registered and may not be a "fit and proper person". The suitcase brokers may be selling financial products which may or may not comply with the offering requirements of Trinidad and Tobago or provide investors with the legal rights and protections which are available under the *SIA, 1995*. Accordingly, investors in Trinidad and Tobago may not be making a fully-informed investment decision by virtue of not being provided with the information necessary to make that decision and with little or no recourse, legal or otherwise, to the selling "suitcase" broker. As well, there is no assurance that suitcase brokers have even minimal competency or education standards. They may even be engaged in "boiler room" activities.

3.6.26 Protection of Local Market Actors. At the industry level, the activities of these individuals may reduce the commissions and business of registered market actors who have gone through the process of registration and met all of the proficiency and other requirements associated with registration.

3.6.27 Temporary Registrations Offers Opportunity to Comply. The temporary registration procedure set out above is intended to provide foreign registrants with the opportunity to comply with the securities laws of Trinidad and Tobago through a relatively simple form of registration, while providing investor protection through the sponsoring concept and the requirement for registration in an approved foreign jurisdiction. Where a person chooses not to comply with either the temporary registration process or the regular registration process of Part IV, the matter becomes one of enforcement by the TTSEC**.** As part of this process, the Consultants suggest that the TTSEC undertake an investor education program to inform the public of the risks associated in dealing with unregistered individuals and companies.

3.6.28 Suspension or Revocation of Registration. A third significant change to proposed Part IV is the clarification that any market actor can have their registration suspended or revoked upon the occurrence of certain events which have been expanded to address fraud or dishonesty on the part of the registered market actor.

The effect of a suspension is set out in subsection 71(7) while the effect of a revocation of registration, the more serious action, is set out in subsection 72(4). In both cases, the market actor would be required to immediately cease activities, however, in the case of a suspension that is rescinded or lifted or which expires, the market actor would be automatically restored to its original position. Where a registration is revoked, it cannot be reinstated. A new application for registration would be required under which the applicant would have to meet all of the applicable registration requirements. In both cases, suspension or revocation, all memberships in, or licenses issued by a self-regulatory organization and held by the market actor would also be suspended or, in the case of revocation, become invalid.

3.6.29 Rights of Appeal on Registration Matters. Finally, disgruntled market actors and applicants under Part IV, would have a new right of appeal to the Tribunal under section 38 of the proposed *SIA, 1995*. While not a change to Part IV, this would be an important structural change to the registration process in Trinidad and Tobago in that it would be a more efficient and less costly means of appeal. It is discussed in greater detail in Chapter Four of this Interim Report.

3.6.30 Registration Related Offences. To complete the revised market actor registration system, the Consultants propose two new registration related offences in section 74.1. The offence in subsection 74.1(2) occurs where a person fails to be registered under subsection 65(1) (company registration) or subsection 65(3) (individual registration). The failure to register under the *SIA, 1995* where registration is required would be punishable by a fine of up to four hundred thousand dollars and imprisonment for up to two years, or both. The offence in subsection 74.1(1) is meant to deter persons from making misrepresentations in applications or in other notifications or other filings required in proposed Part IV. This provision captures making untrue statements or omitting to state material facts. Where this occurs, the person is subject to the same potential fines and prison time as under subsection 74.1 (failure to register). It should be noted that where registration is obtained through the misrepresentation of any fact, the Commission may suspend or revoke the market actor's registration (paragraph 71(1)(b)).

3.7 Part V: Registration Of Issuers And Securities (Disclosure Obligations of Reporting Issuers)

3.7.1 Part V Changes. The Consultants recommend that Part V of the *SIA, 1995* be significantly revised to set out the enhanced continuous disclosure regime applicable to reporting issuers. The registration statement requirement, which is the primary element of the current part, would remain, but would be a post-distribution filing, rather than a requirement prior to an offering of securities or an annual filing (as set out in current subsection 64(3) of the *SIA, 1995*). The repeal of the annual filing of a registration statement will have no practical effect, as the information contained in it, would be included in proxy materials for an annual meeting of securityholders, or in a prospectus, or in a material change filing (such as a change in directors).

3.7.2 The Registration Statement as Post-Distribution Filing. In the Consultants' view, the requirement on issuers to file a registration statement prior to a public offering of securities, as well as the requirement to prepare, file and have a prospectus receipted in connection with a distribution, adds an unnecessary layer of regulatory complexity, with no apparent benefits in terms of investor protection or in fostering the efficient operation of capital markets. The registration statement (currently a Form No. 4) does not provide any additional information to the marketplace than a prospectus provides, but its filing does impose an additional burden on issuers. The Consultants recommend that the Form No. 4 become a reporting matter following a distribution of securities under a prospectus or under a prospectus exemption, instead of a precursor to it (as the registration statement will still provide particulars of the distribution). As a result, in the proposed *SIA, 1995*, the registration statement requirement has not been removed entirely but has been modified so that it serves a more useful purpose (with the requirement now found at section 98).

3.7.3 Secondary Market Disclosure Obligations of Reporting Issuers. The Consultants recommend that Part V should set forth the statutory obligations on reporting issuers to make ongoing timely disclosure to the marketplace of financial information, material changes, annual reports, and management discussion and analysis of financial statements. The current disclosure regime in Trinidad and Tobago requires enhancements in order to be raised to the level of disclosure required by international best practice. The suggested changes are intended to address two key IOSCO principles - that "there should be full, timely and accurate disclosure of financial results and other information that is material to investors' decisions" and that "accounting and auditing standards should be of a high and internationally acceptable quality."

3.7.4 Disclosure Obligations to Apply to all Reporting Issuers. Revised Part V would apply to all reporting issuers, other than governmental entities. The obligations would apply equally to reporting issuers that are CIS's, although these reporting issuers would have additional obligations under the CIS By-Law (which are discussed later in Chapter Five). The revised Part, as recommended, includes a number of new obligations on reporting issuers, and makes amendments to existing requirements.

3.7.5 Annual Audited Comparative Financial Statements. First, the Part would require reporting issuers to prepare and file annual audited comparative financial statements within a prescribed period of time following its financial year-end. (This time period is prescribed in the General By-Law as 120 days). The *SIA, 1995* would require that these financial statements be prepared in accordance with International Financial Reporting Standards ("**IFRS**") (although the General By-Law allows approved foreign issuers to use an auditing principle acceptable in a designated jurisdiction to which they are subject). Such financial statements would be required to include:

- a balance sheet as at its financial year-end (with a comparison to the same date in the year prior period);

- an income statement, a statement of retained earnings (surplus), and a cash flow statement (statement of changes in financial position) for the last completed financial year and the period covered by the financial year immediately preceding the most recently completed financial year; and

- notes to the financial statements.

all of which is prescribed in the General By-Law.

As a result, all reporting issuers would have to report consistently under IFRS thereby increasing the quality and comparability of financial results.

3.7.6 Auditor's Opinions. Proposed section 79 (annual financial statements) would also require an unreserved auditor's opinion on annual financial statements by an auditor who is a member of the Institute of Chartered Accounts of Trinidad and Tobago or any other acceptable professional body prescribed by the TTSEC (subsection 79(3)). If a reservation were proposed, the reporting issuer would have to seek exemptive relief from the TTSEC. It is suggested that granting such relief should be only in exceptional circumstances, such as where the records are not available or have been destroyed, or the TTSEC determines that the cost for the reporting issuer to comply significantly outweighs the benefits associated with providing securityholders with an unreserved auditor's opinion.

3.7.7 Certifications of Comparative Financial Statements. Consistent with recent changes under the securities laws in the United States and in almost all provinces of Canada, the Consultants propose a limited certification requirement for the annual comparative financial statements of a reporting issuer. This proposed requirement is reflected in subsection 79(4) of the proposed *SIA, 1995* and would require the chief executive officer and the chief financial officer of a reporting issuer to certify the accuracy of the annual financial statements on Form No. 12 under the General By-Law. These officers would be certifying that the annual comparative financial statements do not contain a misrepresentation and are not otherwise misleading. The purpose is to focus the CEO and CFO on their responsibility for financial statements, and to provide the investing public with an additional level of comfort regarding a reporting issuer's financial position.

3.7.8 Audit Committee Requirement Introduced to *SIA, 1995*. The basic requirement to have an audit committee would also be imported into Part V (subsection 79(5)) from the similar requirement under the *Companies Act*. Making these changes would require all reporting issuers to abide by the same high standards of IFRS, audit committee requirements, and an appropriate auditor. This is consistent with the goal of "levelling the playing field" to ensure that all issuers which raise capital in Trinidad and Tobago be subject to the same standards, whether or not they are governed by the *Companies Act*.

3.7.9 Interim (Quarterly) Financial Statements. The revised Part V would also impose a quarterly financial statement requirement (proposed section 80). Interim financial

statements would not need to be audited. Quarterly financial statements would have to be prepared under IFRS and include:

- a balance sheet as at the end of the quarterly period (with a comparison to the same date in the year prior period);
- an income statement, a statement of retained earnings (surplus), and a cash flow statement (statement of changes in financial position) for the quarterly period as well as the year-to-date period, and for the corresponding periods in the immediately preceding financial year; and
- notes to the financial statements;

which are prescribed in the General By-Law (and discussed in further detail below). Quarterly financial reporting has been the practice in Canada and the United States for a number of years. The European Union proposes to introduce quarterly reporting in its member states from 2005 onwards. As a result, the preparation of quarterly reports is becoming the international best practice standard.

3.7.10 Transition to Quarterly Interim Financial Statements. It is recommended that the quarterly financial statement requirements not be implemented prior to the later of January 1, 2005 and twelve months after the amended *SIA, 1995* becomes effective, so as to give reporting issuers and their advisors time to be in a position to comply. As a result, the General By-Law retains the current six-month interim financial statement requirement. In both cases, the interim financial statements would be required to be filed with the TTSEC within sixty days of the end of the interim (quarterly) period.

3.7.11 Management Discussion and Analysis. Perhaps most significantly, the revised Part would require that reporting issuers prepare annually a management discussion and analysis ("**MD&A**") on its annual financial statements. The purpose of the MD&A is to supplement the annual financial statement disclosure and to discuss material information and changes about the reporting issuer's financial position that may not be readily apparent from reading the financial statements. Its purpose would also be to discuss, in ordinary language, the reporting issuers' present financial condition as well as its future prospects. Discussion in an MD&A would require the reporting issuer to compare the most recently completed financial year to the prior year. In particular, MD&A would be required to discuss six major topics:

- overall performance, which would include discussing:
    - the reporting issuer's overall financial performance for the financial year including its year-end financial condition, its results of operations, and cash flows (and a comparison to prior year periods);
    - general industry and economic factors affecting the reporting issuer;

  - changes in the business during the year and how those changes have impacted financial condition and performance;

- results of operations, which would include discussing:

  - net sales or revenues for the year, including the impact of new goods or services and factors affecting the change in sales;

  - cost of sales;

  - expenditures in the financial year including research and development, administration and marketing costs, and other material expenses (and a comparison to prior year periods discussing what factors affected the changes in the expenditures);

  - trends, commitments, events, risks or other factors that the reporting issuer believes may materially affect the reporting issuer's future results of operations;

  - any unusual or infrequent factors or transactions which affected results of operations for the financial year;

- liquidity, which would include discussing:

  - the reporting issuer's cash and cash equivalents, in both the short and long term, and their sufficiency to meet planned goals and objectives;

  - working capital requirements;

  - how the reporting issuer will deal with working capital deficiencies, if one exists, or is expected to exist in the upcoming financial year;

  - how balance sheet items or cash flows have impacted, or may impact, the reporting issuer's liquidity or working capital position;

  - defaults on any debt obligations and the effect of such defaults on the reporting issuer;

- capital resources, which would include discussing:

  - the amount, nature and purpose of capital expenditures required;

  - the source of the funds to meet the requirements;

  - sources of financing for the reporting issuer, including sources that have been arranged but not yet used;

- related party transactions, which would include discussing:

- all material transactions with non-arm's length parties, including discussing the purpose of the transaction, identifying who the related party is, how transaction prices were determined, and the ongoing relationship with the related party, if applicable; and

- accounting policies, which would include discussing:

  - any changes in accounting policies from prior financial years, the reason for the change, and the policy currently adopted by the reporting issuer; and

  - those accounting policies which are critical to the reporting issuer in that they require judgements, estimates or uncertainties where the use of different judgements, estimates or uncertainties may result in materially different amounts reported in the reporting issuer's financial statements.

