STIKEMAN ELLIOTT

Review and Revision of the Trinidad and Tobago *Securities Industry Act, 1995* and Related By-Laws and Associated Legislation

INCEPTION REPORT

November 18, 2002

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1) INTRODUCTION AND PURPOSE OF REPORT

This Inception Report is prepared for the Trinidad and Tobago Securities and Exchange Commission (the "**TTSEC**") in accordance with the mandate it granted to Stikeman Elliott on August 13, 2002 to review the *Securities Industry Act, 1995* (the "**SIA, 1995**") and the by-laws made thereunder (the "**By-Laws**"), the *Companies Act, 1995* (as it relates to the securities industry), and associated legislation (collectively the "**Subject Legislation**").

The purpose of this Inception Report is to provide a starting point for the review, to give it shape and direction, and to provide the consultants' preliminary views as to recommended legislative and policy changes within the scope of the mandate. This Inception Report will outline the objectives and scope of the mandate, provide a brief review of the background to the mandate and the credentials of Stikeman Elliott and the Stikeman Elliott team, set forth the process and framework for the review of the Subject Legislation, outline the themes and concerns which have been identified as part of the consultative process and review of the Subject Legislation to date, and set out preliminary recommendations as to legislative and policy changes.

It is the recommendation of the consultants that this Inception Report be publicly circulated by the TTSEC as necessary in Trinidad and Tobago as part of an on-going consultative process with those industry and market participants with a vested interest in the legislative recommendations resulting from the mandate.

This Inception Report marks the end of the first phase of a process aimed at developing a more modern, efficient, effective and fair securities regulatory regime based on international best practices, but which is also responsive to the state of development and local characteristics of the securities markets in Trinidad and Tobago.

2) BACKGROUND

A) TTSEC Request for Proposals and Selection of Stikeman Elliott

In the fall of 2001, Stikeman Elliott submitted an Expression of Interest to the TTSEC in response to its advertisement for consultancy services to review and revise the Subject Legislation.

On December 14, 2001, the TTSEC invited Stikeman Elliott to submit a Technical Proposal and Cost Proposal for the review and revision of the Subject Legislation. Stikeman Elliott submitted its proposals on February 13, 2002. The Cost Proposal was revised as of August 13, 2002. The TTSEC subsequently awarded the mandate to Stikeman Elliott by Letter of Award dated September 5, 2002.

Stikeman Elliott is a Canadian and international business law firm, with more than 400 lawyers working out of nine cities in Canada and around the world.

The Stikeman Elliott team is headed by the firm's chairman, Edward Waitzer. Mr. Waitzer has advised on a number of public policy initiatives over the course of his career. From 1993 to 1996 Mr. Waitzer was the Chair of the Ontario Securities Commission ("**OSC**"). He also chaired the Technical Committee of the International Organization of Securities Commissions ("**IOSCO**") from 1994 to 1996.

Primary responsibility for the execution of the mandate, the preparation of this Inception Report, the Interim Report and the Final Report (including the legislative drafting brief) lies with the project co-leaders, Ermanno Pascutto and Dee Rajpal. Mr. Pascutto is a senior advisor to Stikeman Elliott with a 20-year career as a securities regulator and lawyer. Mr. Pascutto played a critical role in the establishment of the Securities and Futures Commission in Hong Kong between 1989 and 1994. Prior to that position, Mr. Pascutto was the Executive Director of the OSC. Mr. Rajpal is a partner with Stikeman Elliott whose practice focuses on public finance, mergers, and corporate law. Mr. Rajpal regularly advises boards of Canadian and international companies in respect of these transactions. He regularly speaks on corporate and securities law issues in Canada, and was a member of the SEDAR Toronto Working Group, which participated in the development of Internet-based electronic public company filings in Canada.

As the scope of the project dictates, other members of Stikeman Elliott and outside specialized consultants (as required and permitted under the terms of the mandate) will be utilized to execute the review. In this report the term "**Consultants**" refers to Messrs. Pascutto and Rajpal together with other members of Stikeman Elliott and outside personnel engaged as part of the mandate.

B) Purpose and Scope of the Project

i) Purpose of the Project

The purpose of the project is to provide to the TTSEC detailed recommendations for a revised and amended *SIA, 1995* (and where necessary, other Subject Legislation), and to prepare a detailed drafting brief which will form the basis of legislation (including subordinate legislation such as rules and by-laws) to be drafted by the Trinidad and Tobago Attorney General's Department in order to implement those recommendations of the Consultants which are accepted by the TTSEC.

ii) Scope of the Project

The scope of the project is to conduct an overall review of the Subject Legislation with a focus on the appropriate regulatory framework in respect of collective investment schemes, take-over bid regulation, asset securitization transactions, and securities clearance and settlement systems.

In order to complete the project, the Consultants have been mandated to do the following:

- Review the Subject Legislation and proposed related legislation (including subordinate legislation).
- Review the policy guidelines published by the TTSEC as well as reports of other consultants and other relevant documents that contain proposals/ recommendations for amendments to the Subject Legislation or new legislation regulating the securities industry.
- Review the Report of the Technical Committee appointed to assist in the formulation of mutual fund (collective investment scheme) legislation.
- To the extent applicable, review the reports, studies and other documentation prepared or published by international agencies, including IOSCO, the Council of Securities Regulators of the Americas ("**COSRA**"), the Organization for Economic Co-Operation and Development ("**OECD**") and the Inter-American Development Bank ("**IADB**"), with a view to incorporating those recommendations that would assist in achieving the project's goals.
- Obtain the views of the staff and commissioners of the TTSEC as well as market participants in reviewing the Subject Legislation.
- Prepare this Inception Report setting out the overall view of the Consultants with respect to the mandate.
- Prepare the Interim Report including detailed notes for amendments to the Subject Legislation, as well as new proposed legislation and subordinate legislation such as regulations, rules or by-laws.

- Prepare the Final Report containing a detailed Drafting Brief which will form the basis of legislation (and subordinate legislation) or legislative amendments to be drafted by the Trinidad and Tobago Attorney General's Department.

Subject to permitted extensions (including to permit consultation with market participants), the project is to be completed within six (6) months from its inception. The final documents, being the Final Report and Drafting Brief, are expected to be delivered to the TTSEC in March, 2003.

C) Framework of Review

The mandate has been divided into three distinct review phases each corresponding to one of the deliverable reports.

i) Phase One: Inception Report, Preliminary Review, Market Participant and TTSEC Meetings

The purpose of phase one of the review was for the Consultants to familiarize themselves with the existing securities regulatory framework in Trinidad and Tobago, including proposed legislation and by-laws, and to develop an understanding of the local securities market participants and market conditions. An important part of this process is the review of previous consultative reports, position papers, studies and other related material.

The major events of phase one were the consultative meetings held with the TTSEC, its staff, and securities industry and market participants in Port of Spain. Prior to these meetings the staff of the TTSEC provided the Consultants with a written list of legislative issues, areas of regulatory concern to staff, and suggested amendments to the Subject Legislation. The meetings in Port of Spain with the TTSEC were held to discuss these regulatory issues at a preliminary level, and to gather facts with respect to both the existing legal framework and local securities industry and market conditions. In addition, such meetings were also aimed at defining and clearly delineating the scope of the mandate and the TTSEC's business objectives. Subsequent meetings with securities industry and market participants had the goal of expanding the Consultants' knowledge of local market conditions and involving from the outset those most keenly interested in the legislative recommendations arising from the project. Phase one will be completed upon delivery of this Inception Report to the TTSEC.

ii) Phase Two: Interim Report, Detailed Review, Market Participant and TTSEC Responses to Inception Report

Phase two has the goal of refining the preliminary legislative recommendations made in the Inception Report in continuing consultation with both the TTSEC and its staff, and local market participants. The Consultants will respond to comments made by the TTSEC and its staff and any comments received from the wider industry. The further refinement of the recommendations will result in the drafting and development of the Interim Report.

The Interim Report will contain more detailed findings resulting from the Consultants' review, and contain recommendations for revising, amending and/or repealing portions of the Subject Legislation and/or drafting new legislation, regulations, rules, by-laws, policies and guidelines, as appropriate. Phase Two will be completed upon the delivery of the Interim Report and after debriefs and discussions occur with the TTSEC and its staff. It is expected that the Interim Report will be delivered at the mid-point of the review, likely in January, 2003.

iii) Phase Three: Final Report and Drafting Brief

The final phase of the project involves incorporating and acting upon the Interim Report for the purpose of preparing a detailed Drafting Brief which will serve as a guideline for the preparation of legislative amendments (or new legislation or subordinate legislation) by the Trinidad and Tobago Attorney General's Department. The Drafting Brief will include drafting guidelines/draft legislation (and the underlying policy rationale for amending and revising existing legislation and drafting new legislation) in respect of the four areas of the mandate - collective investment schemes, take-over bid regulation, asset securitization transactions, and securities clearance and settlement systems.

The Final Report will also discuss other matters related to the Subject Legislation, where, as a result of the review and within the scope of the mandate, the Consultants' view is that additional amendments or changes should be considered. The Final Report and Drafting Brief are expected to be delivered in March, 2003.

