5. SUGGESTED AMENDMENTS TO THE *COMPANIES ACT*

5.1.1 **Introduction**. The Consultants have recommended that the conceptual underpinning of securities regulation in Trinidad and Tobago generally evolve from jurisdiction based on the place of incorporation of the issuer to jurisdiction based on the location of the investor or the trading activity, as well as jurisdiction where a trading activity overseas with a local nexus has an effect on the capital markets in Trinidad and Tobago.

5.1.2 **Harmonization With The Proposed *SA, 2005***. An important component of this recommendation would be the amendment of the *Companies Act* to harmonize it with the proposed *SA, 2005*. *Companies Act* regulation of "public companies" is symptomatic of securities regulation based on the jurisdiction of incorporation of the issuer which results in differing standards being applied to "public companies" that may access the capital markets in Trinidad and Tobago – one standard for those governed by the *Companies Act* and a differing standard for those companies governed by the companies law of another jurisdiction. Entities that are not companies would be subject to yet another set of requirements. Harmonizing regulation of "public companies" in the proposed *SA, 2005* would "level the playing field" and provide uniform regulation for issuers that access the capital markets in Trinidad and Tobago. Accordingly, the Consultants have recommended that a number of provisions of the *Companies Act* be amended.

5.1.3 **Amendments to Accommodate Non-Physical Transfers of Securities**. The *Companies Act* was written assuming that securities transactions would be accomplished with the physical transfer of certificates and with written entries made in the registries of companies. A second set of recommended changes to the *Companies Act* are focused on ensuring that transactions in securities of *Companies Act* companies in Trinidad and Tobago can be accomplished through entries in the record entry systems of the Central Depository.

5.1.4 **Selected Amendments**. The Consultants have not conducted a review of the *Companies Act* and have not had a mandate to do so. We have only reviewed those portions which have an impact on the capital markets in Trinidad and Tobago, or which are impacted by recommendations made to the *SIA, 1995*. Suggested significant changes to the *Companies Act* are discussed sequentially below.

5.1.5 **Interpretation**. Given the recommended changes to the *SIA, 1995*, the Consultants recommend that the definition of "public company" in the *Companies Act* be amended so that a public company would be defined as "a reporting issuer under the *Securities Act, 2005*, as amended from time to time". Accordingly, the definitions between the two acts would be consistent.

5.1.6 **Distribution to the Public**. The Consultants recommend that section 6 (distribution to the public) be deleted. The concepts which are present in it would be

captured by the recommended definition of "reporting issuer" in the proposed *SA, 2005* which would form a part of the revised definition of "public company" described above.

5.1.7 **Shareholder Lists**. Section 125 (list of shareholders), like section 191 (basic shareholder lists), addresses the need for and use of lists of shareholders of a company. With the Central Depository set up as the depository, it will (in time) become the largest shareholder of virtually every company that is a reporting issuer. In Canada, CDS is the "registered" owner of between 95% and 100% of every class of equity security issued. Once the Central Depository has been operating for a period of time, any list developed under either section 125 or section 191 will be virtually meaningless, since it will show the Central Depository as the "registered owner" of virtually all securities of every company. Accordingly, the Consultants recommend that section 125 be amended to require the public company to produce a list of beneficial holders by harmonizing this section with the similar requirements of section 126 of the proposed *SA, 2005* (issuer's duty to request list of participants). Proposed section 126, like section 125 of the *Companies Act*, addresses shareholder lists in connection with the setting of record dates for meetings, dividends and liquidation distributions. Section 126 of the proposed *SA, 2005* requires reporting issuers who wish to set such record dates, to request a beneficial securityholder list from a clearing agency.

5.1.8 **Proxies**. No change is recommended with respect to sections 139 to 147. The basic proxy obligation set forth in this division of the *Companies Act* has served as the basis for the basic proxy solicitation obligation recommended for Part V of the proposed *SA, 2005*. Accordingly, and given the exemption suggested for proposed paragraph 71(5)(b) of the *SA, 2005*, a reporting issuer which complies with this part of the *Companies Act* would be exempt from the parallel provisions in the proposed *SA, 2005*.

