EXECUTIVE SUMMARY

1. Stikeman Elliott LLP has been retained by the Trinidad and Tobago Securities and Exchange Commission (the "**TTSEC**") to conduct a review of the *Securities Industry Act, 1995*, its by-laws and associated legislation, and to provide recommendations aimed at bringing the securities regulatory regime in Trinidad and Tobago to the level of international best practice.

2. As part of this mandate, the team from Stikeman Elliott LLP has conducted a review of the existing legislation, held several public meetings with market participants in Trinidad and Tobago, met with important stakeholders including but not limited to, the Central Bank, the Stock Exchange and market actors, reviewed the comments provided by those participants to the TTSEC, and has engaged in numerous discussions with the TTSEC and its staff on the matters and issues raised during the course of the mandate.

3. Several themes emerged in the course of the review. These themes, are reflected in this Executive Summary. The principal recommendations resulting from the mandate are also summarized below.

Significant Changes to Recommendations Made in Interim Report

4. A number of recommendations made in the Interim Report have been modified based on our review and consideration of the comments received and the Consultants continuing review. Throughout the Final Report we have identified these changes. In particular, we have amended our recommendations on such matters as a separate adjudicative body, the incorporation of investment advisers, and name restrictions, initial investment, and disclosure for collective investment schemes. Finally, the Consultants now recommend that the existing *SIA, 1995*, be repealed and replaced with a new *Securities Act, 2005* ("***SA, 2005***"), given the significant number of amendments proposed.

Balanced Approach to Recommendations

5. A number of competing concerns have been identified during the course of the mandate. These include 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.

6. Given the scope of the mandate, and these concerns, we have proposed a balanced approach for the capital markets in Trinidad and Tobago. The recommendations in this Final Report 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 and the financial costs of complying with the proposed changes. In these areas, international best practice is proposed to be achieved in stages in order to accommodate

market development and other local considerations. 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.

The competing considerations and factors that have influenced the Consultants' recommendations are found in Part 2.2 of Chapter 2.

Conceptual Underpinnings

7. Several conceptual and structural changes for securities regulation in Trinidad and Tobago have been recommended by the Consultants. These include the evolution of the basis for jurisdiction in securities regulation in Trinidad and Tobago from issuer-based jurisdiction to investor-based and activity-based jurisdiction which among other things leads to the suggested amendments to the *Companies Act* that move "public company" regulation under the auspices of the proposed *SA, 2005*. On the structure of the TTSEC we recommend the separation of certain adjudicative functions from the policymaking, enforcement and administrative functions of the securities regulatory authority in the country. The proposed separate adjudicative body would hear appeals from decisions of the TTSEC and its staff and civil actions brought by the TTSEC in connection with "market misconduct" offences.

8. In addition, the Consultants are recommending a more prominent use of subordinate legislation, that is, by-laws, in establishing the securities regulatory regime in Trinidad and Tobago. To that end, three new draft by-laws are included with this report – a Collective Investment Scheme ("**CIS**") By-Law, a Prospectus By-Law and a General By-Law. A fourth by-law regulating take-over bids has been previously published by the TTSEC and was the subject of a public meeting in August, 2003. It is being addressed separately from this Final Report.

Part 2.4 of Chapter 2 sets out the Consultants' views for the conceptual underpinnings underlying securities regulation in Trinidad and Tobago.

Registration of Companies and Individuals

9. The Consultants are recommending a significantly revised registration regime for brokers, dealers, traders, underwriters and investment advisers. Of the two most significant recommendations in this area, one is structural and the other is substantive.

10. With respect to structural changes, the Consultants recommend that the detailed requirements for the registration of market actors 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. As a result, many jurisdictions have given the authority for creating and enforcing subordinate legislation to their securities regulatory authority. This has been justified on numerous grounds, including that the legislative body lacks the time to deal with

complex and detailed requirements of securities regulation, 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 that, if the legislative body were required to work out, would result in lengthy delays in the enactment of legislation which delays would be prejudicial to the public interest and the markets. This principle is now reflected in the proposed legislation as the detailed criteria to be satisfied to obtain registration as a broker-dealer, investment adviser, or underwriter (the simplified categories proposed), appear in the General By-Law.