3) PHASE ONE OF REVIEW

A) In-Country Mission – September, 2002 and Market Participant Meetings

The first in-country mission occurred between September 25, 2002 and September 27, 2002. The first objective of this mission was to meet with the TTSEC commissioners and their staff to discuss the scope of the mandate, their concerns with the current regulatory framework and their business objectives for the project. As well, meetings were held to obtain the first-hand views of participants in Trinidad and Tobago's securities markets which assisted the Consultants in obtaining a better understanding of the nature of the local market, particular local market conditions as well as specialized local concerns.

Representatives from the brokerage community, legal and accounting firms, unit trust and mutual fund companies (including bank providers), the Trinidad and Tobago Stock Exchange (the "**Stock Exchange**"), the Trinidad and Tobago Central Depository (the "**Central Depository**"), investment advisors, and securities companies were invited to meet with Messrs. Pascutto and Rajpal, as well as Mr. Quentin Markin, an associate lawyer with Stikeman Elliott, to discuss the mandate and their concerns and views regarding the project. A detailed list of the invitees is set forth in Schedule "A" to this report. As well, separate meetings were held with officials of the Central Bank of Trinidad and Tobago (the "**Central Bank**") and the Commissioners and staff of the TTSEC.

These meetings prompted an informed discussion amongst market participants on the state of securities regulation in Trinidad and Tobago. In addition to providing a forum for market participants to suggest changes to the Subject Legislation and to highlight other relevant concerns, these forums provided the Consultants with the ability to conduct fact finding in respect of the current legal framework governing securities regulation in Trinidad and Tobago (including the regulation of public issuers), the role of the Stock Exchange and other self-regulatory organizations, the nature of the institutional and retail securities markets, the prevalence and nature of investment products offered in the local market, disclosure standards, the day-to-day role of the TTSEC, and the securities registration and offering process.

All participants were invited to submit written comments to the staff of the TTSEC by October 14, 2002. Written comments were received by the staff of the TTSEC from RBTT Trust Limited, Caribbean Stockbrokers Limited, Ernst & Young, First Citizens Trust & Merchant Bank Limited, the Trinidad and Tobago Chapter of Investment Professionals, Scotiabank Trinidad and Tobago Limited and Caribbean Money Market Brokers Ltd. The Consultants were provided with a copy of all of these written comments.

The written comments covered numerous areas including collective investment scheme regulation, registration requirements, accounting standards, public company

directorship standards, and regulatory duplication. Comments ranged from conceptual and policy recommendations to specific legislative changes.

Resulting from these meetings and the written comments, a number of concerns with the existing securities regulatory framework were identified to the Consultants from which a set of themes emerged.

B) Themes and Concerns

i) The TTSEC must have the scope of its legislative, interpretative and enforcement powers clarified, and in particular, needs to ensure that it has the power and authority to make, interpret and enforce by-laws and rules which have the force of law.

Perhaps the most pervasive and consistent topic of discussion was the status of the TTSEC and its role, power and authority. A concern raised by market participants (brokers, traders, mutual fund companies, lawyers, the Stock Exchange, and banks) was that the TTSEC either did not have the necessary legislative power to implement, interpret and enforce subordinate legislation, such as rules and by-laws, or if it did, then that power was not being utilized in an effective manner by the TTSEC. Several lawyers expressed the view that under the laws of Trinidad and Tobago there was some doubt as to the enforceability of certain by-law making powers given their view as to the vagueness of such provisions and constitutional questions related to delegated authority. Other participants disagreed with this view.

In the absence of a clear power to make and enforce by-laws and rules, the TTSEC has attempted to use "moral suasion" to convince securities industry and market participants to voluntarily follow guidelines, policy statements and proposed by-laws, as if such documents were law. The Consultants were informed that not all parties actually followed such guidelines, policy statements and proposed by-laws on a voluntary basis when requested by the TTSEC.

As a corollary to this issue, it was raised to the Consultants that the TTSEC had concerns about its ability to make and interpret existing by-laws and to then investigate, enforce, and punish violators of the very same by-laws. There was concern expressed that it may be unconstitutional for a body which makes policy and subordinate legislation such as the TTSEC to make by-laws and to then interpret and enforce the same. The potential for conflict of interest was raised on several occasions.

ii) Revising the securities laws must place the greater emphasis on market development and consider the emerging position of Trinidad and Tobago's capital markets while balancing the need for investor protection.

A second significant theme arising from the September, 2002 consultative meetings was the need to foster a securities regulatory regime that placed relatively more emphasis on

market development (and capital formation), and considered the relatively underdeveloped state of the capital markets in Trinidad and Tobago. "Market development", however, means something different to each market participant. To some it meant increasing the number of listings of public companies on the Stock Exchange, while for others it meant increasing the dollar value of assets under management in unit trusts and other collective investment schemes. The consistent theme and concern, however, was that a securities regulatory regime not be put in place which makes the costs of compliance so overly burdensome that issuers choose not to access the capital markets in Trinidad and Tobago, or which stunts the growth of the capital markets or unnecessarily impairs capital formation. That being said, it was recognized that investor protection was both needed and desirable, but the regulatory requirements must be appropriate for the market conditions of Trinidad and Tobago.

iii) There are a number of deficiencies in securities regulation including in respect of take-over bids, collective investment schemes, sales of securities by non-registered persons (the "suitcase brokers"), and disclosure standards for reporting issuers (public companies).

Four specific areas were identified as being deficient in the current securities regulatory framework.

(A) Take-Over Bids

The lack of enforceable by-laws in the area of take-over bids was cited as a deficiency by many of the market participants, particularly the brokerage community. There is currently a proposed Take-Over By-Law prepared by the TTSEC which was published in the Trinidad and Tobago Gazette on October 31, 2000. However, no action has yet been taken to enact the proposed by-law as a by-law under section 131 of the *SIA, 1995* (specifically subsection 131(2)).

The lack of a regulatory framework for take-over bids was given more urgency as a result of three take-over bids in the securities markets in Trinidad and Tobago. The action taken by the TTSEC in these transactions was to request that the parties involved follow and abide by the proposed take-over bid by-law on a voluntary basis. The Consultants understand that not all of the participants agreed to do this. This has had the practical effect of creating confusion in the marketplace and a sense of frustration among brokers at the lack of an appropriate regulatory framework for such transactions.

(B) Collective Investment Schemes

Unit trusts, mutual funds (and other forms of collective investments) are the most important investment products offered and sold at the retail level in Trinidad and Tobago. The Consultants were informed that more than one-half of Trinidad and Tobago's population invested in unit trusts and other collective investment schemes in an amount of between US$12 billion and US$15 billion. However, there is at present no binding regulatory regime applicable to all participants (including issuers of securities) in the unit trust and

collective investment industry. In particular, it was noted that there is a need to replace the existing loose framework of "guidelines" developed by the Central Bank in 1994 (Circular No. 1 of 1994 – *Guidelines for the Establishment and Operations of Mutual Funds by Institutions Licensed under the Financial Institutions Act, 1993*) and the TTSEC (Policy Guideline 11.1 – *Distribution of Securities of Foreign Mutual Funds in Trinidad and Tobago*) with comprehensive, industry-wide regulation carrying the weight of law under the auspices of a single regulator, generally agreed to be the TTSEC.

Under the topic of collective investment scheme regulation, a number of other areas of substantive concern were also raised. First, many participants noted the need for consistent and uniform standards in, among others, prospectus disclosure for mutual funds (and other continuous offering documents), fund performance (and valuation) calculations and reporting, and in the "naming" of mutual funds. For example, this latter issue raised the point that some (so-called) "money-market" funds (in which a majority of invested capital in unit trusts has been placed) include instruments which would not otherwise be characterized as money-market instruments (i.e. they carry a maturity date of more than 365 days after issue). Some participants felt that this characterization is misleading although this is not a universally shared concern. As well, it was expressed that disclosure should be able to permit the investor to discern whether his or her investment manager is actually following the approved and disclosed investment goals and policies.

Another issue which was raised, is the general role of the Unit Trust Corporation ("**UTC**") in the marketplace for collective investment products. The UTC is widely acknowledged as being the forerunner in the development of the mutual fund industry in Trinidad and Tobago. However, concerns were raised about its investment guarantees, which guarantee a return provided the investor holds the investment for a minimum period of time. There was concern expressed by other mutual fund providers that disclosure of the guarantee, the risks associated with it, and the method for providing it, are not being adequately made by the UTC.

Concerns with the structure of collective investment schemes and mutual funds were also raised. Historically, the UTC has performed the services of trustee, asset manager, investment advisor and promoter of a particular scheme or unit trust. The potential for conflict of interest and development of unacceptable risk profiles by this practice was raised. However, while many participants agreed that international best practices for regulation should be the goal, it was generally the view that a regulatory regime would have to take into account the state of development of the industry in the country as well as the concentrated expertise in the field locally. Accordingly, it was suggested that little regulation of fund structure and the relationship between issuer, trustee, investment advisor and promoter be implemented but, rather, these relationships should be the subject of more fullsome disclosure, including disclosure of the practices among such parties for risk mitigation and management.