3.7.12 Exemptions Available. Exemptions would be available for new reporting issuers where prior year comparisons are unavailable. These content requirements will be set out in the General By-Law. The Consultants recommend that MD&A be prepared for each financial year ending on or after January 1, 2005, which means that for issuers with a December 31 year-end, the first MD&A would be required for the financial year ending December 31, 2005.

3.7.13 Delivery of MD&A. MD&A, like annual comparative financial statements, would be required to be sent to the securityholders of the reporting issuer at the same time that they are filed with the TTSEC, other than debt securityholders. The physical delivery of annual financial statements to securityholders is consistent with international best practice. Interim financial statements are also required to be delivered to securityholders. However, reporting issuers may satisfy this obligation by publishing the statements in a newspaper of general circulation in Trinidad and Tobago. The TTSEC should also consider permitting reporting issuers to deliver MD&A and financial statements electronically, subject to technical limitations, as this practice is beginning to develop internationally.

3.7.14 Mandatory Audit Committee for all Reporting Issuers. Two other significant changes are also recommended in Part V based on existing provisions in the *Companies Act*. The first is the requirement for reporting issuers to have audit committees made up of directors that are not senior officers or employees of the reporting issuer. In the Consultant's view, given that this requirement in the *Companies Act* applies only to "public companies", this requirement is more appropriately an *SIA, 1995* requirement, which will then require all reporting issuers participating in the capital markets in Trinidad and Tobago to adhere to this basic governance obligation. This recommendation is addressed in greater detail in Chapter Six below dealing with recommended changes to the *Companies Act*.

3.7.15 Mandatory Proxy Solicitation for all Reporting Issuers. The other significant change to Part V is the introduction of basic proxy solicitation requirements to the *SIA, 1995*. This is a suggested change aimed at levelling the playing field among *Companies*

Act and non-*Companies Act* reporting issuers in Trinidad and Tobago and ensuring that fulsome disclosure is made to securityholders in connection with a meeting.

3.7.16 Mandatory Proxy Solicitation Supports Shareholder Rights. The suggested provisions of the proposed *SIA, 1995* impose the obligation on management to solicit proxies when giving notice of a meeting of securityholders (proposed subsection 83(2)). Subsection 83(3) would then require management to prepare a proxy circular containing disclosure regarding the reporting issuer and the items of business at the meeting. The basic principle is securityholder empowerment, and ensuring, that all securityholders are able to make an informed decision in exercising their voting rights in the reporting issuer.

3.7.17 Exemptions Available from Mandatory Proxy Solicitation. Importantly, there is a significant exemption to the basic requirement in that proposed section 83 (proxy solicitation) would not apply if the reporting issuer is complying with the laws of the jurisdiction in which it is organized or incorporated, but provided that those requirements are substantially similar to the requirements of this section. This exemption would be available to all reporting issuers including approved foreign issuers. Accordingly, all reporting issuers would have to solicit proxies under the *SIA, 1995*, but those which complied with requirements that are substantially similar to those found in section 83, would be exempt. This would include reporting issuers that complied with the substantially similar provisions of the *Companies Act*.

3.7.18 Contents of Proxy Materials. With respect to the contents of a proxy circular, or dissident proxy circular, the forms set out in the General By-Law are based on the equivalent forms under the *Companies Act*.

3.7.19 Disclosure Exemption for Approved Foreign Issuers. Proposed section 84 (exemptions for certain foreign issuers) of revised Part V would provide an exemption from the disclosure requirements for certain foreign issuers who comply with the securities laws of a “designated foreign jurisdiction”, which would be certain prescribed jurisdictions where disclosure standards and the level of regulatory oversight is viewed as being at least equal to that in Trinidad and Tobago. Such issuers will be required to have at least a three year reporting history (proposed subsection 3(1) – definitions) in their designated foreign jurisdiction and in order to utilize the exemption in section 84, would also have to have a minimum market capitalization of five hundred million dollars (as prescribed in the General By-Law). The rationale and potential benefits of such an exemption are discussed below in greater detail in respect of proposed changes to Part VI of the *SIA, 1995*. However, the principles discussed there also apply to ongoing disclosure by reporting issuers.

3.7.20 Investor Protection Not Hindered. Reporting issuers, with a minimal securityholding presence in Trinidad and Tobago and who are subject to regulatory oversight in a designated foreign jurisdiction, should be exempt from the continuous disclosure requirements of the *SIA, 1995* provided they comply with the filing and delivery requirements of continuous disclosure materials (including financial statements) of

the designated foreign jurisdiction. The issuer would be required to file the continuous disclosure information with the TTSEC and send to shareholders in Trinidad and Tobago the same information they send to the shareholders resident in the designated foreign jurisdictions. Again, investor protection would be served by relying on the securities regulatory framework of a jurisdiction that has standards that are viewed as being at least equal to those in Trinidad and Tobago. For investors, the number of reporting issuers, and accordingly, investment opportunities, may increase without any corresponding loss of investor protections.

3.7.21 Limits on Exemptions for Approved Foreign Issuers. The exemption would not be available where the foreign reporting issuer had a significant market for its securities in Trinidad and Tobago (i.e. if more than 10% of the voting securities of the reporting issuer were held by residents of Trinidad and Tobago as at it last financial year-end). Were this to be the case, the reporting issuer would have to comply with the disclosure requirements of Part V of the proposed *SIA, 1995* and could not rely on its continuous disclosure documents filed in a designated jurisdiction.

3.7.22 Incentive to List. This exemption may provide an incentive for issuers to become reporting issuers in Trinidad and Tobago or perhaps seek a listing on the Stock Exchange, because an issuer could do so without attracting additional regulatory burden. However, the Consultants would suggest that the TTSEC consider a higher threshold in order to attract additional foreign issuers to the capital markets in Trinidad and Tobago. In the Consultants view, a higher threshold of 20% may enhance market development (through attracting additional issuers) and improve the efficient utilization of the regulatory resources of the TTSEC. Alternatively, the TTSEC could consider granting discretionary exemption relief to issuers who fell between 10% and 20%. In any event, there should be no loss of investor protections as a result of a higher threshold, as these foreign issuers would be subject to the regulatory oversight in an approved foreign jurisdiction. Finally, the issuers would need to have a market capitalization of at least five hundred million dollars, which in the Consultants' view, practically limits the types of issuers that would be coming to the local market to those with such sufficient scale that they are more likely to seek an out of jurisdiction listing in any event.

3.7.23 New Disclosure Related Offence Provisions. Finally, three new offence provisions have been recommended for Part V to deter non-compliance with the disclosure standards.

3.7.24 Offence for Breach of Part or Misrepresentation. The first (proposed subsection 85(1)) makes it an offence for a reporting issuer to either (a) contravene a requirement of the Part, or (b) make a misrepresentation in any document filed with the TTSEC or delivered to securityholders under the Part. For example, the failure to file financial statements or the inclusion of a misrepresentation in those financial statements would both be offences punishable by a fine of up to two hundred thousand dollars. However, in recognition that not all failures to comply with the part are equally egregious, subsection 85(2) provides for lesser penalties of up to

twenty thousand dollars (late filing of 7 days or less) and up to sixty thousand dollars (late filings more than 7 days but less than 14 days), where the breach of Part V consists only of a failure to file a document within the time periods set out.

3.7.25 Liability of Directors for Disclosure Violations. The second recommended offence provision (proposed subsection 85(2)) is designed to deter those who direct the operations of the reporting issuer from failing to comply with the disclosure obligations of the Part. Where a reporting issuer is convicted of an offence under subsection 85(1) each director who knowingly authorized, permitted or acquiesced in the offence is also guilty of an offence and potentially subject to a fine of up to two hundred thousand dollars or to imprisonment up to two years or both. In addition, directors may also be banned from acting as a director of a reporting issuer for up to five years. This, it is suggested, should act to encourage directors of reporting issuers to be vigilant in complying with disclosure obligations.

3.7.26 Offence for Making False Audit Reports. The third offence provision (proposed subsection 85(4)) makes it an offence for an auditor to knowingly provide false or misleading audit reports. The penalty may be a fine of up to two hundred thousand dollars or more importantly, a ban on being an auditor of a reporting issuer for up to five years.

3.7.27 Future Additional Disclosure Obligations. Once implemented, the changes suggested above will serve as the foundation for supporting basic principles of information dissemination to the public markets and will provide an appropriate balance given the current level of development of the local capital markets. The Consultants recommend that additional disclosure obligations or more timely disclosure be introduced in time so as to continue to raise the standard of disclosure to the level of international best practice. For example, MD&A on interim financial statements is becoming increasingly common in a number of jurisdictions. The time period in the United States for the filing of annual financial statements is 90 days, and 45 days for interim financial statements (although the latter is proposed to be reduced to 35 days). In Canada, annual and interim financial statements are required to be filed within 140 days and 60 days respectively (but this will be reduced to 90 days and 45 days in 2004). This is compared to 120 days in Trinidad and Tobago for annual financial statements and 60 days for interim financial statements. The TTSEC will have to continue to monitor such developments so that the regulatory regime will keep pace with international best practice. However, the Consultants recommend that these additional changes be implemented over time.

3.8 Part VI: Distributions

3.8.1 Part VI Changes. The Consultants recommend a number of changes to Part VI, some of which are conceptual and others more technical in nature.

3.8.2 "Offer To The Public" Versus "Distribution". In the *SIA, 1995* at present, an "offer to the public" attracts the obligation to file a registration statement with the TTSEC,

while a "distribution" attracts the requirement to prepare and file a prospectus with the TTSEC. The Consultants suggest that the use of a single term and concept to capture those situations when an issuer would be required to prepare and have receipted, a prospectus, would lead to greater certainty in the application of the *SIA, 1995* without any loss of investor protection. This would result because the change will not require an assessment of whether the trade is being made to a member of the "public".

3.8.3 Conceptual Recommendations. At the conceptual level, the Consultants recommend that the concept of "offer to the public" be removed from the *SIA, 1995* and the concept of "distribution" be retained as the sole concept determining when an issuer would need to prepare, file, and have receipted, a prospectus. This is reflected in the proposed *SIA, 1995.*

3.8.4 Need for Exemptions. A number of important additional changes would flow from an acceptance of a regime based on this principle. The first is that an appropriate set of exemptions from the prospectus requirement would have to be implemented to exempt those trades, where, for policy reasons, a prospectus is not warranted in order to protect an investor's interests.

3.8.5 "Hold Periods" and Restricted Resales. The other consequence of such a system is a "hold period." A hold period is a period of time during which any subsequent trade in a security, issued under a prospectus exemption, could not be traded again without the filing of a prospectus or the use of a subsequent prospectus exemption. A hold period is necessary to ensure that securities that are issued on an exempt basis are not immediately resold to the public in a transaction which would, in effect, be a "sham" transaction aimed at getting securities into the hands of the public without a prospectus. However, once the "hold period" expires, the securities subject to it would be freely tradable (other than securities held by a controlling securityholder). These concepts are all reflected in the proposed revisions to Part VI.