11. With respect to substantive changes, the Consultants are recommending a regime whereby companies and individuals are separately registered, and the categories of registration simplified. Under the proposed *SA, 2005* persons wishing to carry on business as a broker-dealer or underwriter would need to carry on that business through a company. The existing category of 'securities company' is proposed to be deleted.

12. The Consultants acknowledge the comments made by several commentators regarding the proposal in the Interim Report that investment advisers should also be required to incorporate. After review, the Consultants recommend that investment advisers be able to obtain registration whether the investment adviser is an individual or is a company. In either case, there would be no capital requirements for investment advisers, which is justified on the basis that investment advisers would not hold client cash or securities, but only provide investment advice.

13. With limited exceptions, the employees of the registered company that conduct the securities business would need to be registered individually as a director or senior officer, or registered representative.

14. Another important change is a category of temporary sponsored registration for non-resident individuals that conduct brokering or advising activities in Trinidad and Tobago. Such non-resident individuals would need to be sponsored by a broker-dealer or investment adviser in Trinidad and Tobago. These "temporary" market actors, who would already be registered in an approved foreign jurisdiction, would be permitted to conduct these activities in the country for no more than 30 days in a calendar year.

The Consultants recommendations for changes to the registration of brokers, dealers, underwriters and investment advisers can be found at Part 2.7 of Chapter 2.

Reporting Issuer Disclosure Regime

15. Appropriate and timely disclosure of information relating to reporting issuers is a necessary condition for the establishment of fair, efficient and transparent capital markets. The existing continuous disclosure regime in Trinidad and Tobago falls short of international best practice in this area. Accordingly, the Consultants are recommending changes to increase the amount and timeliness of information flowing from issuers to investors. In particular, the proposed revisions to Part V of the *SIA, 1995* would require reporting issuers to:

- prepare and file annual audited financial statements presented in accordance with International Financial Reporting Standards ("**IFRS**") within 120 days of their financial year-end;

- prepare and file a management's discussion and analysis ("**MD&A**") on its annual audited financial statements, which would supplement the financial statements, and would discuss material information and changes about the reporting issuer's financial position that are not readily apparent from reading the financial statements;

- commencing in 2007, prepare and file interim (quarterly) unaudited financial statements presented in accordance with IFRS within 60 days of a quarter end;

- have their chief executive officer and chief financial officer (or their equivalents) certify the accuracy of annual audited financial statements;

- have an audit committee composed of a majority of persons who are not officers and directors (or "non-executive directors"); and

- solicit proxies in connection with securityholder meetings, and provide a minimum standard of information to securityholders with respect to the matters to be conducted at the meeting.

16. To supplement the recommended disclosure requirements, the Consultants are also recommending new offence provisions which would impose liability on directors and senior officers for knowingly authorizing, permitting or acquiescing in the failure of a reporting issuer to comply with its disclosure obligations. As well, auditors who provide false audit reports would face fines and potentially a ban on being the auditor of a reporting issuer for up to five years.

17. Finally, the Consultants are recommending that issuers that are subject to oversight in an approved jurisdiction be exempted from the disclosure requirements in Trinidad and Tobago on the basis that they are already subject to disclosure requirements at least as rigorous in an approved foreign jurisdiction, and that they provide local investors with the same documents provided to investors in the home market. This exemption would be available, provided that the issuer has no more than 10% of its voting securities held in Trinidad and Tobago.

Part 2.8 of Chapter 2 discusses the recommended continuous disclosure regime for reporting issuers.

Distributions and Offers of Securities

18. 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. The Consultants recommend that the concept of "offer to

the public" be removed from the proposed *SA, 2005* and the concept of "distribution" be retained as the sole concept for determining when an issuer would need to prepare, file, and have receipted, a prospectus. A registration statement would be required to be prepared and filed following a distribution of securities and would report on the results of the distribution.

19. The revised definition of "distribution" in the proposed *SA, 2005* would include all treasury issuances of securities of all types of issuers, both private and public. It would also include sales by controlling securityholders. All issuances of securities would attract the prospectus obligation subject to an appropriate set of exemptions from the prospectus requirement, where, for policy reasons, a prospectus is not warranted in order to protect an investor's interests. Exemptions include private placements to a revised group of "accredited investors" (formerly "sophisticated purchasers"). It is recommended that individual "accredited investors" would be required to obtain investment advice in order to utilize the exemption.