Discussions were also held on the topic of foreign mutual funds and their sale in the country. It was outlined that a number of foreign organized mutual funds have been registered with the TTSEC and are being sold and distributed by local banks. Participants want to continue to see foreign funds available in Trinidad and Tobago but want to ensure that these funds are subject to the same registration and qualification requirements as domestic mutual funds (although it was noted that certain foreign funds should continue to be registered in a manner similar to that under existing TTSEC Policy Guideline 11.1). There was, however, a concern that foreign funds and salespeople not come to dominate the local industry. For this reason, the industry would want to see that foreign funds only be sold by persons or companies registered in Trinidad and Tobago to sell mutual fund securities.

Another area of concern in collective investment scheme regulation was with the qualifications and registration of mutual fund salespeople. In this regard, it was suggested that there should be minimal standards of competence and education for persons selling mutual funds and regulations governing sales practices.

(C) "Suitcase" Brokers

The topic of "suitcase" brokers was raised in discussions at a number of meetings. "Suitcase" brokers are individuals who reside in a jurisdiction outside of Trinidad and Tobago and who travel to the country for the purpose of selling investment products not registered locally. "Suitcase" brokers, by definition, 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 focussed on the investor (and investor protection) and the other on the industry and its participants.

At the investor level, "suitcase" brokers are 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.

At the industry level, concern was expressed that these individuals are taking away commissions and business from local registered market participants. They are therefore competing in the local market without having to be subject to local securities regulation, and the costs and expenses associated in complying with it. That being said, industry participants fell short of suggesting an outright ban on "suitcase" brokers. Rather, it was suggested that such individuals need to be brought within the regulatory framework, licensed in some

manner, and supervised, all as part of an effort to "level the playing" field among market participants.

(D) Disclosure Standards

Reporting issuer disclosure standards in Trinidad and Tobago were generally viewed as being below international best practice standards. Financial statement reporting is only required every six months. Disclosure of material events and changes in the issuer and its business is sporadic and without an adequate mechanism for conveying that information to the investing public. Public dissemination of information regarding insider trades (trades made by directors, officers and other persons or companies in a control position with respect to a reporting issuer) is not required under the *SIA, 1995* although the statute does require certain persons to report shareholdings in a company to the company itself, if requested. By comparison, the *Companies Act* does require a public company to keep a register recording its directors' holdings in the company. The contents of the register and any changes are to be provided to the TTSEC under the *Companies Act* (section 179). The *Companies Act* also requires a company governed thereby to keep a similar list with respect to substantial shareholders and to provide it and details of changes to the TTSEC (sections 182 to 185). Market participants generally were of the view that the provisions of these two acts had to be harmonized, the scope of insider reporting expanded to cover corporate officers as well as directors and substantial shareholders of all reporting issuers (whether governed by the *Companies Act* or otherwise), and the content of insider reports made publicly available.

iv) The SIA, 1995 has a number of technical deficiencies which have created ambiguity in the law, including the definition of "security".

Concern was also expressed (particularly by the legal community) with regard to a number of technical deficiencies and uncertainties in the *SIA, 1995.*

It was noted that the very definition of "security" was ambiguous and therefore it was not certain whether a particular product or offering would be subject to regulation. This was most often expressed with respect to asset-backed securities, but also reverse-mortgage transactions, viatical settlements and timeshare arrangements.

Concern was expressed that the concept of "offering to the public" is vague and often difficult to apply in the context of a particular transaction. This gave a great deal of concern to issuers and their counsel who expressed frustration in attempting to interpret whether a particular issue was an "offering to the public". If it was, it would require the preparation and filing of a registration statement with the TTSEC. Another similar concept in the *SIA,* 1995, is the concept of a "distribution". A distribution (which may or may not be an offering to the public) attracts the requirement under the *SIA, 1995* to prepare, file with the TTSEC and have receipted, a prospectus.

v) Communication between the TTSEC and market participants.

At present, there are no mechanisms, standing or ad hoc, statutory or otherwise, for on-going consultation between the TTSEC and industry. Market participants were therefore pleased to seize the opportunity to participate in the process with the Consultants to review the Subject Legislation. Despite their expressed concerns at a lack of consultation, market participants have not been active in developing a process or forum for consultation, whether through industry associations or individual contact with the TTSEC, other than in the regular course of business. The concept, therefore, of an advisory committee to the TTSEC or similar body charged with communicating between the TTSEC and industry was widely supported. Such a body would be made up of market participants and representatives from the investment and investor community selected by the TTSEC for the purpose of holding regular consultative meetings on all matters related to the securities industry and the capital markets in Trinidad and Tobago.

vi) Duplicative regulation of various market participants by the Central Bank, TTSEC, and under the Companies Act is unnecessary.

Market participants expressed the view that duplicative regulation was hampering market development. In the area of mutual funds, the Central Bank had stepped in with its guidelines (which cover bank owned and operated mutual funds) in the absence of an effective regime under the *SIA, 1995*. These guidelines co-exist with TTSEC Policy Guideline 11.1 regarding the sale of foreign mutual funds in Trinidad and Tobago. The *Companies Act* regulates, among others, the disclosure of the holding of securities in a company by its directors and substantial shareholders (i.e. insider reporting), a matter also regulated in the *SIA, 1995*, albeit in a different manner in each statute.

Given the resources available in the country, and the limited specialized expertise, it was generally seen as appropriate that regulation of the capital markets be rationalized to avoid duplication of effort among regulatory bodies. Generally, it was viewed that the TTSEC would be the appropriate regulatory body to undertake this role, thereby leaving the Central Bank to regulate banks and other financial institutions in their capacity as banks and not their activities in the capital markets.

vii) The development of the capital markets in Trinidad and Tobago requires effective enforcement by the TTSEC.

Enforcement action by the TTSEC has been limited in the five years since the coming into force of the *SIA, 1995* in 1997. Market participants generally were of the view that more enforcement action was required in the local securities markets, and as a result would be generally supportive of legislative changes resulting from the mandate which would facilitate enforcement.

viii) Local standards need to be raised to the level of international best practices.

Most market participants were in agreement that international best practices (as set forth generally by IOSCO standards) was the goal to which securities regulation in the country had to evolve. Evolution, and not revolution, should be the process given the state of development of the local market and the need for a balanced regulatory approach.

ix) A "level playing" field in the capital markets is needed.

The concept of a "level playing" field was a theme which underlay much of the discussions held in September, 2002. The theme became prevalent in a number of areas, including, for example, in the case of registered and non-registered salespeople (the registrants versus the "suitcase" brokers), in the case of disclosure and other requirements for companies incorporated under the laws of Trinidad and Tobago and those that were not, and in the case of the registration of foreign securities in the country as compared to the requirements that Trinidad and Tobago based issuers are required to comply with when offering securities outside of the country (such as in the United States). The "level playing field" concept was generally supported although, in respect of dealings with foreign jurisdictions, market participants generally accepted that reciprocity in treatment would not always be available.

x) The TTSEC has not prescribed the by-laws and rules required by the SIA, 1995 to provide detail to certain requirements.

The *SIA, 1995* contains a number of sections where further details of the requirements were to be prescribed by the TTSEC. A number of these areas were identified for the Consultants. However, the concern was that many of these requirements for more detailed prescription had not been followed by a comprehensive body of regulations, rules or by-laws. This had created a significant level of uncertainty for many participants in the securities industry and had left regulation open to the discretion of the staff of the TTSEC in a number of areas.

4) PRELIMINARY RECOMMENDATIONS

This section sets out the Consultants' preliminary views with respect to legislative and policy changes. At this initial stage of the mandate, these recommendations should be considered preliminary only and will be further developed in consultation with the TTSEC, its staff, and market participants. In particular, recommendations as to timing (such as the number of days to comply with a particular requirement), should be considered illustrative, and are based on the Consultants' experience and the practice in other jurisdictions.

Two structural changes dealing with the policy rationale underlying securities regulation in Trinidad and Tobago and the structure of the TTSEC are addressed first. This is followed by thirteen more specific preliminary recommendations for legislative change with accompanying commentary.

A) Structural Recommendations

i) The basis underlying securities regulation in Trinidad and Tobago needs to evolve from jurisdiction based on the issuer to jurisdiction based on the location of the trade and the residency of the investor.

The current regulatory regime in Trinidad and Tobago makes distinctions between local issuers and foreign issuers. Locally incorporated public issuers are generally subject to regulation under the *Companies Act* and the *SIA, 1995*. Foreign incorporated or governed public issuers are subject to regulation under the *SIA, 1995* only, and therefore escape the public company regulation found in the *Companies Act*. Not only does this distinction not have any sound policy basis, it creates an unnecessarily duplicative and complicated regime, and may disadvantage issuers incorporated or governed under Trinidad and Tobago law.

This duality of regulation based on incorporation or governance is not new or unique to Trinidad and Tobago. Rather it 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 the more dominant form of regulation.

The more modern conception is to regulate access to a jurisdiction's capital markets through its securities laws based on the location of the trade 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 capital. 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. Local public issuers would be subject to the same requirements under the securities laws.