3.8.6 Prospectus Required for all Distributions. The revised definition of "distribution" in the proposed *SIA, 1995* would include all treasury issuances of securities of all types of issuers, both private and public. It would also include sales by controlling securityholders. Such trades would become subject to the prospectus requirement. However, exemptions from the prospectus requirement would be available for certain distributions, in which case, subsequent trades would be subject to the "hold period." The main benefit of this revised definition is that it does not require an assessment of whether the trade is being made to a member of the "public" and therefore, increases the level of certainty surrounding which trades attract the prospectus requirement of the *SIA, 1995.*

3.8.7 The Prospectus Obligation. Proposed section 87 imposes the obligation on persons to file and have receipted, a prospectus, where they trade in a security and the trade would be a distribution. This prospectus obligation would be complemented by proposed section 90 which requires that all prospectuses contain full, true and plain

disclosure of all material facts concerning the issuer and the securities to be issued. Exemptions from section 87 (the prospectus requirement) are set forth in proposed section 93, and include, among others, trades to "sophisticated purchasers."

3.8.8 "Sophisticated Purchaser" Prospectus Exemption. The second substantive legislative change to Part VI is to the definition of "sophisticated purchaser". The Consultants recommend expanding the categories of persons who, by the nature of their education, experience or financial resources, do not require the protections that a prospectus would afford. These persons include governmental entities and registered market actors. As discussed later, these sophisticated purchasers could purchase securities in a distribution, exempt from the prospectus requirement, but subject to new "hold period" requirements. A more expansive definition is required, given that more transactions in securities will attract the prospectus requirement under a system built around the revised "distribution" concept. Under the proposed definition (proposed for subsection 86(2)), "sophisticated purchasers" would include banks, insurance companies, and loan and trust companies incorporated or regulated in Trinidad and Tobago, government entities, market actors registered under Part IV of the proposed *SIA, 1995*, and persons who have certain minimum net assets, as well as persons outside the country that are analogous to certain of these persons.

3.8.9 High Net Worth Individuals. Individuals who are "sophisticated purchasers" by reason of high net worth, other than those who are so because they are directors or officers of the issuer, or an individual registered market actor, will, in order to qualify for the exemptions provided for under paragraphs 93(1)(l) and (m) (prospectus exemption for sophisticated purchasers) need to obtain investment advice from a registered market actor or other prescribed person who does not receive remuneration from the issuer in connection with the distribution. Other prescribed persons would include most persons (such as a lawyer or accountant) exempted under the General By-Law from the requirement to be registered as an investment adviser. In the Consultants' view, while high net worth individuals may have significant net worth and assets (at least five hundred thousand dollars[5] of net financial assets), and potentially access to information similar to that contained in the prospectus, such wealth or information does not necessarily mean that they are "sophisticated" in reviewing the merits and demerits of investing in a particular security. Accordingly, in the interest of investor protection, an issuer could only sell securities to high net worth individuals where the individuals have reviewed any proposed purchase of securities on a prospectus exempt basis with a registered market actor or other prescribed person.

3.8.10 Prospectus Qualified Securities are Free Trading. Securities distributed under a prospectus would be freely tradable by the purchaser, other than securities held by a purchaser that is a controlling securityholder. Trades by controlling securityholders

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[5] The Consultants suggest than $500,000 be used initially for individuals, and that the TTSEC re-evaluate the appropriateness of this amount once some experience has developed with it, particularly given that in both the U.S. and Canada, the test is one million dollars in local currency. The test for persons that are not individuals is $5,000,000.

may be exempt under the proposed trading transaction exemption (subsection 93(5)).

3.8.11 Prospectus Exempt Securities May Be Subject to Resale Restrictions. Securities issued under certain prospectus exemptions are not subject to any "hold period" while securities issued under other prospectus exemptions (including the "sophisticated purchaser" exemption discussed above and in limited offerings) are subject to a six month "hold period". During this six month period, the purchaser will be able to resell the security only if he is able to rely on a prospectus exemption as the further trade in the securities is deemed a "distribution" and therefore would require the preparation of a prospectus. Once the six hold month period expires, the security may be freely traded by the purchaser, unless the purchaser is a controlling securityholder.

3.8.12 Legislating the "Hold Period" Requirement. Proposed section 95 legislates the "hold period" requirement and deems certain subsequent trades in securities issued under a prospectus exemption (found in proposed section 93) to be a "distribution." Therefore, such trades would attract the prospectus requirement of proposed section 87. This would apply unless the conditions set forth in subsection 95(1) have been satisfied, including, in particular, that at least six months have elapsed from the date of the prospectus exempt distribution of securities and the issuer has been a reporting issuer for at least 12 months preceding the date of the trade. A vendor would also be able to utilize any other available prospectus exemption during the six month period. The other recommended conditions are aimed at ensuring that the market is not manipulated or seasoned in advance of the trade. Following the expiry of the six month "hold period" the resale would no longer be deemed a distribution and the security could be traded free of the prospectus requirement (other than by a controlling securityholder).

3.8.13 Trades By Controlling Securityholders. Trades by persons who control an issuer, or who own 30% (recommended so as to correspond with the expected threshold under the Take-Over By-Law) or more of the outstanding voting securities of the issuer, would always be a "distribution", and therefore would be required to be resold under a prospectus, unless an exemption from the prospectus requirement were relied upon. Limitations on the ability of such controlling securityholders to freely trade securities of the issuer that they control is consistent with international best practice, and is predicated on the theory that such securityholders are more likely than other securityholders to have access to preferential information regarding an issuer which should be disclosed to prospective purchasers before they buy, and because they are in a position to affect the marketplace adversely by their trades. A controlling securityholder could sell securities under any available prospectus exemption, including, for example, to "sophisticated purchasers". In addition, a controlling securityholder would also be permitted to trade securities from its holdings without a prospectus in a "trading transaction" (proposed subsection 93(4)).

3.8.14 "Trading Transaction" Exemption for Controlling Securityholders. A "trading transaction" is defined under proposed subsection 93(5) as a distribution of securities of a reporting issuer by a controlling securityholder where the following conditions are met:

- the distribution of the security is conducted through a registered market actor;
- the issuer has been a reporting issuer for at least twelve months immediately preceding the distribution;
- no selling or promotional expenses are incurred in connection with the distribution except for services customarily performed by the market actor;
- the distribution takes place through the facilities of the Stock Exchange;
- the controlling securityholder certifies that it does not have knowledge or possession of any undisclosed price sensitive information in respect of the reporting issuer at the time of the distribution;
- where the securities to be distributed have been acquired by the controlling shareholder under a prospectus exemption, at least six months have elapsed from the date of the initial exempt distribution; and
- notice of the intention to trade securities in a trading transaction is disclosed by press release and filed with the TTSEC no less than three business days and no more than ten business days prior to the first sale by the controlling shareholder.

3.8.15 Limitations on "Trading Transaction" Exemption. Under proposed subsection 93(6) the "trading transaction" exemption would only be available to a controlling securityholder if the first sale takes place no less than three business days and no more than ten business days after the press release is issued, and the final sale is completed no more than sixty days after the press release is issued. Where the controlling securityholder wishes to continue sales beyond the sixty day time period, the selling securityholder would have to issue another press release to commence another trading transaction. The purpose of these conditions is to prepare the marketplace sufficiently in advance of the first sale by the controlling securityholder and to continue to require the controlling securityholder to keep the market fully informed of its decision to sell within a reasonable period of time. As a result, controlling securityholders will be able sell securities from their positions and the securities marketplace will be adequately informed and prepared for the sale by a controlling securityholder.

3.8.16 Distributions of Asset-Backed Securities. One of the four main areas of focus for the mandate was the area of asset securitization transactions. The Consultants generally recommend a disclosure regime for the trading of asset-backed securities in Trinidad and Tobago, as opposed to substantive regulation. Specifically, the Consultants recommend that disclosure specific to asset-backed securities be required in a

prospectus. As well, the Consultants recommend that a prescribed "risk disclosure statement" be delivered to prospective investors prior to the sale of asset-backed securities under a prospectus exemption.

3.8.17 Treatment of Asset-Backed Securities in Other Jurisdictions. Most major capital markets, including the United States and Canada, have not implemented specific legislation regulating the substantive form, content and structure of asset securitizations. However, the Consultants note that securitization legislation has been implemented in some jurisdictions such as India, Italy, the Philippines and South Korea. Such legislation generally addresses many areas of substantive law, including by way of example, financial institution regulation and capital adequacy requirements, personal property security law, business corporations and company law, and bankruptcy law, and it is generally intended, at least in part, to facilitate the execution of securitization transactions by addressing deficiencies or gaps in existing substantive laws. Securities laws, however, most appropriately address the disclosure required in respect of a distribution of asset-backed securities.

3.8.18 Additional Disclosure Recommended for Securitizations. Accordingly, the Consultants recommend more detailed disclosure in a prospectus which qualifies the distribution of asset-backed securities, including:

- the features or aspects of a securitization;
- information pertaining to the nature, performance and servicing of the underlying pool of financial assets;
- the material attributes and characteristics of the asset-backed securities;
- the existence of any third party or internal support or credit enhancement arrangements established to protect holders of the asset-backed securities from losses associated with the performance of the financial assets; and
- information in respect of persons or companies who sell the assets or provide services or other support in respect of the securitization transaction.

These are reflected in the draft Prospectus By-Law which is discussed in greater detail in Chapter Five of this Interim Report. In addition to the protections afforded by full disclosure of all material facts related to a distribution of asset-backed securities, the Consultants also recommend that, in order for asset-backed securities to be eligible for sale under a prospectus, the securities would be required to have an approved rating (which would be a rating of "investment grade") from an approved rating organization. This system is intended to ensure that asset-backed securities distributed at the retail level are "investment grade". This is reflected in proposed subsection 87(2).

3.8.19 Use of a Risk Disclosure Statement. In the case of prospectus exempt distributions of asset-backed securities, for example to sophisticated persons, such transactions

could not be completed until the purchaser of the asset-backed security had received a prescribed risk disclosure statement. An investment grade credit rating from an approved rating organization would not be required for such "private placements" of asset-backed securities. This is reflected in proposed subsection 93(2) and is intended to provide the purchaser with a risk statement similar to what they would have received in a prospectus regarding risk factors, although no prospectus would be required. The contents of a "risk disclosure statement" are set at in Form No. 6 to the General By-Law.

3.8.20 Substantive Regulation of Asset Securitization Transactions. In the Consultants' view, the substantive regulation of securitization transactions, if undertaken in Trinidad and Tobago, should be dealt with in legislation other than the *SIA, 1995*, as some other countries have done in the passing of omnibus "securitization" legislation which affects all aspects of such transactions, including disclosure afforded by securities laws. However, the Consultants' note that in the course of completing this mandate nothing has come to the attention of the Consultants' which suggests a pressing need for substantive regulation of asset securitization transactions in Trinidad and Tobago.

3.8.21 Prospectus Distributions of Approved Foreign Issuers. Trinidad and Tobago has a relatively small capital base compared to many other capital markets, including the obvious examples of Western Europe and North America. Further, its securities regulatory framework is in a state of early development and growth, and the TTSEC has comparatively limited resources. Accordingly, it is the view of the Consultants that there should be a recognition that certain foreign incorporated or governed public companies (and CIS's) from approved jurisdictions should be exempt from compliance with the securities laws of Trinidad and Tobago in the securities offering process, provided that they comply with the securities laws of an approved foreign jurisdiction (including requirements as to delivery of materials to securityholders), and the issuer otherwise has a limited shareholder presence in Trinidad and Tobago. These issuers would be the same group of issuers permitted to rely on the similar exemption from the continuous disclosure requirements of Part V discussed above, as each of which would be subject to a level of oversight by a securities regulator in a "designated foreign jurisdiction."