20. Securities that are issued on a prospectus exempt basis pursuant to certain exemptions (e.g. accredited investors) would be subject to a "hold period" during which time they could not be traded again without the filing of a prospectus or the use of a prospectus exemption. Certain securities, such as debt of local government entities or certain international agencies, would not be subject to any re-sale restrictions. Securities distributed under a prospectus would be freely tradable by the purchaser, other than a purchaser that is a controlling securityholder.

21. A distribution of asset-backed securities would require specific and more detailed disclosure in a prospectus which qualifies the distribution of the asset-backed securities, including the features or aspects of the 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. The Consultants also recommend that, in order for asset-backed securities to be eligible for sale under a prospectus, the securities would need to have an approved rating (which would be a rating of "investment grade") from an approved rating organization. In the case of prospectus exempt distributions of asset-backed securities, such transactions could not be completed until the purchaser of the asset-backed security had received a prescribed risk disclosure statement (although an investment grade credit rating would not be required).

22. As well, the Consultants recommend that exemptions from the prospectus requirements be made available to approved foreign issuers where the issuer uses the foreign offering documents reviewed and utilized in an approved foreign jurisdiction. There would be little or no review of the documents by the TTSEC. The TTSEC would be relying on the approval process of the securities regulatory authority in the designated foreign

jurisdiction. 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. However, the exemptions would not be available where the approved foreign issuer has more than 10% of its voting securities in Trinidad and Tobago following a distribution, or failed to have a minimum market capitalization.

Part 2.9 of Chapter 2 discusses the recommended changes to the securities offering and prospectus system in Trinidad and Tobago.

Insider Trading and Market Manipulation Offences

23. 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. 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 deterrence of market manipulation is effective legislation prohibiting activities that constitute market manipulation. Accordingly, the Consultants are recommending a number of changes to the existing market manipulations prohibitions under the *SIA, 1995*.

24. Each of the existing market manipulation prohibitions is proposed to be expanded with appropriate additions, including to address the creation of artificial prices for securities and a prohibition against making any misrepresentation to induce a purchase or sale of a security. As well, the Consultants recommend a number of additional new market manipulation offences which prohibit price rigging and the manipulation of prices on a securities exchange.

Insider Trading

25. The insider dealing prohibitions under Part IX of the *SIA, 1995* would now be included with the other market manipulating offences. (The recommendations in this Final Report address both insider dealing and insider reporting requirements (the term "insider" is used in this Final Report to refer to "persons connected to a reporting issuer" as defined in proposed *SA, 2005*)).

26. Insider dealing with knowledge of undisclosed price sensitive information is prohibited conduct in all major financial markets. 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 inside information.

27. Accordingly, the Consultants are recommending changes aimed at, clarifying the prohibition on insider dealing, permitting fair and effective enforcement of violations, fostering investor confidence in the securities marketplace, and increasing transparency by enhancing the quality and timeliness of information on securities dealings by directors and substantial shareholders.

28. The basic recommended approach to insider dealing is that persons commonly known as "insiders", who have access to price sensitive information, must refrain from trading until the reporting issuer has disclosed and disseminated that information to the market. 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. Two recommended provisions 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, counseling others to trade, and disclosing the information prior to its general dissemination, other than in the necessary course of business.

29. In addition, the Consultants recommend that the determination of who is a "connected person" be made more objective and simplified by deeming certain persons to be "connected" to a reporting issuer, including its directors, senior officers, and substantial shareholders.

30. A person who commits a serious breach of the prohibitions on insider trading or tipping would be subject to increased sanctions. Insider trading may be prosecuted on a civil basis before the proposed securities markets tribunal or on a criminal basis before the courts. As discussed below, the securities markets tribunal would have the power to impose civil sanctions such as a fine, require that compensation be paid, or prohibit the person from being a director of a reporting issuer. In the event of criminal prosecutions, it is recommended that the financial penalty on summary conviction would be no less than the profit made or loss avoided (and potentially as high as the greater of one million dollars and double the profit made or loss avoided). The potential prison term on summary conviction would remain at six months. The financial penalty on indictment is proposed to be no less than the profit made or loss avoided (and potentially as high as triple the profit made or loss avoided). The potential prison term on indictment would remain at two years.