Accordingly, regulation of access to the public's money via the capital markets should not draw an unnecessary distinction between local public companies and "foreign" ones. The word "foreign" however, needs to be used with caution. A company may be physically situated in Trinidad and Tobago with its mind, management and operations partially or completely situated within the country. However, it may, in the case of Trinidad and Tobago, be incorporated or governed by the laws of another CARICOM country or a jurisdiction further afield. As presently structured, this public company would face a regulatory environment in Trinidad and Tobago that is distinct from another public company governed by the *Companies Act*. It is questionable whether such a distinction should continue to be maintained.

A revised securities framework for Trinidad and Tobago should ensure that unnecessary distinctions are not drawn between "foreign" and local public companies. The distinction should, at a minimum, to the extent duplicative, be eliminated particularly in areas of insider reporting and disclosure to shareholders. Any issuer, wherever incorporated or governed, and whether a corporation, trust, partnership or other legal form, wishing to access Trinidad and Tobago's public capital markets, should comply with the *SIA, 1995* standards in these areas. As well, proxy solicitation and proxy regulation for public reporting issuers should be brought into the *SIA, 1995*. Duplication in the regulation of public companies under the *Companies Act* should be eliminated with regulation of public reporting issuers falling primarily to the TTSEC. Alternatively, exemptions from the *Companies Act* requirements for public companies should be made available to issuers who comply with the revised *SIA, 1995* standards.

Such a change in the conceptual underpinning of the *SIA, 1995* would have a number of discernable benefits in Trinidad and Tobago:

- duplicative regulation in Trinidad and Tobago would be reduced;
- limited resources would be utilized more effectively; and
- investors would be offered the same level of investor protection regardless of the jurisdiction of governance or incorporation of the reporting issuer.

The Consultants are not, however, suggesting any change to the general requirement that brokers, traders, securities companies and other market participants and intermediaries be incorporated in Trinidad and Tobago or in other CARICOM states and registered under Part IV of the *SIA, 1995* and Part V of the *Companies Act*, as the case may be.

ii) The policy making and enforcement functions of the TTSEC need to be separated from its adjudicative function.

The adjudicative powers of the TTSEC should be vested in a separate body, thereby leaving the TTSEC to act primarily as a policy making body. A clear concern was expressed about the TTSEC's role as both law-maker, law-interpreter and law-enforcer.

To this end, the Consultants would recommend that the TTSEC's adjudicative function be separated and vested in a separate body or bodies. Such a body would hear appeals of TTSEC and/or TTSEC staff decisions (made under delegated authority from the TTSEC) on administrative matters such as prospectus receipts and registration of market participants and would hear cases at first instance of other breaches of securities laws brought by the TTSEC. A similar conceptual structure to the proposal set out below is in use in Hong Kong but operates with two separate bodies. This type of proposed structure is not the current structure of the OSC, whose structure has been the subject of some debate in Canada in recent months. While these functions may be conducted in one body, how they would operate is easiest illustrated by separating the functions of the body into two bodies, as is the case in Hong Kong. Such an approach in Trinidad and Tobago may be as follows.

The first of these bodies, an Appeal Tribunal, would be a separate statutory body created under the *SIA, 1995*. The Appeal Tribunal's role would be to hear appeals of all decisions made by the TTSEC, or by the General Manager, as the delgatee of authority from the TTSEC. Separating the appeal function from the TTSEC would have the effect of giving market participants a fairer and impartial hearing on appeal. The Appeal Tribunal would be empowered to hear all matters under the *SIA, 1995*, including decisions regarding prospectus receipts and registration matters. No subsequent statutory right of appeal would be available from the Appeal Tribunal to the regular court system. Recourse would remain available through the mechanism of judicial review.

The Appeal Tribunal would be staffed on an as needed basis from a roster of five persons, who could be former judges, members of the bar, outside or foreign securities practitioners, and former registrants with no active business interest in the local securities markets. The Appeal Tribunal would have the power to uphold, overturn or remand a decision of the TTSEC or the General Manager for reconsideration. It would also have the power to do any act or thing or issue any order or make any decision, on appeal, which the TTSEC or the General Manger could have done, such as issue a prospectus receipt or grant registration to an applicant.

The second of these bodies, a Market Misconduct Tribunal ("**MMT**"), would act as a new independent body established under the *SIA, 1995* to hear market misconduct cases at first instance. The TTSEC would generally bring actions against market participants and reporting issuers in front of the MMT. The jurisdiction of the MMT would extend to cover matters including:

- insider trading and self dealing;
- market manipulation;
- trading in securities by unregistered persons (the "suitcase" brokers);
- false trading in securities and illegal price rigging;
- breaches of disclosure standards; and
- disclosure of false or misleading information in securities transactions.

The MMT would not be a criminal tribunal. It would be permitted and could consider issuing a range of civil sanctions only (subject to compliance with the Constitution of Trinidad and Tobago), which could include for example:

- disgorgement of profits made or loss avoided, subject to compound interest thereon;
- disqualification of persons from being a director or officer or otherwise involved with a public company for up to five years;
- removal or suspension of registration under the *SIA, 1995*;
- fines;
- "cease and desist" orders (i.e. not to breach any of the market misconduct/ manipulation provisions for up to five years); and
- payment of costs associated with the action.

The range of orders and remedies available would enable the MMT to deal comprehensively and relatively swiftly with market misconduct with the attendant benefits of simpler evidentiary and procedural rules. The MMT would not be able to issue criminal sanctions, such as imprisonment. However, both the MMT and the TTSEC would have the authority to recommend that particular matters, where applicable, be treated criminally and referred to the Director of Public Prosecutions or other appropriate authority for criminal prosecution. This would allow the TTSEC and the Director of Public Prosecutions to make an assessment of the best way to proceed depending on the nature and severity of the offence. As a first instance tribunal, a right of appeal would be available from the MMT to the court system.

The MMT, like the Appeal Tribunal, would consist of a roster of five persons, who could be former judges, members of the bar, outside or foreign securities practitioners, or former registrants with no active business interest in the local securities markets. Under no circumstances would members of either body (or a single body, should that be the chosen route) be members of the TTSEC (although it may be appropriate to consider former members who have been out of office for a number of years). As well, and mindful of the current resource and expertise limitations in Trinidad and Tobago, it is not necessary that the

individuals comprising the rosters of the Appeal Tribunal or the MMT be different individuals. The same persons could be appointed to act in both capacities. Appointments could be made by the Judicial and Legal Service Commission in consultation with the TTSEC.

The role of the courts would not be ousted in such a model. Rather the courts would retain their jurisdiction as a forum for judicial review, for enforcing administrative orders and issuing criminal sanctions, and for appeal of certain decisions.

The success of this model will be a function of the resources devoted to it. However, in the Consultants' view, by clearly separating the adjudicative functions into a new body, whether it be an Appeal Tribunal and an MMT, or a single body, regulatory oversight and enforcement would improve.

B) Preliminary Legislative Recommendations

i) The SIA, 1995 needs to be amended, not re-written.

The *SIA, 1995* provides a sound framework for the evolution of securities regulation in Trinidad and Tobago. It does not need to be repealed and replaced. (Indeed, such a process would take far in excess of the six month timeframe for the mandate.) Rather, the changes recommended in this Inception Report (and in the subsequent reports to be drafted as part of this mandate), should be written into an amended act, not a new one.

Discontent was raised in the September, 2002 meetings over the process of implementing the *SIA, 1995*, in that it was a significant departure from the legislation that preceded it. To repeal the *SIA, 1995* and replace it with an entirely new act, would, in the Consultants' view, not result in any discernable benefits, and result in the learning which has developed in the local marketplace since 1995 to be lost. The existing legislative framework should remain the framework for the evolution of the securities regulatory regime in Trinidad and Tobago.

ii) The structure, power and functions of the TTSEC need to be revised in the SIA, 1995 to provide clear by-law making authority and clear enforcement power.

Fundamental to a modern, 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 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, lengthy delays in the enactment of legislation would result, which, as a matter of principle, are needed in the public interest and to preserve the public good.

To this end, the powers of the TTSEC to make "rules" (section 21) and to make "by-laws" (section 131) need to be rationalized under one by-law making authority (although the power of the TTSEC to make procedural rules should be retained). By-laws, once enacted, should carry the force of law and should (at least with respect to administrative matters such as prospectus receipts and registration) be enforceable by the TTSEC (with an appeal to the Appeal Tribunal) or enforceable by the TTSEC before the MMT (or in a single body vested with such adjudicative powers). This would not oust the ultimate jurisdiction of the courts in criminal prosecutions, as an appellate body on certain matters, and as a forum for judicial review of decisions of the Appeal Tribunal and MMT.

A number of procedures could be used to implement and create the by-laws. A suggested process (and which is similar to that presently used in Ontario) would have the draft by-laws initially be subject to the scrutiny of the TTSEC commissioners who would have the opportunity to approve or disapprove of the draft by-laws prepared by staff. Once approved at the TTSEC level, the by-law would be published for public comment for a period of between 60 days and 120 days. Following the public comment period, all comments would be evaluated by the TTSEC and its staff. If required, amendments to the draft by-law would be made by staff and re-submitted to the TTSEC. Where a material amendment is made the draft by-law would be republished for comment for an additional 30 day period. Where only immaterial amendments are made, or none at all, the draft by-law would then be sent to the responsible Minister (not Parliament) for negative disapproval. The responsible Minister would have 60 days to disapprove the draft by-law. If it were disapproved, the Minister would return the by-law to the TTSEC with comments for the TTSEC's further consideration. If disapproval is not received by the 60th day, on the 75th day following its sending to the Minister, the draft by-law would become a by-law carrying the force of law. The Minister could also explicitly approve the by-law within the 60 day period. As well, a shortening of the time periods would be available in appropriate circumstances.