3.8.22 "Approved Foreign Issuers" Able to Rely on Foreign Documentation. In the context of a distribution of securities, the foreign issuer from a designated foreign jurisdiction could use the foreign offering documents (with minimal additional requirements in Trinidad and Tobago) to offer securities locally. There would be little or no review of the documents by the TTSEC. Rather, the reliance would be placed on the approval process of the securities regulatory authority in the designated foreign jurisdiction. However, there would still be a need to use a market actor registered under the *SIA, 1995* to place the securities in Trinidad and Tobago. It is the Consultants' view that such a system would give issuers an incentive to distribute securities in the country. It would increase the number and type of

securities available to the investing public while still providing the investing public and local market actors with an appropriate level of investor protection.

3.8.23 Effective Utilization of Limited Resources. From the TTSEC's perspective, it is suggested that the acceptance of such a reliance system would more effectively utilize the limited resources of the TTSEC by freeing it from the task of reviewing offerings by "global issuers" who would already have had a review in a designated foreign jurisdiction.

3.8.24 Limits on Exemption for Approved Foreign Issuers. Proposed section 94 sets out this regime for approved foreign issuers to raise capital in Trinidad and Tobago using disclosure and offering documents which have been cleared by a securities regulatory authority in a designated foreign jurisdiction. The system, however, operates on the basis of a *de minimis* market in Trinidad and Tobago and a certain scale of issuer. Should the approved foreign issuer place or have more than 10% of its voting securities in Trinidad and Tobago following a distribution, the exemption would not be available, and the issuer would have to comply with the general prospectus requirements of proposed Part VI. However, for the reasons discussed previously, the Consultants suggest that consideration be given to the introduction of a higher threshold over time in order to attract additional foreign issuers to the capital markets in Trinidad and Tobago. As well, issuers with a market capitalization of less than five hundred million dollars (prescribed in the General By-Law) would not be permitted to rely on the exemption (such issuers not being qualified as "approved foreign issuers"). The calculation of market capitalization is set out in the General By-Law.

3.8.25 Potential Benefit of Reciprocal Offering Systems. In the offering context, by way of example, Canada and the United States maintain a system, the Multi-Jurisdictional Disclosure System, whereby certain larger Canadian issuers may use a Canadian prospectus for offering securities in the United States with the need for only minimal United States documentation and without any review by the United States Securities Exchange Commission, and vice-versa. This type of reciprocal offering system might be considered in Trinidad and Tobago between it and other CARICOM countries. This would enable issuers to use a single offering document in two or more Caribbean jurisdictions, approved by only one securities regulatory authority, which would make capital raising less costly for issuers and more efficient, but would sacrifice little in the way of investor protection.

3.8.26 Stock Option Plans. Finally, the question of how the distribution of securities under stock option and incentive plans should be treated in a revised *SIA, 1995* has been raised with the Consultants. Under the proposed *SIA, 1995*, the issuance of an option by an issuer would be a distribution of a security requiring an prospectus. However, for most issuers such a distribution would be exempt by the application of the exemption provided for in paragraph 93(1)(h) (exemption for trades, to directors, officers and employees) of the proposed *SIA, 1995.* For "private" companies, the limited offering exemption would, in many cases, also be available. The exercise of

the option for a share, and the issuance of the share, would also be a distribution, but again, would likely be exempt under the exemptions just described or under the exemption in paragraph 93(1)(d) (exemptions for previous rights to acquire security) for distributions of securities upon the exercise of previous rights to acquire the security. In the view of the Consultants, no further regulation of stock option or incentive plans is warranted under the proposed *SIA, 1995*. In particular, the substantive terms of such plans (such as the number of shares reserved under option or their exercise or strike prices) are more typically matters for regulation by the listing rules of the Stock Exchange.

3.9 Part VII: Market Conduct And Regulation

3.9.1 Part VII Changes. The Consultants are recommending several significant changes to Part VII, and several consequential ones. Many amendments are consequential in that they flow from other recommendations made with respect to the *SIA, 1995*. For example, existing section 90 (record-keeping by a securities exchange) is recommended to be moved in Part III dealing with self-regulatory organizations. Part III currently has provisions for record-keeping by self-regulatory organizations. The Consultants are of the view that consolidating the record-keeping requirements for self-regulatory organizations in Part III is more efficient from a drafting perspective.

3.9.2 Revised Market Manipulation Offences. The most significant recommended changes are to existing sections 80, 81, 82, 83 and 84 which, respectively, prohibit market rigging transaction, certain inducements to buy or sell securities, the use of deceptive devices in the sale of securities, limit certain recommendations, and excessive trading transactions. At present, these are the only operative sections of the *SIA, 1995* which prohibit manipulative conduct. In the Consultants' view, these provisions are presently inadequate to address the potential types of market misconduct which may occur and to permit effective prosecution of offenders.

3.9.3 Market Manipulation Reduces Investor Confidence. IOSCO recognizes that the possibility and types of market manipulation are, in part, a function of the characteristics of the particular market (such as its size and liquidity), and that different jurisdictions have taken different approaches to defining, investigating and prosecuting market manipulation.[6] Whatever the approach, should it be ineffective, confidence in the markets will suffer, thereby reducing the efficiency of the capital markets. The first step to effective prosecution of market manipulation is effective legislation prohibiting activities that constitute market manipulation. While this varies by jurisdiction, market manipulation consists of activities that have the effect of creating or stabilizing artificial prices for securities, creating false trading volumes, and fraud.

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[6] IOSCO, *Investigating and Prosecuting Market Manipulation*, May, 2002, at page 4.

3.9.4 Expansion of Existing Prohibitions. Each of the existing market manipulation prohibitions is proposed to be expanded with appropriate additions. New proposed section 100 (false trading and artificial prices) develops the current section 80 prohibition on market rigging, by also prohibiting the creating or maintaining of artificial prices on a securities exchange. Current section 80 only prohibits the creation of "apparent trading activity." It does not address artificial prices. Proposed section 102 (misrepresentation in inducing trades in securities) expands upon the current section 81 prohibition on inducements to trade in securities by dissemination of certain information. Proposed section 102 is broader than current section 81 in that it prohibits making any misrepresentation to induce a purchase or sale of a security. Current section 81 only proscribes one type of misrepresentation, that is that the price of the security will likely rise or fall because of the market operations of such person.

3.9.5 New Market Manipulation Provisions. In addition, a number of additional new market manipulation offences have been added. Proposed section 101 prohibits price rigging which is not specifically caught under the existing *SIA, 1995*. Proposed section 103 prohibits the manipulation of prices on a securities exchange (i.e. the Stock Exchange).

3.9.6 Disclosure of Conflicts of Interest in Connection with Recommendations. Proposed section 106 (restrictions on recommendations) elaborates on existing section 83 of the *SIA, 1995*. Proposed section 106 now clearly prohibits any market actor from recommending any trade in a security to any customer unless the security is suitable for the client and he discloses in writing all conflicts of interest, and potential conflicts of interest, which he may have in respect of the security or the issuer. Market actors would, however, be exempt from this prohibition where they publish research reports not for the benefit of a specific customer, provided they make the same conflict of interest disclosure. This standard is consistent with the IOSCO principles of transparency and fairness in the securities markets. Investors, it is recommended, should be provided with all information necessary to make an informed investment decision.

3.9.7 Increased Fines for Market Manipulation. Proposed section 107 increases the potential fines for breach of the market manipulation provisions in sections 100 through 106 to up to four hundred thousand dollars on indictment, and up to two hundred thousand dollars on summary conviction. In addition, aggrieved persons may also seek recourse using the new civil liability provisions of Part X of the proposed *SIA, 1995* (discussed later).

3.9.8 Prosecution of Market Manipulation Offences. The other suggested change to Part VII is not as readily apparent, but is fundamentally important. Market manipulating transactions prohibited by proposed sections 101 through to 106 would be capable of being prosecuted by the TTSEC on a civil (as opposed to criminal) basis in front of the Tribunal by application of proposed section 41 (market misconduct

proceedings) of Part II.A. This procedure is discussed in greater detail in Chapter Four.

3.9.9 Consolidation of Provisions. As well, in addition to the expansion and creation of substantive market manipulation offence provisions, it is recommended that existing sections 96 (standards of conduction for persons trading) and 97 (information to be filed with the Commission) form part of proposed section 151 which sets out the by-law making powers of the Minister, on the recommendation of the TTSEC. Both existing sections merely grant the TTSEC the power to prescribe certain requirements. It is suggested that such prescriptive provisions be consolidated in Part XI.

3.10 Part VIII: Simplified Clearing Facilities

3.10.1 Part VII Changes and Introduction. This section sets out the recommendations with respect to clearing and settlement matters which are aimed at supporting a more modern securities clearing and settlement infrastructure in Trinidad and Tobago.[7] In formulating these recommendations, the Consultants met with representatives of the Central Depository and Stock Exchange in February, 2003. As with other recommendations made as part of the mandate, the recommendations with respect to clearing and settlement matters can be classified as both conceptual or structural, and legislative. With respect to the latter, recommendations are made with respect to both the *SIA, 1995* and the *Companies Act* (which recommendations are reflected, respectively, in the proposed *SIA, 1995* found at Schedule "B" and in Chapter Six which addresses suggested changes to the *Companies Act).* Several observations on the rules of the Central Depository are also set out at the end of this section. Conceptual or structural changes are included for discussion at this point, and are not generally reflected in the draft legislation and by-laws.

3.10.2 BIS/IOSCO Recommendations. The recommendations made by the Consultants in this section have taken into consideration the general policy and other concerns outlined at the commencement of this Interim Report, as well as the objective of achieving international best practice in the area. For the most part, these international best practice standards are documented in the Bank for International Settlements ("**BIS**")/IOSCO paper titled "Recommendations for Securities Settlement Systems".

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[7] The recommendations set forth in this section are principally based on the work of Mr. Gary Stephenson, an expert on clearing and settlement retained by Stikeman Elliott LLP to work with the Consultants on the mandate. Mr. Stephenson has extensive experience in developing and operating securities trading and settlement systems world-wide. From 2000 to 2002, Mr. Stephenson was the Chair of the Canadian Capital Markets Association Institutional Trade Processing Committee which has been developing a blueprint for moving Canada's clearing and settlement system to a T+1 environment. From 1996 to 2000, Mr. Stephenson was a Vice-President of the Canadian Depositary for Securities Ltd. where he was responsible for strategic planning and coordinating with other regulatory authorities, including the Bank of Canada. Between 1993 and 1997 Mr. Stephenson worked on a number of settlement and clearing assignments for the World Bank including for markets in Kenya, Ghana, Mauritius, Oman, Zambia and Uganda. From 1993 to 1994, he participated in the implementation of the stock exchange and securities commission in Zambia. He has also written a number of papers on settlement and clearing issues for governments, IOSCO and other non-governmental organizations.

3.10.3 Conceptual and Structural Recommendations. There are two main conceptual and structural recommendations. Ideally, these recommendations would form part of the legislative framework in Trinidad and Tobago. However, at this point, the Consultants have not included these changes in the proposed *SIA, 1995* and draft by-laws. Instead, the recommendations are made for discussion purposes. Given their nature, they need not become legislation to be effectively implemented, but we recommend that they should be given timely and serious consideration by the government of Trinidad and Tobago in conjunction with Central Bank, TTSEC, the Central Depository, the Stock Exchange and market participants. The outcome of these discussions would help form official government policy and should be clearly communicated to the securities market.