5.1.9 **Comparative Financial Statements**. Section 151 requires the directors of a company to place before their shareholders comparative financial statements at every annual meeting of shareholders. With respect to "public companies" (as redefined) and in order to avoid an inconsistency with Part V of the proposed *SA, 2005*, it is recommended that a new subsection (4) be drafted to provide that a public company which complies with the annual financial statement requirements of the proposed *SA, 2005* is deemed to have complied with the section.

5.1.10 **Omission of Prior Year Financial Statements**. Subsections (2) and (3) of section 151, which respectively permit companies to omit comparative financial statement for a preceding year and allow the Registrar to adjust the required periods for financial statements should be amended to exclude public companies. In the Consultants' view, it is inappropriate for public companies to be permitted to omit comparative financial statements for a preceding year and for the Registrar under the *Companies Act* to modify the periods relating to financial statements of public companies. The first subsection is not consistent with the IOSCO standard that

there should be full and accurate disclosure of all financial results. In the Consultants' view, comparative financial information is crucial to investors obtaining a full understanding of the implications of current year financial performance. The second subsection is contrary to the conceptual recommendation that the regulation of capital markets activities of reporting issuers (public companies) should be a matter within the jurisdiction of the TTSEC.

5.1.11 **Summary Financial Statements**. The Consultants recommend that subsections 155(2), (3), (4) and (5) should be repealed, or alternatively, should be amended to exclude public companies. These subsections permit a public company to send summary financial statements to its shareholders in lieu of full financial statements. In the Consultants' view public companies should be required to comply with the more fulsome financial disclosure and delivery requirements of the proposed *SA, 2005*. Timely and full disclosure of financial results is of paramount importance and consistent with international best practice.

5.1.12 **Audit Committees**. Section 157 imposes an obligation on public companies to have an audit committee, and permits companies that are not public companies, to have an audit committee. The Consultants recommend that this requirement for "public companies" to have an audit committee be implemented in the proposed *SA, 2005* in subsection 67(5) (audit committee) where it would also be an obligation on all reporting issuers. The Consultants recommend that an amendment be made to Section 157 to the effect that if a reporting issuer complies with the *SA, 2005* audit committee obligations, it will be deemed to be in compliance with the comparable obligations in section 157 of the *Companies Act*.

5.1.13 **Registers of Directors' Holdings**. The Consultants recommend that sections 179 (register of directors' holdings) and 180 (extending section 179 to associates of directors) of the *Companies Act* be amended. The obligations in the provisions apply only to public companies. Accordingly, and consistent with the recommendation that public company regulation be a matter for the proposed *SA, 2005*, this provision should more appropriately be an *SA, 2005* matter as opposed to a *Companies Act* matter.

5.1.14 **Impact of Proposed *SIA, 2005* Changes**. Part IX of the proposed *SA, 2005* addresses the disclosure obligations imposed on directors under section 179. It goes further to include senior officers and to require as well that the TTSEC publicly disclose the reports filed by such persons regarding their securityholdings in a reporting issuer. Under Part IX of the proposed *SA, 2005* the disclosure obligation would be on the director or senior officer on whom liability may be attached for failing to comply.

5.1.15 **Substantial Shareholders**. Sections 181 to 185 of the *Companies Act* address the issue of substantial ownership of shares in a public company, which is defined as 10% of the total votes entitled to be cast at a meeting of shareholders. Substantial owners are required to disclose this information to the company which is required to

keep a register of substantial shareholders. Again, this requirement is more appropriately an *SA, 2005* matter for the reasons noted in the preceding paragraph. Accordingly, the Consultants recommend that these provisions be amended and reliance placed on the disclosure obligations found in proposed sections 131 and 132 of the *SIA, 2005*).

5.1.16 **Centralized Filings**. As well, the Consultants suggest that maintaining such information with the company is not the most efficient or reliable means to disseminate the information to shareholders or to the marketplace. This would be more efficiently conducted through the TTSEC and its obligation to make all filings with it public (or some other centralized location such as the Stock Exchange or Central Depositary). Insider trading reports for directors and substantial shareholders have been filed with North American regulators for decades. Canadian securities regulators have recently adopted an Internet-based system, SEDI (www.sedi.ca), for the filing and dissemination of such trading data of directors, senior officers and other insiders of reporting issuers. In the United States, such filings are also available on the Internet utilizing the EDGAR service of the United States Securities and Exchange Commission.