By-law making power would be enacted by amending the *SLA, 1995* to clearly ascribe weight to the by-law making power and to legislate the process by which a draft by-law becomes law by the authority of Parliament to sub-delegate portions of its authority including the power to make subordinate legislation. As well, the scope of the by-law making power would be limited to those areas specifically enumerated in an amended *SLA, 1995*. By-laws could not be made and enacted if not under one of the heads of by-law making power. A possible list of these areas of by-law making authority is attached as

Schedule "B", which would include the power to make by-laws regulating hearings and for the filing of documents (including electronic filings) with the TTSEC.

iii) The proposed Take-Over By-Laws need minor amendment and should be implemented as a by-law carrying the force of law once clear by-law-making power is given to the TTSEC.

The proposed Take-Over By-Laws provide a complete code regulating the acquisition, by take-over bid, of public companies in Trinidad and Tobago. With a few modifications (including appropriate exemptions for take-over bids conducted under the laws of another jurisdiction) the Consultants are of the view that the by-laws as drafted could be implemented under a revised by-law making power and brought into force largely as drafted. It may be appropriate to re-publish the Take-Over By-Laws for public comment, particularly in light of the take-over experience in the market since their initial publication.

iv) A new by-law governing collective investment schemes should be drafted and implemented as a by-law carrying the force of law once revised by-law making power is given to the TTSEC. Duplicative regulation by the Central Bank should be ended. Existing policy statements and guidelines should be repealed and subsumed in the new by-law.

A new by-law governing unit trusts and collective investment schemes should be drafted and implemented as a by-law under the revised by-law making power. Upon coming into force, existing Central Bank guidelines and TTSEC Policy Guideline 11.1 should be revoked, the contents of those guidelines having been subsumed within the new by-law, to the extent applicable. The by-law would regulate and prescribe by-laws for, among others, the following areas related to unit trust and collective investment schemes:

- the form and content of a prospectus offering unit trust and mutual fund securities;
- disclosure of the relationship (and potential conflicts of interest) between the trustee, the investment manager, and the promoter;
- create a new category of registrant – "mutual fund salesperson" and describe the minimum standards required to obtain registration in the category;
- require the delivery of a prospectus offering unit trust and mutual fund securities to investors;
- grant investors a 5-day "cooling off" period after the purchase of a mutual fund security during which time they could unwind the purchase for any reason whatsoever;
- mandate specific risk factor disclosure in the prospectus offering unit trust and mutual fund securities;

- regulate the calculation and disclosure of management expense ratios and other charges associated with units trust and mutual funds;
- outline a standardized set of measures for calculating fund performance and net asset values;
- require fund companies to have a risk assessment policy and to disclose the policy to its investors; and
- prescribe standards for on-going disclosure of the performance of the fund, its management and holdings to investors.

v) The SIA, 1995 should be amended to provide for enhanced disclosure by reporting issuers.

Secondary market disclosure of reporting issuers in Trinidad and Tobago requires enhancement to raise the disclosure requirements to a level approaching international best practices. Improvements and enhancements to disclosure standards should be phased-in over a number of years to permit reporting issuers and their advisors to be in a position to fully comply with the enhanced requirements.

All issuers who are reporting issuers (subject to appropriate exemptions consistent with international best practices), should be required to prepare and publicly disclose the following information and documents:

- **Annual audited financial statements**, prepared in accordance with International Accounting Standards ("**IAS**") and auditing standards prescribed by the International Federation of Accountants (or other acceptable standards prescribed by by-law), within 120 days of the financial year end of the reporting issuer. (This requirement should be brought into force immediately, and as a transitional exemption, permit a reporting issuer not to prepare its annual audited financial statements for its current financial year in accordance with such requirements, if immediate compliance would be unduly burdensome.)
- **A management discussion and analysis** of the annual audited financial statements requiring management to address the reporting issuer's financial performance, and explain and discuss changes from the past financial year's performance. (This requirement should be brought into force immediately.)
- **Quarterly unaudited financial statements**, prepared in accordance with IAS (or other acceptable standards prescribed by by-law), within 60 days of each quarter end, other than the end of the fourth quarter in a financial year. (This requirement should not be brought into force immediately in order to allow reporting issuers to prepare for its requirements. A suggested date for implementation would be two years from legislative enactment of amendments to the *SIA, 1995*.)

- **A press release** immediately following a "material change" in the business and affairs of the reporting issuer, to be followed by the filing of a material change report within seven days describing such change. (This change should be brought into force immediately.) The definition of "material change" in subsection 3(1) of the *SIA, 1995* should remain unchanged.

The basic requirement for this disclosure should be legislated into the *SIA, 1995*. However, details, such as the contents of MD&A or appropriate accounting or auditing standards, should be drafted as by-laws under the revised by-law making power.

All of these documents should be filed with the TTSEC (and/or the Stock Exchange). At a minimum, the TTSEC should organize a public filing library where members of the public may come and view all publicly filed documents during normal business hours. Over the longer term (given the significant technical and financial resources which would be required), it is strongly suggested that consideration be given to developing an electronic Internet-based system for the public filing and retrieval of documents and information with the TTSEC. However, as an interim step, the TTSEC should require reporting issuers to file documents electronically with the TTSEC by e-mail and in an approved electronic format (such as PDF – Adobe Acrobat Format). These electronic filings could then be posted to the website of the TTSEC.

An enhanced insider reporting regime should be implemented in the *SIA, 1995*, and duplicative provisions in the *Companies Act* repealed. Presently, section 122 of the *SIA, 1995* permits an issuer to require its "members" to disclose to the issuer their beneficial ownership of shares in the issuer. There is no requirement on the issuer to require this disclosure, and if made, there is no requirement to have it made publicly available. Public companies under the *Companies Act* do have to report the insider holdings of their directors and substantial shareholders to the TTSEC, although the Consultants understand that this information is not routinely made public. It is vital to an effective securities regulatory regime, and to sustaining investor confidence, that public disclosure of insider activity be made, and be made available to the investing public.

Accordingly, the *SIA, 1995* provisions dealing with the disclosure of beneficial interests in share capital to issuers should be amended to require "insiders" of the reporting issuer to file a report with the TTSEC disclosing their security holding interest in the reporting issuer within five days of becoming an insider of the reporting issuer and an updated report within five days of any trade made by such insider in any securities of the reporting issuer. Such reports should be made available for public viewing at the TTSEC during normal business hours. An "insider" should be defined as any director, officer, substantial shareholder, or director or officer of a substantial shareholder, of a reporting issuer. The investing public will then be afforded the opportunity of making investment decisions with full knowledge of the economic interest insiders have in the reporting issuer regardless of its jurisdiction of incorporation or governance. This, it should be noted, is not a

prohibition on the ability of insiders to trade securities of the issuers of which they are insiders. Section 121 of the *SIA, 1995* prohibits such trades on certain undisclosed information. Rather, this mechanism is one of disclosure. The present power of a reporting issuer to require disclosure of shareholding interests should be maintained to supplement this new requirement.

In the Consultants' view, these recommendations with respect to ongoing disclosure by reporting issuers are the minimum changes which should be made. They are not representative of international best practices. However, given the state of secondary market disclosure in Trinidad and Tobago and the significant number of changes which would be required to bring the standards to that of international best practice, the Consultants would recommend incremental change to permit reporting issuers, their advisors and the TTSEC to adapt to the changes and to be in a position to comply.

By way of comparison, reporting issuers in Canada face additional documentary filing requirements and timelines (which may be reduced under a new proposed National Instrument.) Schedule "C" contains a table summarizing generally, Canadian documentary filing and timing requirements for reporting issuers and other market participants.

There are other changes in the United States resulting from the *Sarbanes-Oxley Act* of 2002 which may come to set the standard for international best practices. These would include certification of financial statements by officers of reporting companies (with the attendant civil and criminal penalties for false certification), the requirement to have an audit committee made up entirely of independent members of the board of directors, a prohibition on loans to executives by the reporting companies (other than certain normal course commercial loans by reporting companies with a lending business), and enhanced material reporting requirements including the reporting on a "rapid and current" basis of an expanded class of reportable events. The appropriateness of similar changes is being considered by securities regulators in a number of jurisdictions, including Canada. Similar changes should be considered in Trinidad and Tobago in consultation with the TTSEC, its staff and market participants.

vi) *Appropriate exemptions should be made available for issuers from approved foreign jurisdictions in raising capital or complying with disclosure requirements in Trinidad and Tobago.*

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, its securities regulatory framework is in a state of early development and growth, and the TTSEC has comparatively limited resources. Accordingly, there should be a recognition that certain foreign incorporated or governed public companies (and mutual funds) from "approved jurisdictions" should be exempt from compliance with the securities laws of Trinidad and Tobago in the securities offering process and in ongoing continuous disclosure matters, provided that they comply with that other set of securities laws to which they are

subject (including requirements as to delivery of materials to securityholders), and the issuer otherwise has a minimal shareholder presence in Trinidad and Tobago. A list of "approved jurisdictions"[1] would be developed by the TTSEC and would be jurisdictions where the securities laws and regulatory oversight are of a standard equal to or better than that in Trinidad and Tobago.