3.10.4 Single Clearing and Settlement Entity. There are a number of organizations in Trinidad and Tobago that provide "clearing and settlement" services in some fashion. These include the Central Depository (equities), the Central Bank (government debt) and the Unit Trust Corporation (CIS's). As with virtually every other market in the world, the market in Trinidad and Tobago is not large enough to cost effectively support the development and operation of multiple entities engaged in the same clearing and settlement activities – at least for the clearing and settlement of equity, debt and money market securities (the clearing and settlement of securities of CIS's is substantially different from other "securities" and may warrant a different approach).

3.10.5 Inefficiencies of Multiple Clearing and Settlement Organizations. The inefficiencies inherent in sustaining more than one clearing and settlement organization include the duplication of staff, systems, rules and procedures. In addition, multiple clearing and settlement organizations will require that market participants learn and accommodate multiple systems and multiple procedures. Given these considerations and the limited size of the securities marketplace in Trinidad and Tobago, the Consultants are not aware of any compelling reasons that could justify multiple clearing and settlement organizations in Trinidad and Tobago.

3.10.6 Practical Problems of Multiple Clearing and Settlement Organizations. While the major issue in duplicating clearing and settlement infrastructure is the cost of supporting multiple systems, there are many other practical problems that this duplication can create. Although it is not a practical reality in Trinidad and Tobago today, a securities lending practice may develop in the coming years. BIS/ IOSCO recommendations suggest that markets should review the use of securities lending to reduce settlement failures. A typical securities lending transaction could involve borrowing equities against collateral, often in the form of government debt. If equity securities were cleared and settled in one system and debt securities in another system, it would be difficult for both sides of the loan transaction to be executed simultaneously. There are many other examples of "cross-market" transactions that would be difficult, and potentially impossible, to execute if more than a single clearing and settlement system were implemented. As a matter of policy, Trinidad and Tobago should deliberate and decide on whether to have a single clearing and

settlement organization for all securities, or at least for equities, as well as debt and money market securities. Consideration should be given as to whether the Central Depository should be given the mandate to develop and operate clearing and settlement systems for all equity, debt and money market securities transactions.

3.10.7 Regulation of Clearing and Settlement. There are at least two regulatory agencies with jurisdiction over clearing and settlement in Trinidad and Tobago. The TTSEC has the authority to regulate "clearing agencies" under the *SIA, 1995* while the Central Bank also regulates the clearing and settlement of government debt. Regulation of clearing and settlement includes not only the regulation of the relevant "agencies" but also the clearing and settlement activities of the market participants themselves. Overlapping regulatory oversight can and will lead to ambiguous and potentially conflicting instructions to the market participants (i.e. one regulator requires one thing and the other requires the opposite). It will be important for the market to understand clearly which authority presides over their clearing and settlement activities.

3.10.8 A Single Regulator. The Consultants are of the view that the legislation and regulation of clearing and settlement in Trinidad and Tobago should be assigned to a single agency. The main focus of this policy should be to ensure that it is clear to both the regulated, and the regulators, exactly who is responsible for this regulatory oversight. It is also essential that the regulatory authority be properly resourced to undertake this task. Either the TTSEC or the Central Bank (but not both) could be assigned as the primary regulator of clearing and settlement activities. This issue is for the government of Trinidad and Tobago, the Central Bank and the TTSEC to resolve.

3.10.9 Suggested Legislative Changes to the *SIA, 1995*. While the conceptual and structural considerations set forth above require further consideration, the Consultants do recommend a number of immediate changes to the *SIA, 1995* in order to support a modern clearing and settlement infrastructure.

3.10.10 Written Authorization from Beneficial Owners. The first of these suggested changes is aimed at ensuring (and clarifying) that book-entry (or record entry) transfers have full legal authority in Trinidad and Tobago. An obstacle to an efficient clearing and settlement environment in Trinidad and Tobago is the *SIA, 1995's* many requirements that the "clearing agency" obtain the "written authorization" from a beneficial owner to have their securities held and settled using book entries (as opposed to certificated settlement). For example, section 104 of the *SIA, 1995* (proposed to be renumbered as section 121) states that an issuer may deliver a certificate directly to a clearing agency if the issuer obtains the written authorization signed on or behalf of the beneficial owner and the clearing agency and the delivery of the certificate is evidenced by written confirmation by the clearing agency to the beneficial owner. We understand that there are an estimated 100,000 beneficial owners of securities in Trinidad and Tobago. As a result, this requirement places an almost impossible burden on the Central Depository.

3.10.11 Written Authorizations in Agreements with Market Actors. This problem has been addressed in Canada by beneficial owners acknowledging in account documentation that their securities may be held by a nominee when they open an account with their broker. The Consultants recommend that it be solved in a similar manner in Trinidad and Tobago. A suggested solution is found at renumbered subsection 121(3) of the proposed *SIA, 1995* which permits the written authorization requirement to be satisfied by the entering into of an agreement with a registered market actor or clearing agency. A similar concept is found at renumbered subsection 122(4) (transfers of securities through a clearing agency). The Consultants understand that brokerage agreements used in Trinidad and Tobago do contain language that beneficial owners give their "written authorization" for book-entry or record-entry processing. Unfortunately, the existing language in the *SIA, 1995* was drafted to describe a world of individual certificated settlements. While this is not likely to pose a problem, when issues do arise it will be important that the *SIA, 1995* be clear as to the validity of transfers that have been accomplished through record entries. It will be a flaw in the general securities market infrastructure if a legal challenge could be supported to dispute transfers that have been made through the systems of the Central Depository. Accordingly, the Consultants recommend that the *SIA, 1995* be amended in this way to allow an indirect form of acknowledgment from beneficial owners of a clearing agency's book entry processes. In addition, in order to ensure that these indirect written authorizations are obtained, the Consultants recommend that corporate market actors be obligated to obtain such authorization in account opening agreements. This forms part of the proposed General By-Law.

3.10.12 Use of Record Entries. The second suggested change surrounds the use of record entries. The *SIA, 1995* does contemplate the use of record entries as a means of transferring ownership, but in the Consultants' view, the language is not very clear. This is a critical foundation of any modern clearing and settlement infrastructure. There must be no doubt that a trade settled through a record entry in the systems of the Central Depository has the same legal effect as a transfer of a paper certificate and an entry on the registry of an issuer. Accordingly, the Consultants recommend that the *SIA, 1995* be amended to clarify that a "record entry" on the books of a registered clearing agency has the same legal effect as a physical paper transfer of securities. This recommendation is reflected in a new subsection 123(2) which aims to clarify the legal effect of a record entry transfer.

3.10.13 Contingency Fund. The third recommended change to the *SIA, 1995* in the area of clearing and settlement regards the creation and operation of a "contingency fund." Current section 48 of the *SIA, 1995* contemplates that a self-regulatory organization maintain a "contingency fund" to compensate customers for losses resulting from the insolvency, bankruptcy or default of a member. This currently includes clearing agencies. It is unusual for a "contingency fund" of this nature to be operated by a central depository. The purpose of a "contingency fund," as required in section 48 of the *SIA, 1995* (proposed to be renumbered as section 61), is to compensate the clients of a broker that has failed. The need for such a fund arises when brokers operate, not because a central depository has been established.

3.10.14 Settlement Assurance Fund. The *SIA, 1995* (and for this matter, the rules of the Central Depository) do not address the more salient issue in securities clearing and settlement - the issue of settlement assurance. Settlement assurance is a means through which the Central Depository can continue to operate and function even in the event of a failure to pay by one of its participants. The BIS/ IOSCO standard in this regard is for the central depository to have arrangements in place to address the failure to pay by the single largest participant, of the largest possible owing amount, without resorting to the un-winding of transactions. The section 48 "contingency fund" is not a settlement assurance fund. Accordingly, the contingency fund should be structured and operated outside the Central Depository, since such a fund addresses investor protection versus broker failure regardless of the existence of the Central Depository. As a result, the Consultants recommend that the *SIA, 1995* be amended to require any clearing agency to establish a settlement assurance fund to address the failure-to-pay problem. There are many ways to address the failure-to-pay issue and the Consultants suggest that the *SIA, 1995* should not attempt to impose any particular method, but rather, should mandate the broad requirement. New subsection 61(2) of the proposed *SIA, 1995* addresses this issue and imposes the broad requirement on a clearing agency to establish such a fund.

3.10.15 Segregation of Client Assets. The fourth area of legislative recommendation is in respect of the broker's duty to segregate client assets from its own. The *SIA, 1995* does not impose a clear obligation on brokers to segregate and account separately for their own securities and the securities belonging to their clients. Such a requirement is clearly set out in proposed section 39 of the General By-Law.

3.10.16 Custody Transactions. The final area of suggested changes in respect of Part VIII of the *SIA, 1995* is with respect to the institutional custody business. The *SIA, 1995* does not appear to recognize the processing or regulation of what might be termed "custody transactions" – i.e. the delivery of securities against payment to an institutional client's custodian. Typically, a custodian would be a large bank that processes transactions on behalf of a client. Certain types of clients (unit trusts, insurance companies, pension funds) are generally required by their own enabling legislation to hold their assets with a bank or trust company of a certain minimum size (for example, in Canada, mutual funds, pension funds and insurance companies are required to hold their securities at a bank or trust company with at least Cdn.$250 million in capital). Since these types of entities are often regulated by another agency, there can be conflicts in regulation.

3.10.17 Jurisdiction over Custodian. The Consultants recommend that the *SIA, 1995* be amended to clearly set out the scope of the TTSEC's authority to regulate this aspect of a custodian's business. To effect this recommendation, the Consultants recommend that the TTSEC and the Central Bank enter into discussions to co-ordinate consequential amendments, if necessary, to the *SIA, 1995* and other legislation.

3.10.18 *Companies Act*. The Consultants also recommend changes to the *Companies Act* in respect of securities clearance and settlement which are included in Chapter Six of this Interim Report.

3.10.19 The Rules of the Central Depository. The rules of the Central Depository have been based on the rules of the Canadian Depository for Securities Ltd. ("**CDS**"), Canada's primary settlement and clearing organization. However, the CDS rules which form the basis for the current rules of the Central Depository are older service rules and do not conform to current international standards in a number of areas, particularly with respect to finality of payment and risk management. As a result the Central Depository's rules do not cover the situation where they do not receive a net payment owed by one of their participants and do not specify that payment, when made, should be made using Central Bank funds (it is not clear if even these type of payments are "final and irrevocable"). Most of the BIS/IOSCO recommendations target this one specific issue. The Central Depository should review and revise its rules to address international standards, in particular to address the issue of a participant default. The review and revision of these rules is, however, beyond the scope of the mandate of the Consultants.

3.11 Part IX: Dealings By Persons Connected With Issuers (Insider Dealing)

3.11.1 Insider Dealing and Insider Reporting. Part IX addresses both insider dealing and insider reporting requirements (the term "insider" is used in this Interim Report to refer to "persons connected to a reporting issuer" as defined in proposed Part IX of the *SIA, 1995*). The Consultants recommend a number of significant changes in this area.

3.11.2 Objectives of Insider Dealing Regulation. The objectives of securities regulation are the protection of investors and the fostering of fair, efficient and transparent markets. Insider dealing is prohibited conduct in all major financial markets as conduct that is contrary to these objectives. It is prohibited for a number of different reasons including the desire for fairness in financial markets, the need to enhance investor confidence and encourage timely disclosure of price sensitive information, while deterring conduct on the part of insiders which often involves a breach of trust or duty. For markets to operate successfully, investors must have confidence that there is a level playing field and that insiders are not benefiting to the detriment of public investors through access to insider information. The belief on the part of investors that "insiders" are profiting unfairly from the use of "inside information" undermines investor confidence and hinders market development. Fairness is a touchstone of securities regulation and a basic principle set forth by IOSCO.