Penalties

31. In the Interim Report, the Consultants suggested that the TTSEC consider the adequacy of the potential penalties available under the revised legislation, particularly in light of the general increase in the severity of penalties for securities law violations in North America and elsewhere. After review with the TTSEC and its staff, the Consultants recommend that the maximum financial penalties for indictable offences climb to TT$2 million and to TT$1 million for summary offences. No change has been recommended to the maximum prison sentence of two years (on indictment) or six months (on summary

conviction). Effective market manipulation legislation requires appropriate penalties to deter the conduct.

32. Finally, effective market manipulation legislation requires appropriate penalties to deter the conduct. Market manipulation offences are recommended to be prosecuted either on a civil basis before the securities market tribunal or on a criminal basis before the courts. The tribunal would have greater flexibility in hearing cases and proof would be on the balance of probabilities. However, the tribunal would not have the power to impose criminal sanctions. Where the offence was serious enough to warrant criminal sanctions and evidence sufficient to prove the case to a criminal standard of proof, the matter could be referred to the Director of Public Prosecutions.

Part 2.10 of Chapter 2 discusses the recommended changes to the insider trading and market manipulation provisions.

Insider Reporting

33. It is standard international practice to require insiders to report their ownership of, and transactions in, securities of issuers of which they are insiders. The Consultants are recommending changes aimed at increasing the information available to the marketplace about the activities of insiders, and to ensure that the information is publicly disseminated in a timely manner. Under the recommended amendments, 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, would have 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 connected to a reporting issuer, and thereafter within five business days of a trade in securities of the reporting issuer. Information on trading by insiders would be made publicly available by the TTSEC on a timely basis. The Consultants are also recommending consequential changes to the *Companies Act* in this area.

Part 2.12 of Chapter 2 discusses the recommended changes to the insider reporting system in Trinidad and Tobago.

Statutory Rights of Action

34. The Consultants are recommending a number of changes to clarify the rights of action available to aggrieved investors and to grant investors a right of action for damages in more circumstances than just for misrepresentations in a prospectus (as described below).

35. With respect to civil liability for misrepresentation in a prospectus, the Consultants recommend amendments to make it clear that a purchaser has a right of action for damages against the issuer and its directors, experts, promoters and other persons who sign certificates in a prospectus. The Consultants recommend that the issuer and selling

securityholder be liable for any misrepresentation and not have the benefit of the due diligence defence. Directors and other persons could rely on a due diligence defence.

36. The Consultants also recommend limited rights of action for aggrieved investors in connection with:

    - misrepresentations in offering documents other than prospectuses;
    - insider trading;
    - market manipulation; and
    - breaches by market actors of conflict of interest provisions.

37. The Consultants are not recommending statutory civil liability for misrepresentations made in continuous disclosure documents of reporting issuers. However, as the availability of statutory rights of action for secondary market disclosure continues to develop in a number of jurisdictions, a civil liability regime for secondary market purchasers should, in time, be implemented in Trinidad and Tobago.

Part 2.13 of Chapter 2 discusses the recommended changes to the civil liability provisions.

The By-Law System

38. The Consultants recommend changes designed to enhance and elaborate on the by-law making power of the Minister, based on recommendations made by the TTSEC.

39. The Consultants recommend that the majority of areas where by-laws may be prescribed be included in the proposed Part XI of the *SA, 2005* for ease of reference. Concerns have also been raised about the potential for legal challenges in the areas of by-law making power. As a result, the Consultants suggest 44 main heads of detailed by-law making authority, and numerous sub-headings. Should by-laws be made beyond the TTSEC's jurisdiction aggrieved persons would be able to seek a remedy in the courts. 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 courts all have important roles to play. Public consultation on proposed by-laws would continue to be required.

40. The Consultants also recommend a general by-law making power. 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 expressly provided the necessary authority. In the Consultants' view, such a power would necessarily be circumscribed by the purposes of the *SA, 2005* and the functions of the TTSEC, and accordingly, the TTSEC would not be in a position to make a by-law unless it was within the scope of the *SA, 2005*. As noted above, the making of by-laws are also

subject to extensive checks and balances through the Minister and the "negative resolution" of Parliament.