In the context of a public offering or distribution of securities, the foreign issuer from an approved jurisdiction could use the foreign reviewed offering documents (with minimal additional requirements in Trinidad and Tobago) to offer securities in the country. There would be little or no review of the documents by the TTSEC. Rather, the TTSEC would be relying on the review conducted by the securities regulatory authority in the approved foreign jurisdiction. As well, the foreign issuer could use its foreign financial statements provided they have been prepared in accordance with IAS, or other acceptable standards (to be prescribed in by-laws), such as U.S. or Canadian GAAP. However, there would still be a need to use an *SIA, 1995* registrant to market and place the securities in Trinidad and Tobago. Such a system would give issuers an incentive to conduct securities offerings in the country thereby increasing the number and type of securities available to the investing public while still providing the investing public with an appropriate level of investor protection. Issuers utilizing the system should be required to submit to the jurisdiction for service of process and should not be permitted to use foreign offering documents, if, following the issuance of securities, more than 10% of its outstanding voting securities would be held by residents of Trinidad and Tobago.

Consideration should be given to applying the same principle to ongoing disclosure by reporting issuers. Reporting issuers, with a minimal securityholding presence in Trinidad and Tobago (less than 10%) and who are subject to regulatory oversight in an approved 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 approved jurisdiction. Again, investor protection would be served by relying on the securities regulatory framework of a jurisdiction which has standards equal to or better than that in Trinidad and Tobago. For issuers, this would provide an incentive to become a reporting issuer in Trinidad and Tobago or perhaps seek a listing on the Stock Exchange, because they could do so without attracting additional regulatory burden. For investors, the number of reporting issuers, and accordingly, investment opportunities, may increase without any corresponding loss of investor protections.

In order to properly implement a system where reliance is placed on other securities regulators, the TTSEC should enter into Memoranda of Understanding or similar

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[1] A suggested list could include the United States, Canada, Australia, Hong Kong, Singapore, and the United Kingdom as well as CARICOM countries which the TTSEC would consider have an appropriate level of regulatory oversight.

arrangements with regulators in approved jurisdictions to provide for, among others, co-operation in investigation and enforcement. This type of co-operation is presently contemplated in section 19 of the *SIA, 1995*. However, the section should be amended to specifically authorize the TTSEC to enter into these types of arrangements.

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 should be considered in Trinidad and Tobago between it and other CARICOM countries. This would enable issuers to use a single offering document, vetted by only one securities regulatory authority, in two or more Caribbean jurisdictions, which would make capital raising less costly for issuers and more efficient, but would sacrifice little in the way of investor protections.

Canadian securities regulators have also proposed a new National Instrument which would provide foreign incorporated reporting issuers, that are subject to regulatory oversight in one of sixteen approved jurisdictions, and that have less than 10% of their shares in Canada, with exemptions from Canadian continuous disclosure requirements provided the reporting issuer complies with the disclosure requirements of that approved jurisdiction (including delivery of documents to shareholders), and files the documents, in English or French, in Canada.

vii) The Companies Act should be amended so as to repeal duplicative regulation of public companies.

The *Companies Act* should be limited to regulating the internal matters of companies, both private and public. It should not be the primary vehicle regulating the public capital markets. Duplicative provisions which purport to govern the conduct of companies governed by it in the public capital markets should be repealed, leaving regulation of these areas to the *SIA, 1995*.

viii) A number of technical amendments should be made to the SIA, 1995.

The *SIA, 1995* will need a number of technical amendments including:

- the definition of security should be recast and expanded to capture all securities, including asset-backed securities and securities issued by foreign governments and international agencies as well as "investment contracts" generally;
- the concepts of "offer to the public" (requiring a registration statement) and "distribution" (requiring a prospectus) should be rationalized into one concept aimed at characterizing those issuances or trades of securities which should attract the requirement to prepare, and have receipted by the TTSEC, a prospectus;

- the requirement to file a registration statement with the TTSEC prior to conducting a distribution or offering to the public should be repealed. Rather, an issuer should be required to file a revised registration statement with the TTSEC within 10 days after any distribution (whether exempt or not) as a reporting matter;
- the private placement exemptions need clarification. It should be clear that issuing securities in reliance on a private placement exemption, does not, in and of itself, make the issuer a reporting issuer. A revised sophisticated investor provision should be considered as a private placement exemption. Where a security is "distributed" or "offered to the public" under a private placement exemption it should be subject to a four (4) month restricted period during which it could not be resold, unless sold pursuant to another exemption or to a "sophisticated investor"; and
- the prospectus filing process should be more fully developed, including by drafting new prospectus disclosure by-laws and by-laws for filing other documents material to the issue. Such by-laws would, among others, require issuers to file their constating documents with a prospectus in order to obtain a prospectus receipt. All filed documents should be made available for public inspection by the TTSEC unless a confidentiality request were granted by the TTSEC. The by-laws should explicitly give the TTSEC the power to review and comment on the prospectus.

ix) Registration requirements for market actors, investment advisors, brokers, dealers, traders, underwriters and securities companies.

Part IV of the *SIA, 1995* sets out the requirement to be registered in one of the prescribed categories (broker, investment advisor, dealer, trader, underwriter and securities company) and further sets out the qualifications and requirements to obtain registration in each category. By-Laws 14 to 38 further set out more detailed standards for record-keeping by registrants, trade confirmations and similar matters.

It was suggested in meetings with the staff of the TTSEC that minor amendments be made to the various qualification criteria, including clarifying when the TTSEC could revoke the registration of a market actor. In the Consultants' view, Part IV should be re-written with a new companion by-law implemented under the revised by-law making power. Part IV should be limited to (a) the basic requirement to obtain registration in the appropriate category, including a new category of "mutual fund salesperson" (the full requirements of which should be set out in the new by-law regulating unit trusts and mutual funds), (b) the requirement on the TTSEC to grant the registration provided it has been made in accordance with the by-laws and written notice of such has been given by the TTSEC, (c) setting out the terms upon which a registration may be suspended or revoked by the TTSEC (including where the registrant no longer conducts an active business), (d) providing for the voluntary surrender of registration by the registrant, and (e) providing that the registration of

an individual terminates when employment is terminated. The remainder of the details including, among others, qualification criteria, application fees, form requirements, other conditions of registration, and the subject matter presently covered in By-Laws 14 to 38 should be contained within the new by-law.

In addition, the by-law should provide the TTSEC with the power to conduct on-site inspections of a registrant's premises, books and records as part of a routine compliance program whether or not any violation is suspected.

x) "Suitcase Brokers"

It is important to the legitimacy of the securities regulatory framework in Trinidad and Tobago that the "suitcase brokers" either be brought into the registration framework of the *SIA, 1995* or that the unregistered selling activity be prosecuted and punished. The ability of the TTSEC to detect, investigate, prosecute and punish unregistered "suitcase brokers" is a function of its available resources among, other things. To the extent this is the chosen route, in the Consultants' view there are no changes from a legislative perspective which should be made. The activities as described to the Consultants appear to be breaching the *SIA, 1995*. The question is one of detection and enforcement.

However, an alternative and novel solution may be to permit such persons a limited right to sell securities in the country based on a special category of registration – the "temporary broker/investment advisor." To obtain registration in this category, individuals who are not residents of Trinidad and Tobago (and only individuals) would be required to (a) be registered in an appropriate category in an approved jurisdiction and employed by a registered securities company in that jurisdiction, (b) obtain sponsorship from a registrant under the *SIA, 1995*, (c) complete a simplified registration application with the TTSEC, and (d) pay an application fee. Under the simplified registration process, registration in the "temporary broker/investment advisor" category should be issued in a short space of time (such as 10 working days), and once registered would permit that individual to act as a broker or investment advisor in Trinidad and Tobago for a limited period of time (e.g. less than 30 calendar days in any given calendar year). Registration would only be obtainable once per calendar year. However, the temporary registrant would still be required to sell products with a prospectus or otherwise rely on an exemption from the prospectus requirement.

As well, there should be a broader exemption from the requirement to be registered as a broker or investment advisor where the person is selling only to designated institutions and sophisticated purchasers.

In all other cases the "suitcase broker" would need to register as any other broker or investment advisor with the TTSEC. In this way, the activities of "suitcase brokers" can be brought within the securities regulatory framework, and supervised, while affording investors the opportunity to invest in products that might not otherwise be available.

xi) The regulation of securitization transactions should be left as a matter of disclosure and not regulation of form or structure.