3.11.3 Part IX Changes. The Consultants recommend significant changes to Part IX (Dealings by Persons Connected With Issuers) with the aim of:

(i) clarifying the prohibitions in this Part to ensure that both insiders and the marketplace fully understand what conduct is prohibited;

(ii) permitting fair and effective enforcement of violations;

(iii) fostering investor confidence in the securities marketplace;

(iv) creating a level and fair playing field between those persons connected to reporting issuers and who thereby may have access to such material information, and those persons who do not have access;

(v) increasing transparency by enhancing the quality and timeliness of information on securities dealings by directors and substantial shareholders; and

(vi) bringing Trinidad and Tobago's regime in line with international standards.

3.11.4 Conceptual Approach. The basic conceptual approach to insider dealing is that persons commonly known as "insiders", who have access to price sensitive information, must either disclose and disseminate that information to the market or they must refrain from trading. Similarly, an insider who has price sensitive information acquired as a result of his connection to the issuer must not disclose that information to other persons except in the necessary course of business. Outsiders who learn information from an insider are similarly prohibited from trading.

3.11.5 Illegal Use of "Undisclosed Price Sensitive Information". Current section 121 of the *SIA, 1995* prohibits certain trades by connected persons with knowledge of undisclosed information. These provisions are technical and do not appear to reflect a consistent conceptual approach to the subject of insider trading. This makes it difficult for market participants to understand clearly what activity is prohibited and why. Further, it is the Consultants' view that it would be difficult to prosecute offences under the existing legislation.

3.11.6 Current Defences. Current section 124 provides a number of defences to current section 121. Under the current subsection 124(1)(a) an insider is not prohibited from trading with knowledge of price sensitive information where he can demonstrate that making a profit or avoiding a loss by use of the inside information was not his primary motivation in trading. Further, under current subsection 124(1)(d) a director or employee with knowledge of price sensitive information is permitted to acquire shares up to one half of one percent of the issued share capital of the issuer over a period of one year. These defences are not consistent with the objectives of regulating insider trading since they permit insiders to trade with knowledge of price sensitive information. The better approach is to require the reporting issuer to disclose the price sensitive information to the market so that there is a level playing field. If the issuer is not prepared to make the disclosure, then

insiders who have knowledge of the inside information should be strictly prohibited from trading.

3.11.7 Proposed Legislation. Two operative provisions (proposed sections 138 (insider trading prohibition) and 139 ("tipping" prohibition) of the *SIA, 1995*) would operate to clearly prohibit certain uses of "undisclosed price sensitive information" by persons connected to a reporting issuer, including trading for their own account, counselling others to trade, and disclosing the information prior to its general dissemination, other than in the necessary course of business.

3.11.8 Connected Persons. The Consultants recommend that the determination of who is a "connected person" be objectified and simplified by deeming certain persons to be "connected" to a reporting issuer. Under current subsection 120(2), a subjective assessment may be required which may make it difficult to determine whether any particular individual is in fact connected to a reporting issuer. For example, in the case of an officer or employee, two subjective assessments are currently required. The first is to determine whether such person may reasonably be expected to have access to price sensitive information and the second requires a determination of whether such person would reasonably be expected to not disclose such information except in the performance of his functions. In the Consultants' view, such determinations make it difficult for individuals to determine whether they are prohibited from trading under the legislation, and make it difficult for regulators to have the ability to prosecute individuals for offences. As a result, the Consultants' recommend a deeming section (proposed section 137(2)) whereby all senior officers are deemed to be "insiders" as well as directors and significant securityholders (i.e. those holding more than 10% of the outstanding voting securities of the reporting issuer). Consistent with best international practice, no subjective assessment is required. On the bases of their close relationship with the reporting issuer, these persons are deemed to be connected to the reporting issuer and subject to the prohibitions on trading, and informing others of undisclosed price sensitive information, set forth in proposed sections 138 and 139, respectively. Certain other persons, who may be privy to such information, namely experts retained by the reporting issuer and persons engaging, or proposing to engage in, any business activity with the reporting issuer, are also deemed to be connected to the reporting issuer.

3.11.9 Information About Another Issuer. Current sections 121(2) and (4) prohibit insiders of one issuer from trading in securities of a reporting issuer where the two companies are involved in a business transaction or the first company is planning to make a take-over bid for the issuer. This type of activity remains prohibited under the proposed changes to Part IX. This is achieved by deeming any person who is contemplating such a business transaction (which would be price sensitive for the reporting issuer) or take-over bid to be connected to the reporting issuer (proposed paragraphs 137(2)(d) and (e)). As well, by the application of paragraph 137(2)(f), individuals employed by, or who are directors or officers of, entities proposing or engaging in those transactions would also be deemed to be connected to the

reporting issuer if they obtain undisclosed price sensitive information regarding the reporting issuer. As a result, all of these persons would be generally prohibited from trading under the revised sections 138 and 139.

3.11.10 Prohibition on All Trading. As noted, it is proposed that an insider or connected person be prohibited from trading on undisclosed price sensitive information until that information is publicly disclosed and disseminated. The prohibition would apply regardless of whether the trading is on a securities exchange or off-exchange.

3.11.11 Profit Motive. Current section 124 of the *SIA, 1995* provides that insider trading is not prohibited unless the trading was with a "view to making of a profit or the avoidance of a loss whether by himself or another person, by the use of that information". This approach is conceptually unsound in that it permits trading with the benefit of undisclosed price sensitive information and also creates serious enforcement difficulties since it is difficult to prove motivation or what is in a person's mind. There is great difficulty trying to establish whether a person actually "used" the undisclosed price sensitive information in the conduct of a trade with a "view to making of a profit or the avoidance of a loss" or whether the trade was allegedly made with some other purpose in mind. Subsection 137(5) deems any person who trades with "knowledge" or "possession" of undisclosed price sensitive information to have traded the security as a result of his knowledge or possession, unless shown to the contrary by him. A rebuttable presumption puts the onus on the individual with the "knowledge" or "possession" of undisclosed price sensitive information to show that they did not use such information contrary to Part IX. This question of whether insider information was actually used by the insider in conducting trades while it was in his possession has been litigated in the United States.

3.11.12 "Tipping". Connected persons are prohibited from disclosing price sensitive information to third parties (i.e. "tipping") other than in the necessary course of business (proposed section 139(2)). The suggested amendment eliminates the requirement on the person connected to the reporting issuer to make a determination whether the person to whom information is conveyed (i.e. the "tippee") would reasonably be expected to use the information for the purpose of a purchase or sale of a security.

3.11.13 Price Sensitive Information. The current definition of "price sensitive information refers to "unpublished" information which, if generally known, "might" reasonably be expected to materially affect the price or value of the securities. The revised definition proposed by the Consultants refers to "undisclosed" as opposed to "unpublished" price sensitive information, adjusts the standard of importance of the information from "materially" to "significantly", and changes the subjective standard from "might" to "would" reasonably be expected to significantly affect the price or value of securities of the reporting issuer. The Consultants are of the view that the use of the term "undisclosed" as opposed to "unpublished" is more appropriate given the lack of any obligation in the *SIA, 1995* to "publish" information. As well,

changing the standard from "materially" to "significantly" would make the standard consistent with that presently associated with a "material fact" and a "material change" where the "significant" standard is used. To do otherwise, presents a risk that, a person interpreting the legislation, may find a fact to be a "material fact" but not "price sensitive information" on the basis that the same fact is "significant" but not "material". In the Consultants' view this distinction is somewhat artificial. Finally, the change from "might" to "would" has been made for two reasons. The first is legislative consistency. Under the present *SIA, 1995*, three standards are used. "Would" is used for a material change; "could" is used for a material fact; and "might" is used for price sensitive information. Given the obligations associated with the disclosure of "material facts" and "material changes", and the prohibition associated with trading on "price sensitive information", a uniform standard is appropriate. Second, given the penalties associated with inappropriate trading, the higher standard of "would", is, in the Consultants' view, more appropriate and consistent with similar legislation in other jurisdictions.

3.11.14 Dissemination. A separate provision (proposed subsection 137(4)) would deem price sensitive information to be "generally disclosed" twenty-four hours following the time of public dissemination by way of a press release of the price sensitive information.

3.11.15 Defences. The General By-Law (section 77) includes an "ethical" or "Chinese wall" defence in the case of persons that may be liable under proposed Part IX. The defence would, in essence, limit the liability of firms whose directors, officers or employees engage in trading activities where the firm has undisclosed price sensitive information provided that the firm has implemented and maintained reasonable policies and procedures to prevent contraventions of these prohibitions and persons with actual knowledge are not involved in the trading activity. Multifunctional securities and other firms may engage in activities such as providing underwriting or advisory services that may result in the firm being privy to inside information. Meanwhile, in another part of the firm, its employees are engaging in trading activities on behalf of clients or for their own account where, in fact, they do not have knowledge of the undisclosed price sensitive information. Accordingly, the General By-law recognizes the reality of modern business and provides an exemption where appropriate measures are taken by the firm to safeguard the information so that it is not available to other parts of the firm.

3.11.16 Knowledge of Counter Party. There may be situations where two insiders wish to trade in securities of an issuer off the market where both have knowledge of the inside information. Such trades do not offend the underlying objectives of regulating insider trading and, accordingly, a defence is provided in such circumstances in the General By-Law (section 77).

3.11.17 Exemptions. The Consultants recommend that the existing exceptions to the prohibitions against insider trading be curtailed. A number of the exceptions do not appear to have any sound policy basis. The existing exemption in current paragraph

124(1)(d) of the *SIA, 1995* which permits "insider trading" by directors and employees up to one-half of one percent of the share capital of the issuer in any one year period would be deleted. The basic standard of fairness should be that persons who have access to undisclosed price sensitive information should not be able to use that information for their personal benefit and to the detriment of other investors, in any amount. This is a principle consistent with international best practice.

3.11.18 Sanctions. A person who commits a serious breach of the prohibitions on insider trading or tipping would be subject to increased sanctions. The starting point should be that the insider who engaged in unlawful insider trading should not keep the fruits of his misconduct. Financial penalties should take into account the profit made or loss avoided. It is proposed that the penalty on summary conviction would be not less than the greater of $200,000 and the profit made or loss avoided, and six months in prison (proposed subsection 144(2)(a)). The financial penalty on indictment is proposed to be not less than the greater or $400,000 and double the profit made or loss avoided (proposed subsection 144(2)(b)). The potential prison term would remain at two years. The court would be given the discretion to impose both a fine and a prison term. By way of comparison, the recently revised penalty for insider trading in Ontario is now a minimum fine equal to the profit made or loss avoided, and a maximum fine equal to the greater of Cdn.$5 million (approximately TT $23.5 million) and triple the profit made or loss avoided. The potential term of imprisonment is now five years less a day. Insider dealing would also be prosecuted on a civil basis before the Tribunal (as discussed in Chapter 4).

3.11.19 Right of Action. A person who trades with another person who is trading in violation of the prohibition against insider trading (proposed section 138) is effectively at an unfair disadvantage and may incur financial loss as a result. Given the difficulties that have historically been associated with pursuing a remedy at common law in such circumstances, the Consultants recommend that a specific right of action for either damages or rescission, but not both, be made available to the wronged person. This is proposed to be included in the civil liability part (Part X, proposed section 148) of the proposed *SIA, 1995*. As a result, the aggrieved person will be able to make a claim using a civil standard of proof and obtain damages from the person he sold his securities to, or purchased them from, where it can be shown that the purchaser or vendor (as the case may be) traded with knowledge or possession of undisclosed price sensitive information contrary to section 138 of the proposed *SIA, 1995*.