5.1.17 **Co-Ordination of Obligations With the Proposed *SA, 2005***. The proposed *SA, 2005* insider reporting obligations are broad so that they capture ownership and trading in all securities of the reporting issuer, directly or indirectly, or over which control or direction is exercised. Consequently, the Consultants recommend that the sections of the *Companies Act* requiring directors and substantial shareholders to report their holdings of, and dealings in, securities to the company (sections 178 and 182) be amended so that persons who comply with their Part IX reporting obligations (specifically proposed section 131), will also be deemed to have complied with the comparable requirements in sections 178 and 182 of the *Companies Act*. The company would still be required to keep registers of directors and substantial shareholders' holdings. The information would also be provided to the company under Part IX of the proposed *SA, 2005* (subsection 131(7)). Alternatively, these sections of the *Companies Act* may be repealed in which case no registers of directors and substantial shareholders would be statutorily required to be maintained, and all reporting by insiders would be an *SA, 2005* matter only. In either case, these changes are aimed at satisfying the basic principle of providing information to investors in a timely manner and avoiding duplication.

5.1.18 **Disclosure of Information to Issuer**. Proposed section 131 (reports by certain connected persons) of the *SA, 2005* would require the 10% shareholder to inform the issuer at the same time that it files a report with the TTSEC. In this way, a company, would continue to be informed on a timely basis of trading activity by its larger shareholders.

5.1.19 **Central Depository**. As currently drafted the director and substantial shareholder disclosure provisions of the *Companies Act* do not make a distinction between registered and beneficial owners of shares. As above noted, the Central Depository

will become the registered owner of more than 10% of the voting shares of almost all listed companies. Accordingly, the Central Depository will attract a disclosure obligation under the *Companies Act* for which there is no policy basis. This discrepancy could be solved by amending these provisions to exclude the Central Depository.

5.1.20 **Shareholders List**. The intent of section 191 is to allow anyone to obtain a list of the shareholders of a company for the purposes of influencing voting at a company meeting or to acquire the shares of the company. As discussed in respect of section 125, the Consultants recommend that this section be amended to provide a procedure similar to that set out in section 126 of the proposed *SA, 2005*, so that the list which is produced is a useful list containing not only registered shareholder information, but information with respect to the beneficial ownership of shares as well.

5.1.21 **Transfer of Shares**. Section 195 deals with the transfer of ownership and is one of the single most important sections of the *Companies Act* that needs to be addressed in the context of the operation of the Central Depository and the dematerialization of securities transfers. This section states that shares may be transferred by written instrument signed by the transferor. This can remain in place to address transfers that continue to be done through certificated settlements. However, section 195 should be amended to address the legal validity of record entries within the systems of a recognized clearing agency as a means of transferring ownership so that there is no question as to the validity of these transfers. A provision similar to that suggested for subsection 118(2) of the proposed *SA, 2005* (transfer of beneficial ownership by record entry) should provide the necessary legal authority for the validity of transfers by record entry.

5.1.22 **Certificates – Duty to Issue**. Section 197 requires a public company to issue a certificate to evidence a transfer. As with section 195, this section needs to be modified to make it possible for companies to issue shares without certificates and to make a transfer of beneficial ownership valid without a certificate.

5.1.23 **Section 198 – Transfer Certificate**. Section 198 states that a company has up to two months to transfer a security. This is the legacy of a market dominated by "buy and hold" investors. Once the Central Depository's operations have become established, most of the transfers that are processed by a company or their transfer agent will be deposits to the Central Depository. These transfers should not take two months to complete. The Consultants recommend that transfers be effected within a five business day period. This is an important issue because if it takes two months to complete a transfer, it will become a practical necessity for the Central Depository to give credit in its books for deposited securities before the transfer is completed. If, for any reason, the transfer is rejected, after the Central Depository has given credit, and allows a participant to trade based on a record entry position, then a situation will exist where there is technically more securities in the market than were issued.

5.1.24 **Definition of "Take-over Bid"**. The Consultants recommend, for purposes of consistency, that the definition of "take-over" bid be amended so that the definition of "take-over" bid used in the Take-Over By-Law is used in the *Companies Act* as well.