In most major capital markets, including Canada and the United States, asset-backed securities have been treated as "securities" subject to the offering, registration and/or prospectus disclosure requirements of applicable securities laws. The form and structure of securitization transactions and asset-backed securities have not been regulated by securities regulators in these jurisdictions. Rather, promoters have been free to structure securitization transactions as the marketplace demands and/or investors desire. This is consistent with the general treatment of securities internationally whereby few requirements are imposed by securities laws on the terms, form, content, structure, or rights and privileges attaching to, securities. Rather, full, true and plain disclosure of the terms of the securities has been required.

Accordingly, issues such as the use of an SPV (a special purpose vehicle), the need for "bankruptcy" remoteness, independence requirements between originator and SPV, and "true sale" have not been substantively regulated under securities laws. Where asset-backed securities are being issued to the public, or at the retail level under a prospectus, disclosure of these and other facts related to the asset-backed security has been required so that investors can make a full and informed investment decision given the special characteristics of asset backed securities.

The Consultants are of the view that explicitly defining asset-backed securities as "securities" (and therefore bringing them into the prospectus regime), is the appropriate course of action for the *SIA, 1995* and the TTSEC. This would be consistent with general international practice. New prospectus disclosure and filing by-laws (to be implemented under the revised by-law making power) should require disclosure specific to asset-backed offerings and the filing of constituent and structural documents.

Where asset-backed securities are distributed under a prospectus exemption, consideration should be given to requiring a "risk disclosure statement" be provided to investors as a condition of using the exemption. Such a document would require the issuer/promoter to inform the investor whether the asset-backed securities have a credit rating from a recognized ratings agency, the rating (if any), and to disclose the risks associated with the investment.

xii) Settlement and clearing issues.

The September, 2002 consultative meetings provided little discussion of the technical points related to settlement and clearing issues in Trinidad and Tobago. The only significant discussions of any nature regarding settlement and clearing that were received were that (a) the system needed to move from a paper-based settlement system to an electronic book-entry system, and (b) the TTSEC has to be given the by-law making authority to implement the necessary by-laws required to move the industry to such a book-based system. Several

technical written comments were made by Caribbean Stock Brokers Limited as well. Given this lack of dialogue and given our understanding that much of the work towards a book-based system is presently under way by the Stock Exchange and Central Depositary, we would require additional information in order to formulate a recommendation. The revised by-law making authority outlined above, once enacted, would include the power to make by-laws governing settlement and clearing issues which would permit the TTSEC to draft and implement the necessary by-laws.

xiii) Compensation or Contingency Fund

The question of a compensation or contingency fund has also been raised by the staff of the TTSEC. Presently, section 48 of the *SIA, 1995* requires a self-regulatory organization to maintain a contingency fund in the manner prescribed by the TTSEC to compensate customers for losses resulting from insolvency, bankruptcy, or the default of a member of the organization or a registrant who contributes to such a fund. Detailed by-laws have not been prescribed by the TTSEC for the operation of such a fund.

The Consultants are not in a position to provide a recommendation at this time as to the form, structure, operation, and most importantly, the financing of such a contingency fund. This decision is ultimately a political decision which would require local market and political input. The difficult questions are determining who funds the fund, what losses it covers, and who administers it. Funding could come from registrants and other securities industry participants or directly from the government. Any number of losses could or could not be covered by such a fund and for any of a number of reasons. Finally, such a fund could be administered by a self-regulatory organization, the TTSEC, or a new governmental body or agency. Additional fact finding would be required to make a recommendation in this area.

5) PROCESS RECOMMENDATION AND CONCLUSION

This Inception Report is the beginning of the process to revise and update the Subject Legislation with the TTSEC and its staff. The Consultants will meet with the TTSEC and its staff in Port of Spain to discuss the contents of this Inception Report, the Consultants' preliminary recommendations, and to begin the next phase of the project.

As well, the Consultants would hope that the securities market participants who have been involved in the process to this point, should continue to remain involved throughout the mandate. We would suggest that the TTSEC provide a copy of this report to each of the invitees for their review, and to again invite them to consultative meetings with the Consultants in Port of Spain to discuss the content of this Inception Report, its preliminary recommendations, and their views on its contents, after meetings are held between the Consultants and the TTSEC.

Following these meetings, the preliminary recommendations will be further developed and expanded into the Interim Report, followed by the preparation of the Final Report and detailed Drafting Brief which is expected to be delivered in March, 2003.

ADDENDA

SCHEDULE "A"

Invitees to September, 2002 Consultative Meetings

SCHEDULE "B"

Suggested Heads of By-Law Making Authority

SCHEDULE "C"

Summary of Key Canadian Disclosure Requirements

SCHEDULE "A"

INVITEES TO SEPTEMBER, 2002 CONSULTATIVE MEETINGS

Date	Invited Organizations
September 25, 2002 *10:00am to 12:00 noon* *(Brokers)*	West Indies Stock Brokers Ltd. Trinidad and Tobago Stocks and Shares Ltd. Reliance Stockbrokers Ltd. Bourse Securities Ltd. Caribbean Stockbrokers Ltd. Caribbean Money Market Brokers CMMB Securities Ltd.
September 25, 2002 *1:30pm to 4:00pm* *(Attorneys & Accountants)*	Law Reform Commission Law Association of Trinidad and Tobago Office of the Attorney General and Legal Affairs Office of the Chief Parliamentary Counsel Ministry of Finance Registrar General's Office Central Bank of Trinidad & Tobago Republic Bank First Citizens Bank RBTT Financial Holdings Scotia Bank Trinidad and Tobago Ltd. Pollonais, Blanc, De La Bastide & Jacelon Guardian Holdings Ltd. Fitzwilliam Stone Furness-Smith & Morgan Mair & Company M. Hamel-Smith and Co. Dr. Claude Denbow, S.C. Ashmead Ali & Co. Lex Caribbean Eco-legal and Management Advisory Services Limited Institute of Chartered Accounts of Trinidad and Tobago Ernst & Young PricewaterhouseCoopers
September 26, 2002 *10:00am to 12:00 noon* *(Mutual Funds)*	Royal Merchant Bank Republic Trust and Asset Management First Citizens Trust and Merchant Bank Trinidad and Tobago Unit Trust Corporation Ministry of Finance

September 26, 2002 *2:15pm to 4:00pm* *(Stock Exchange)*	Trinidad and Tobago Stock Exchange Trinidad and Tobago Central Depositary Ltd. Central Bank
September 27, 2002 *9:00am to 12:00 noon* *(Bankers, Securities Companies, Underwriters, Investment Companies, ATTIC)*	RBTT Financial Holdings Ltd. Republic Bank Limited Intercommercial Bank Scotiabank Trinidad and Tobago Limited First Citizens Bank ANSA Finance & Merchant Bank Clico Investment Bank Home Mortgage Bank Limited Citibank (Trinidad and Tobago) Mercantile Banking and Financial Corporation Ltd. Enterprise Development Limited Integra International Limited Guardian Asset Management The Barbados Mutual Assurance Society Trinidad and Tobago Unit Trust Corporation American Chamber of Commerce of Trinidad and Tobago Association of Trinidad and Tobago Insurance Companies Trinidad and Tobago Chamber of Industry and Commerce Trinidad and Tobago Chapter of Investment Professionals

SCHEDULE "B"

SUGGESTED HEADS OF BY-LAW MAKING AUTHORITY

1. Prescribing requirements in respect of applications for registration and the renewal, amendment, expiration or surrender of registration and in respect of suspension, cancellation or reinstatement of registration.

2. Prescribing categories or subcategories of registrants, classifying registrants into categories or sub-categories and prescribing the conditions of registration or other requirements for registrants or any category or sub-category, including,

   (a) standards of practice and business conduct of registrants in dealing with their customers and clients and prospective customers and clients,

   (b) requirements that are advisable for the prevention or regulation of conflicts of interest, and

   (c) requirements in respect of membership in a self-regulatory organization.

3. Extending any requirements prescribed for registrants to unregistered directors, partners, salespersons and officers of registrants.

4. Prescribing requirements in respect of the residence in Trinidad and Tobago of registrants.

5. Prescribing requirements for persons and companies in respect of calling at or telephoning to residences for the purposes of trading in securities.

6. Prescribing requirements in respect of the disclosure or furnishing of information to the public or the TTSEC by registrants or providing for exemptions from or varying the requirements under the *SIA, 1995* in respect of the disclosure or furnishing of information to the public or the TTSEC by registrants.

7. Providing for exemptions from the registration requirements under the *SIA, 1995* or for the removal of exemptions from those requirements.

8. Prescribing requirements in respect of the books, records and other documents required to be kept by market participants, including the form in which and the period for which the books, records and other documents are to be kept.

9. Regulating the listing or trading of publicly traded securities including requiring reporting of trades and quotations.

10. Regulating recognized stock exchanges, recognized self-regulatory organizations, recognized quotation and trade reporting systems and recognized clearing agencies, including prescribing requirements in respect of the review or approval by the TTSEC of any by-law, rule, regulation, policy, procedure, interpretation or practice.

11. Regulating trading or advising in securities to prevent trading or advising that is fraudulent, manipulative, deceptive or unfairly detrimental to investors.

12. Prescribing categories or subcategories of issuers for purposes of the prospectus requirements under the *SIA, 1995* and classifying issuers into categories or subcategories.