3.12 Part IX: Dealings By Persons Connected with Issuers (Insider Reporting)

3.12.1 Rationale for Insider Reporting. It is standard international practice to require insiders to report their ownership of, and transactions in, securities of issuers of which they are insiders. Public reporting of trading by insiders provides valuable information to the market and can affect the market's evaluation of the securities. The requirement to report all trading has a salutary effect in encouraging the

disclosure of price sensitive information, discouraging insider trading and facilitating its detection. The requirement to properly disclose any trading and the publication of information on the trading makes it less likely that an insider will trade on undisclosed price sensitive information. If the insider trades on inside information and reports his trading, the report will draw attention to the possible misuse of information. However, the failure to report trading (including trading through nominee accounts) will, if detected, provide evidence of the insider trading as well as constituting a breach of insider reporting requirements. In the circumstances, insiders are discouraged from insider trading and conversely they have a greater incentive to disclose the price sensitive information to the market (or less of an incentive to keep the information confidential). Therefore, a properly functioning system of insider reporting (including publication) plays a vital role in informing investors and policing markets.

3.12.2 Current Provisions Defective. Current section 122 of the *SIA, 1995* (disclosure of beneficial interest in share capital) and the current *Companies Act* provisions regarding insider dealing disclosure are deficient in a number of ways (and which are addressed by the proposed section 140 of the *SIA, 1995*):

(i) There is no centralized registry for all reporting issuers and insiders through which the public has access to timely information on trading by insiders.

(ii) While the director and substantial shareholders registers kept by each company shall be given to the TTSEC (under sections 179(1) and 184(1) of the *Companies Act*), there is no subsequent obligation on the TTSEC to make the information publicly available. As a result, the investing public is not assured of receiving timely access to information about an insider's holdings in the issuer and the trading activity of the directors and substantial shareholders.

(iii) Substantial shareholders are required to notify the company only when they become or cease to be substantial shareholders (section 182 of *Companies Act*) but they are not required to report purchases or sales on a timely basis. This is inconsistent with internationally accepted standards, where not only must substantial shareholders report when they become substantial shareholders, but they must continue to reporting their trades in securities while they remain substantial shareholders. Of more debate internationally is the threshold test for being a substantial shareholder. The 10% standard currently in the *SIA, 1995*, is in the Consultant's view, the minimum acceptable standard. Other jurisdictions are moving to a lower test, as in the United States, where 5% has been the accepted standard for decades. The Consultants would recommend that the TTSEC monitor these developments and consider a 5% test for substantial shareholders in the future.

(iv) There is no insider reporting regime universally applicable to all reporting issuers. Directors and substantial shareholders of reporting issuers that are companies under the *Companies Act* must comply with its provisions. Those that are not, are only subject to the section 122 *SIA, 1995* provisions, which do not require insider reporting of beneficial interests in a reporting issuer, but simply allows a reporting issuer to determine who its beneficial securityholders are, should it so choose.

(v) The time frame for reporting is inconsistent (being seven days for directors to report to the issuer and fourteen days for substantial shareholders to give notice to the issuer) and not in line with the more rapid dissemination of insider information that is consistent with international best practice.

(vi) The current insider reporting provisions do not include "senior officers" – only directors and substantial shareholders are required to report. The economic interests of management in the enterprise, those people who have day-to-day operational control of the business, may be as relevant to the investing public as a director's economic interest.

(vii) The penalties for failure to file a report are inadequate. Under the *Companies Act*, the failure to file a report with the issuer by a director or substantial shareholder is subject to the general penalty provisions of section 513 of the *Companies Act*, which provides for a maximum fine of only ten thousand dollars. A company which fails to provide its register of director holdings to the Commission under section 179 of the *Companies Act*, or its register of substantial shareholders to the Commission under section 184 of the *Companies Act*, is subject to only to this limited fine.

3.12.3 Summary of the Proposed Amendments. Proposed section 140 would require persons who are connected to the reporting issuer because they are:

(i) a director or senior officer of the reporting issuer (or of an affiliate); or

(ii) a person that beneficially owns securities carrying more than 10% of the votes attached to all outstanding voting securities of the reporting issuer;

to report their holdings in securities of the reporting issuer. Such a report would be required to be filed with the TTSEC within five business days of first becoming deemed to be connected to a reporting issuer, and thereafter within five business days of every subsequent trade in securities of the reporting issuer. A copy of the

report would also be required to be sent to the reporting issuer (proposed subsection 140(7)).

3.12.4 Securities (Including Derivatives and Convertibles). The obligation to disclose dealings by directors and substantial shareholders captures all securities of the reporting issuer, directly or indirectly, or over which control or direction is exercised. This would include securities that are convertible or exchangeable for securities of the issuer and any right to subscribe for securities. It would also include third party derivative securities related to the reporting issuer**.** The definition of "derivative securities" would be an instrument, agreement or security, the market price, value or payment obligations of which are derived from, referenced to or based, on an underlying security, interest, benchmark or formula.

3.12.5 Threshold for Reporting Obligation. As discussed above, the Consultants recommend that the TTSEC consider reducing the substantial shareholder threshold to 5% which is the threshold in the United States, Australia, Japan, Hong Kong and Singapore. The United Kingdom has a 3% disclosure threshold while the threshold in Canada is 10%.

3.12.6 Timing of Notification. International practice in the timing of reporting varies from as little as two business days for insider reporting under securities laws of the United States, the United Kingdom and Singapore, to three business days in Hong Kong to ten calendar days in Canada. (Immediate disclosure is required for certain insiders in European jurisdictions such as Norway.) We note that the Final Report of the Securities Review Committee in Canada recently recommended that the current ten day period that applies in Canada be reduced once the new system for electronic disclosure of insider trading is operational. (The new System for Electronic Disclosure by Insiders ("**SEDI**") became operational in July, 2003.) The present requirements in the *Companies Act* are 7 days for directors and 14 days for substantial shareholders. The Consultants view five business days as an appropriate period of time consistent with international best practice and recommend that it be applicable to directors, senior officers and substantial shareholders.

3.12.7 Publication of Insider Reporting. It is standard practice internationally for insider trading reports to be filed with the securities regulator and for the regulator to make the information publicly available as soon as possible. (In some countries the reports may be filed with the stock exchange which maintains a public register.) We recommend that insiders be required to file notification of their interests in securities and their trading activity with the TTSEC in prescribed form. (The prescribed form is Form No. 7 of the draft General By-law.) The TTSEC in turn is obligated to make the information publicly available. It should also consider making the information available on its web site.

3.12.8 Electronic Filings. In the United States and Canada information on trading by insiders of a particular public company or trading by a particular insider in securities of all public companies of which that person is an insider is available electronically

(www.sec.gov and www.sedi.ca, respectively). While such a system may not be appropriate for Trinidad and Tobago on a cost-benefit basis, it may be possible to achieve a reasonable facsimile by posting the holdings and trading information of insiders on the company website or the TTSEC website.

3.12.9 *Companies Act*. Sections 179 and 181 of the *Companies Act* deal with reporting by directors and substantial shareholders and the maintenance of registers of directors holdings and those of substantial shareholders. With the introduction of the proposed system for insider reporting into the *SIA, 1995*, the *Companies Act* provisions become duplicative and redundant. The *Companies Act* provisions should either be repealed or amended so as to be consistent with those in the *SIA, 1995* or compliance with the *SIA, 1995* should be deemed to constitute compliance with the *Companies Act*. If the *Companies Act* is amended so that persons who comply with their Part IX *SIA, 1995* reporting obligations will also be deemed to have complied with the comparable requirements in sections 179 and 182 of the *Companies Act*, the company would still be required to keep a register of the directors and substantial shareholders' holdings. However, the information would be provided to them under Part IX of the *SIA, 1995*. Alternatively, these sections may be repealed in which case no statutory register would be required to be kept, and all reporting would be an *SIA, 1995* matter only. In either case these changes are aimed at satisfying the basic principle of providing information to investors in a timely manner while avoiding duplicative and unnecessary regulation. While the Consultants have no strong view either way, we propose that the *Companies Act* be amended to provide that persons who comply with their reporting obligations under the *SIA, 1995* will be deemed to have complied with the comparable requirements in the *Companies Act*.

3.12.10 Sanctions. The current monetary sanctions for failure to file to report required under Division 8 of the *Companies Act* are minimal. The proposed penalties for failure to report or for the filing a false report under the revised Part IX of the proposed *SIA, 1995* would be more substantive:

(i) on summary conviction, to a fine of up to fifty thousand dollars or to imprisonment for up to three months, or both; or

(ii) on conviction on indictment, to a fine of up to one hundred thousand dollars or to imprisonment for up to six months, or both.

3.13 Part X: Civil Liability

3.13.1 Part X Changes. Part X of the *SIA, 1995* addresses civil liability and the rights of investors in the case of misrepresentations and other violations of the *SIA, 1995*. The Consultants recommend a number of changes to clarify the rights of action, and, as suggested by several commentators, significant changes in order to grant investors a right of action for damages for a misrepresentation in an offering document (other than a prospectus) and rights of action in connection with insider trading and market manipulation.

3.13.2 Right of Action for Damages for a Misrepresentation in a Prospectus. The civil liability provisions should provide that as between an issuer and an investor, in the event of a misrepresentation by the issuer, an investor should be permitted to recover its investment, and as between investors and directors of such an issuer, the investor should be able to seek recovery of damages from the directors where the directors have not performed the necessary due diligence. The Consultants recommend that section 128 (proposed as section 145 – liability for misrepresentation in a prospectus - damages) be amended to make it clear that a purchaser has a right of action for damages, not only against the issuer but also against its directors, experts, promoters and other persons who sign certificates in a prospectus. The Consultants also recommend the consistent use of the term "misrepresentation" (which is defined) rather than "untrue statements" or "willful non-disclosure". The concept of "willful non-disclosure", it is suggested, is problematic because it requires an intention to not disclose. The result may be that non-disclosure in a prospectus would not be at all "willful", nevertheless the unsuspecting investor may have lost his investment once the non-disclosure comes to light. Such a standard provides little deterrence to issuers, directors and other persons responsible for preparation of a prospectus. So long as the omission - the non-disclosure - is not "willful", there is no liability, even if negligent. This is not an appropriate standard and does not provide investors with an internationally accepted level of protection. The standard, as it is in other jurisdictions, including Canada and the United States, should be one where responsible persons are liable for a misrepresentation, unless they have conducted reasonable due diligence aimed at ensuring the accuracy of the prospectus. This is reflected in the proposed changes to section 145 including the due diligence defence in proposed subsection 145(3). The Consultants recommend, however, that the issuer and selling securityholder be liable for any misrepresentation and not have the benefit of the due diligence defence.

3.13.3 Right of Action for Rescission for a Misrepresentation in a Prospectus. With respect to current section 129, the Consultants recommend that it, like existing section 128, be amended to use the concept of "misrepresentation" throughout. As well, the Consultants are also recommending that the right of action for rescission be limited only to the initial purchaser. In the Consultant's view, in a world of dematerialized transfers and record entry transfers of securities through the Central Depository, it would become a practical impossibility to identify a security acquired under a prospectus versus one acquired in a secondary market trade. The evidentiary burden in attempting to establish a chain of subsequent purchasers would be difficult, if not impossible to establish.