Part 2.14 discusses the revised by-law making power.

The Securities Market Tribunal

41. The most significant structural change to the regulatory framework is the creation of a separate adjudicative body, which could take the form of a new securities market tribunal (the "**Tribunal**"). The Tribunal, as an *ad hoc* body, would assume many of the adjudicative functions of the TTSEC. Its mandate would be to hear appeals of certain TTSEC and staff decisions, as well as to hear market misconduct cases at first instance brought by the TTSEC.

42. The primary reasons for the recommendation to establish the Tribunal are twofold. First, the performance of the multiple functions can strain the resources of the TTSEC and detract from performance of its other functions. The adjudicative function also calls for different skills than the policy making, oversight and investigation functions. Second, a structure where the staff report to the TTSEC and the TTSEC adjudicates on decisions of staff or disciplinary proceedings brought by the staff, may give rise to concerns about "structural" bias or reasonable apprehension of bias. In recent years, the structure of securities regulatory authorities has been the subject of debate, including in Canada, where recent reports have recommended that multi-functional structure be reconsidered on a priority basis. In November, 2004, the Ontario government announced its support for separation of the Ontario Securities Commission's adjudicative function.

43. As an appellate body, the Tribunal would review decisions of the TTSEC and its staff on matters such as prospectus receipts and market actor registration matters. In its role as a forum for the prosecution of market misconduct offences, the Tribunal would hear matters related to the alleged breach of provisions of the proposed *SA, 2005* dealing with insider trading, market manipulation, maintaining or creating artificial prices for securities, and breaches of reporting issuer disclosure obligations.

44. While continuing to endorse the concept of a separate adjudicative function, the Consultants acknowledge the concern expressed by a number of commentators with respect to resources available to set up a new Tribunal. In our view, the separation of the adjudicative function is more important than how that separation is achieved. A number of options are noted in the Final Report, all of which minimize the resources required.

A full discussion of the proposal for a Tribunal or similar adjudicative body, including its proposed structure, functions, and powers, can be found in Chapter 3.

Proposals to Amend the *Companies Act*

45. An important component of the recommendations made in this Final Report 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" 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 are today subject to an altogether different set of requirements. Harmonizing regulation of "public companies" in the *SA, 2005* would "level the playing field" between different issuers, and provide uniform regulation for issuers that access the capital markets in Trinidad and Tobago, without discriminating between issuers. Accordingly, the Consultants have recommended in this Final Report that a number of provisions of the *Companies Act* be amended.

Chapter 5 discusses the consequential amendments proposed to be made the Companies Act.

The Conclusion of the Mandate

46. Securities markets are in a state of constant change and evolution and it is vital that the regulation of securities markets also evolve and change. The Final Report represents a major step forward in the reform of securities regulation in Trinidad and Tobago but it is not the end of the journey. This Final Report does not address all issues which arose during the course of our review. Throughout the report we have identified important topics which fall outside the scope of our mandate but require consideration by the TTSEC including some matters that should be addressed on a priority basis. These include:

    (i) Minimum proficiency requirements for market actors to ensure that registered individuals have a minimum understanding of the regulatory framework requirements and are knowledgeable of the financial products that they deal in or advise upon and the markets to which they provide services;

    (ii) Prescribing capital requirements for market actors that reflect the level of business risk being undertaken and professional indemnity insurance in respect of those risks;

    (iii) The contingency fund provided for in the proposed *SA, 2005* and in the General By-Law needs to be subject to a separate review and assessment;

    (iv) Corporate governance requirements for reporting issuers need development including the functioning, responsibility and composition of boards of directors and the development of audit committee responsibilities. Consideration might be given to forming a task force or working party on corporate governance with the Stock Exchange and other stakeholders; and

(v) review of the rules of the Central Depositary should be undertaken in light of developing international standards.

47. This Final Report marks the completion of the mandate. The Consultants hope that the detailed draft legislation and by-laws included in this Final Report will form the basis for a new, modernized securities regulatory framework in Trinidad and Tobago.