13. Varying the *SIA, 1995* to facilitate, expedite or regulate the distribution of securities or the issuing of receipts for prospectuses, including by establishing,

    (a) requirements in respect of distributions of securities by means of a prospectus incorporating other documents by reference,

    (b) requirements in respect of distributions of securities by means of a simplified or summary prospectus or other form of disclosure document,

    (c) requirements in respect of distributions of securities on a continuous or delayed basis,

    (d) requirements in respect of pricing of distributions of securities after the issuance of a receipt for the prospectus filed in relation thereto,

    (e) procedures for the issuing of receipts for prospectuses after expedited or selective review thereof,

    (f) provisions for the incorporation by reference of certain documents in a prospectus and the effect, including from a liability and evidentiary perspective, of modifying or superseding statements,

    (g) requirements for the form of a prospectus certificate, including providing for alternative forms,

    (h) provisions for eligibility requirements to obtain a receipt for, or distribute under, a particular form of prospectus and the loss of that eligibility, and

    (i) provisions for rights of investors who receive a prospectus.

14. Designating activities, including the use of documents or advertising, in which registrants or issuers are permitted to engage or are prohibited from engaging in connection with distributions.

15. Providing for exemptions from the prospectus requirements under the *SIA, 1995* and for the removal of exemptions from those requirements.

16. Prescribing the circumstances in which the TTSEC must refuse to issue a receipt for a prospectus and prohibiting the TTSEC from issuing a receipt in those circumstances.

17. Prescribing requirements in respect of the preparation and dissemination and other use, by reporting issuers, of documents providing for continuous disclosure that are in addition to the requirements under the *SIA, 1995*, including requirements in respect of,

    (a) an annual information form, and

    (b) supplemental analysis of financial statements.

18. Exempting reporting issuers from any requirement of the *SIA, 1995* under circumstances that the TTSEC considers justify the exemption including that the reporting issuer is subject to oversight in an appropriate jurisdiction.

19. Requiring issuers or other persons and companies to comply, in whole or in part, with continuous disclosure requirements, or by-laws made in respect thereof.

20. Prescribing requirements in respect of financial accounting, reporting and auditing for purposes of the *SIA, 1995*, the regulations and the by-laws, including,

    (a) defining accounting principles and auditing standards acceptable to the TTSEC,

    (b) financial reporting requirements for the preparation and dissemination of future-oriented financial information and pro forma financial statements,

    (c) standards of independence and other qualifications for auditors,

    (d) requirements respecting a change in auditors by a reporting issuer or a registrant, and

    (e) requirements respecting a change in the financial year of an issuer or in an issuer's status as a reporting issuer under the *SIA, 1995*.

21. Regulating take-over bids and related party transactions including, issuer bids, insider bids, and going-private transactions and varying the requirements of the *SIA, 1995* in respect thereof.

22. Prescribing standards or criteria for determining when a material fact or material change has occurred or has been generally disclosed.

23. Prescribing time periods under or varying or providing for exemptions from any requirement related to insider trading and self-dealing.

24. Regulating unit trusts, mutual funds and other collective investment schemes and the distribution and trading of the securities of the funds, including,

    (a) varying the prospectus requirements in the *SIA, 1995* by prescribing additional disclosure requirements in respect of the funds and requiring or permitting the use of particular forms or types of additional offering or other documents in connection with the funds,

    (b) prescribing permitted investment policy and investment practices for the funds and prohibiting or restricting certain investments or investment practices for the funds,

    (c) prescribing requirements governing the custodianship of assets of the funds,

    (d) prescribing minimum initial capital requirements for any of the funds making a distribution and prohibiting or restricting the reimbursement of costs in connection with the organization of a fund,

    (e) prescribing matters affecting any of the funds that require the approval of security holders of the fund or TTSEC, including, in the case of security holders, the level of approval,

(f) prescribing requirements in respect of the calculation of the net asset value of unit trusts and mutual funds,

(g) prescribing requirements in respect of the content and use of sales literature, sales communications or advertising relating to the funds or the securities of funds,

(h) respecting sales charges imposed by a distribution company or contractual plan service company under a contractual plan on purchasers of shares or units of a mutual fund, and commissions or sales incentives to be paid to registrants in connection with the securities of a mutual fund,

(i) prescribing procedures applicable to unit trust, mutual funds, registrants and any other person or company in respect of sales and redemptions of mutual fund securities and payments for sales and redemptions, and

(j) prescribing requirements in respect of, or in relation to, promoters, advisers or persons and companies who administer or participate in the administration of the affairs of unit trusts, mutual funds and other collective investment schemes.

25. Prescribing requirements relating to the qualification of a registrant to act as an adviser to a unit trust, mutual fund or non-redeemable investment fund.

26. Varying the *SIA, 1995* with respect to foreign issuers to facilitate distributions, compliance with requirements applicable or relating to reporting issuers and the making of take-over bids, issuer bids, insider bids, going-private transactions and related party transactions where the foreign issuers are subject to requirements of the laws of other jurisdictions that the TTSEC considers are adequate in light of the purposes and principles of the *SIA, 1995*.

27. Requiring or respecting the media, format, preparation, form, content, execution, certification, dissemination and other use, filing and review of all documents required under or governed by the *SIA, 1995*, the regulations or the by-laws and all documents determined by the regulations or the by-laws to be ancillary to the documents.

28. Respecting the designation or recognition of any person, company or jurisdiction if advisable for purposes of the *SIA, 1995*, including, recognizing stock exchanges, self-regulatory organizations and clearing agencies.

29. Respecting the conduct of the TTSEC and its employees in relation to duties and responsibilities and discretionary powers under the *SIA, 1995*, including, the conduct of investigations and examinations and the conduct of hearings.

30. Prescribing the fees payable to the TTSEC, including those for filing, for applications for registration or exemptions, for trades in securities, in respect of audits made by the TTSEC, and in connection with the administration of the securities law of Trinidad and Tobago.

31. Varying the *SIA, 1995* to permit or require the use of an electronic or computer-based system for the filing, delivery or deposit of,

(a) documents or information required under or governed by the *SIA, 1995*, the regulations, rules or by-laws, and

(b) documents determined by the regulations or by-laws to be ancillary to documents required under or governed by the *SIA, 1995*, the regulations or by-laws.

32. Establishing requirements for and procedures in respect of the use of an electronic or computer-based system for the filing, delivery or deposit of documents or information.

33. Prescribing the circumstances in which persons or companies shall be deemed to have signed or certified documents on an electronic or computer-based system for any purpose of the *SIA, 1995*.

34. Specifying the conditions under which any particular type of trade that would not otherwise be a distribution or offer to the public shall be a distribution or offer to the public.

35. Varying the *SIA, 1995* to permit or require methods of filing or delivery, to or by the TTSEC, issuers, registrants, security holders or others, of documents, information, notices, books, records, things, reports, orders, authorizations or other communications required under or governed by the securities laws of Trinidad and Tobago.

36. Providing for exemptions from or varying the requirements under the *SIA, 1995* in respect of amendments to prospectuses or preliminary prospectuses, or prescribing circumstances under which an amendment to a preliminary prospectus or prospectus must be filed.

37. Prescribing, providing for exemptions from or varying any or all of the time periods in the *SIA, 1995*.

SCHEDULE "C"

SUMMARY OF KEY CANADIAN DISCLOSURE REQUIREMENTS

Document	Prepared or Filed By	Present Filing Deadline	New Filing Deadline Under Proposed NI 51-201
Annual Audited Financial Statements	Reporting Issuer	140 days from financial year end.	90 days for senior issuers, 120 days for other issuers, from financial year end.*
Management Discussion and Analysis on Annual Audited Financial Statements	Reporting Issuer	140 days from financial year end.	90 days for senior issuers, 120 days for other issuers, from financial year end.*
Interim Unaudited Financial Statements	Reporting Issuer	60 days from end of interim period.	45 days for senior issuers, 60 days for other issuers, from end of interim period.*
Management Discussion and Analysis on Interim Unaudited Financial Statements	Reporting Issuer	60 days from end of interim period.	45 days for senior issuers, 60 days for other issuers, from end of interim period.*
Annual Information Form	Reporting Issuers (other than small business issuers)	140 days from financial year end.	90 days for senior issuers, 120 days for other issuers, from financial year end.
Material Change Reports	Reporting Issuers	Press release promptly after the occurrence of the material change. Material change report within 10 days thereafter.	No change.
Business Acquisition Report (including *pro forma* financial statements)	Reporting Issuers	-	75 days after the date of the acquisition triggering the requirement.
Insider Report	"Insider" of a Reporting Issuer	Within 10 days of becoming an insider of the reporting issuer, or any subsequent trade in securities of the reporting issuer.	No change.
Early Warning Report	Insider/Acquirer	Press release forthwith upon acquiring more than 10% of shares of any class of a reporting issuer. Early Warning Report within two (2) business days thereafter.	No change.

*In addition these filing requirements may be adjusted owing to changes in the United States where the filing deadlines for annual audited financial statements and interim unaudited financial statements are expected to be reduced to 60 days and 30 days respectively for most U.S. reporting companies.