3.13.4 Right of Action for Damages for Misrepresentations in Offering Documents other than Prospectuses. Another significant change recommended to Part X is a basic right of action for damages for misrepresentations made in offering documents, other than prospectuses. This suggestion was made by several commentators and reflects a growing reality that offering memorandum, term sheets, and private placement memorandum are increasingly used to market securities under prospectus exemptions, and are increasingly relied upon by private placement purchasers. Under

the proposed changes to Part VI, this may become increasingly the case as "sophisticated purchasers" demand "offering documents" prior to purchasing under a prospectus exemption. The right of action would be available against the issuer and the selling securityholder only. It would only apply to "offering documents", being documents "prepared primarily" for delivery to a purchaser to assist in making an investment decision (proposed subsection 147(2)). The proposed right of action is found in section 147.

3.13.5 Statutory Secondary Market Civil Liability. A statutory civil liability regime for misrepresentations in offering document leads to the issue of civil liability for misrepresentations in secondary market disclosure. The *SIA, 1995* and the proposed *SIA, 1995* do not contain statutory civil liability provisions for misrepresentations made in secondary market disclosure documents such as financial statements, press releases or material change reports.

3.13.6 Present Position on Secondary Market Civil Liability. At present, the TTSEC has the ability to prosecute reporting issuers for breaching disclosure obligations, and a fine would be paid to the TTSEC – compensation would not be made to a purchaser who may have purchased the security on the Stock Exchange at a time when there was an uncorrected misrepresentation in a disclosure document. An aggrieved purchaser may have common law rights of action in these situations, however, they have generally been considered inadequate.

3.13.7 Statutory Civil Liability Regime Should Develop In Time. The availability of statutory rights of action for secondary market disclosure continues to develop in a number of jurisdictions. Statutory civil liability has also been a feature of United States securities laws for many years. In Canada, statutory civil liability for secondary market disclosure has only recently been passed into law, but not yet brought into force. Given generally that more purchasing takes place in the secondary market than under a prospectus, a civil liability regime for secondary market purchasers should, in time, be implemented in Trinidad and Tobago.

3.13.8 TTSEC to Monitor Marketplace. It is recommended that this implementation occur only after reporting issuers and their advisors, as well as the TTSEC, have had the time to adjust to the proposed additional requirements of the Part V continuous disclosure regime. In the intervening period, it would be incumbent on the TTSEC to effectively monitor reporting issuer continuous disclosure filings and prosecute offending reporting issuers who do not comply with the disclosure obligations, or who make misrepresentations in those filings, as provided for under proposed section 85 (disclosure offences) in Part V. As well, the TTSEC should continue to monitor the developments in this area of the law globally, as the standards for such a regime continue to evolve.

3.13.9 Civil Liability for Insider Trading. Proposed section 148 (civil liability for insider trading) and section 149 (civil liability for market manipulation) are two entirely new provisions which, if implemented, would significantly increase the recourses available

to aggrieved participants in the securities markets. Proposed section 148 provides a basic right of action for a purchaser, or seller, against a person who trades with them in contravention of the insider trading prohibition proposed for section 138 of the *SIA, 1995*. The aggrieved person would have the explicit right to seek damages or rescission of the trade against the person who traded with knowledge or possession of undisclosed price sensitive information. Accordingly, persons who suffer damages because an insider traded with the knowledge of undisclosed price sensitive information will have specific legal recourse. This private right of action would be in addition to the powers of the TTSEC to prosecute a breach of Part IX before the Tribunal. Such statutory private rights of action are commonplace in the United States. Statutory rights are less common elsewhere internationally, but the concept is becoming increasingly accepted. At this point the Consultants view the granting of the right of action as the first step. How the right is ultimately utilized in Trinidad and Tobago will be a function of the parties involved and, importantly, how the courts view the provision in light of the common law surrounding breach of statute. The Consultants suggest that over the longer term, the TTSEC monitor how this right of action is utilized, and determine if additional clarifications to the right (such as how damages are to be measured) is necessary, based on marketplace experience.

3.13.10 Civil Liability for Market Manipulation. Proposed section 149 (civil liability for market misconduct) acts in a substantially similar manner to proposed section 148. This proposed section provides that any person who contravenes the market manipulation provisions of proposed section 100 to 105 (including the market actor conflict of interest provision in section 106), is liable to any person who suffered a loss as a result of that breach, subject to any defences that they may have available (proposed subsection 149(2). Accordingly, an investor who suffers a loss because a person has maintained an artificial price on the Stock Exchange in contravention of proposed section 100 (false trading and artificial prices on a securities exchange), would be able to seek compensation for the loss that he suffered.

3.13.11 Civil Liability for Market Actor Conflict of Interest. Proposed section 106 prohibits a market actor from recommending a trade in a security that is not suitable to a client given his "investment objectives, financial situation and needs". A breach of this section would give the aggrieved client the opportunity to seek damages from the market actor on the same basis as the civil liability provisions for market manipulation. The proposed civil liability provisions should deter market actors from making inappropriate recommendations to clients.

3.14 Part XI: Enforcement

3.14.1 Part XI Changes. The main recommended changes to Part XI are the enhancement and elaboration on the by-law making power of the Minister, based on recommendations made by the TTSEC, and clarifying the order-making powers of the TTSEC.

3.14.2 Consolidation Of By-Law Making Authority. The Consultants recommend that the areas where by-laws may be prescribed be consolidated in the proposed section 151 (by-laws) for ease of reference. As well, to address concerns about possible legal challenges to the TTSEC jurisdiction in prescribing by-laws, the Consultants suggest that the areas of by-law making power be described in detail thereby reducing the likelihood of a successful legal challenge. The Consultants suggest 43 main heads of by-law making authority, and numerous sub-headings. Should by-laws be made outside these heads of authority, aggrieved persons would have access to the remedy under current section 137 (proposed to be renumbered as section 159) to appeal the application of the by-law to him, and the Court of Appeal is empowered to revoke the by-law should it find that it exceeds the TTSEC's jurisdiction. Accordingly, there would be (as there currently are) a number of checks and balances in respect of the making of subordinate legislation – the Minister, Parliament and the Court of Appeal have important roles to play. It should also be noted that following discussions with the TTSEC and submissions from market participants, the Consultants are not recommending any change to the process of by-law making currently set out in Part XI.

3.14.3 General By-Law Making Power. The Consultants also recommend a general by-law making power in section 151 (subsection 151(2)). This power would help the TTSEC to respond quickly to the changing needs of the marketplace in the eventuality that no specifically enumerated head of by-law making power in subsection 151(1) provided the relevant authority. In the Consultants' view, such a power would necessarily be circumscribed by the purposes of the *SIA, 1995* and the functions of the TTSEC, and accordingly, the TTSEC would not be in a position to simply make a by-law unless it was within the scope of the *SIA, 1995*.

3.14.4 Order Making Power Of The TTSEC. In the current *SIA, 1995*, the TTSEC has limited specific order making power under current section 133 (power to make orders), current section 141 (cease trade orders), current section 142 (certain public interest orders), and current section 143 (penalty orders). The Consultants propose revisions to these order-making powers so that the TTSEC will be in a position to more effectively address securities market violations, and respond to the changing needs of the marketplace.

3.14.5 Cease Trading Orders. Proposed paragraph 153(2)(c) gives the TTSEC the authority to order that trading cease in securities of a reporting issuer where the issuer fails to comply with the securities laws. Currently, the TTSEC has the power to cease trading securities in connection with a distribution (current subsection 141(1)) and to order cease trading (current subsection 141(2)) where a material fact relating to the reporting issuer has not been disclosed, or it is in the public interest to do so. In the Consultants' view, there should also be the explicit power available to the TTSEC to order cease trading for non-compliance with the *SIA, 1995* or the by-laws by a reporting issuer. It is expected that this power would be used only in necessary cases by the TTSEC, and not for minor infractions. As presently provided for, such orders could only last a maximum of fifteen days without a proper hearing. Such a power is

predicated upon the protection of investors. Where reporting issuers flagrantly violate their reporting or other obligations, the public should not be purchasing those securities until the issuer complies.

3.14.6 General Exemptive Power Of The TTSEC. Section 133 (proposed to be renumbered as paragraph 154(1)(i)) would allow the TTSEC to exempt any person, market actor, or self-regulatory organization from any requirement of the *SIA, 1995* or a by-law, if it is in the public interest. Flexibility in modern securities markets is crucial to effective regulation and efficient capital markets. It is impossible to predict with any certainty how the markets will develop, what products will be introduced, and what issues will arise. Accordingly, a regulatory authority needs the flexibility to exempt persons or transactions from the requirements of applicable securities laws in appropriate circumstances. All such orders would be required to satisfy a public interest test (subsection 154(1)). In the Canadian experience, securities regulators have found that once they have granted exemptions for a particular product or practice numerous times, it becomes appropriate to codify the discretionary exemption through a rule. This may become the practice in Trinidad and Tobago

3.14.7 Public Interest Orders. Proposed section 154 (orders in the public interest) further develops existing section 142. Unlike the power to cease trade securities, orders made under this section could only be made after a hearing of the TTSEC, given the broader powers available to the TTSEC and the potential effect on the person subject to the order. Final TTSEC orders made under this provision would be appealable to the Tribunal under paragraph 38(1)(f) of the proposed *SIA, 1995*. Under proposed section 154, for example, the TTSEC could issue an order, where it was in the public interest, among others, removing available exemptions under the *SIA, 1995* (such as prospectus exemptions or potentially exemptions available to approved foreign issuers), reprimanding any person, or requiring that any documents filed with any government agency also be filed with the TTSEC. This power is in addition to the general exemptive power discussed earlier. These provisions will provide the TTSEC with necessary flexibility to be an effective regulator, while being bound by the procedural safeguards of the *SIA, 1995* and the purposes of the legislation.[8]

3.14.8 Compliance Reviews of Market Actors. The Consultants recommend that the market actor oversight powers of the TTSEC (set forth in re-numbered section 162) be expanded so as to permit the TTSEC to examine or review the books and records of market actors in order to determine whether they are in compliance with the *SIA, 1995* and the by-laws, and regardless of whether or not the TTSEC suspects that securities laws have been violated. Regular compliance reviews of market actors (both office and on-site) are a standard feature of regulatory systems worldwide as are the powers of regulators to conduct such reviews. At present the TTSEC's

[8] Recent Canadian case law has supported the view that the public interest in securities legislation is not vague, but rather confined by the purposes of the legislation. See, for example, *Johnson v. British Columbia (Securities Commission)* (2002) 94 B.C.L.R. (3d) 233 (BCCA).

powers in this are not clearly articulated in the legislation. The proposed *SIA, 1995* would specifically obligate the market actor to provide access to its premises for purpose of a compliance review (proposed subsection 162(2)). At present, the TTSEC's power is limited to investigations where it suspects a breach of the *SIA, 1995* by a "registrant". Such limited powers fall short of the review and compliance powers generally considered to be necessary for effective regulation. The need for such ongoing supervisory and compliance powers has also been noted previously.[9]

3.14.9 Rights of Appeal. Finally, the suggested change in proposed section 158 (appeals for review to Court of Appeal) warrants some comment. The recommended change would make it certain that appeals of final orders of the TTSEC lie generally to the Tribunal under proposed section 38, and not the Court of Appeal. This is consistent with the restructuring of adjudicative and enforcement functions of the TTSEC which is recommended. However, where an appeal of a final order of the TTSEC does not lie with the Tribunal, such final order may be appealed to the Court of Appeal.

3.15 Part XII: Transitional Provisions

3.15.1 No Part XII Changes. No changes have been recommended with respect to Part XII.

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[9] A similar recommendation was also made by Terry Chuppe in the Inter-American Development Bank's 2001 "Diagnostic Study of the Securities and Exchange Commission and Securities Industry of Trinidad and Tobago."