**COMMENTS OF THE LAW ASSOCIATION OF TRINIDAD AND TOBAGO**
**on the COMPANIES (AMENDMENT) ACT, 2017**

Dated 11 April 2018

**General Comments:**

**1. Inclusion of provisions in a separate Part.**

We have reviewed the provisions of the Companies (Amendment) Bill 2017 and recommend that the said provisions insofar as they are accepted and enacted by Parliament should be included as a separate part of the Companies Act ("the Act"), namely a new Part VIII, for the following reasons:

1.1. The Bill is being introduced for a very limited purpose. The intent of the Bill is to create a definition of "beneficial owner" that captures the natural person (or persons) who ultimately owns or controls the legal person or legal arrangement. It seeks to introduce measures to enhance the transparency of legal persons in the Companies Registry with a requirement for the provision of beneficial ownership information. The intention is to ensure that accurate and timely beneficial ownership information and access to a central register is available for improving transparency of investments in and transfers of shares and sharing with competent authorities for utilization in the fight against fraud corruption money laundering and other illicit financial flows.

1.2. The defining purpose of company law and the Companies Act in particular is to facilitate business enterprise and entrepreneurship through establishment and regulation of a legal form that provides for a separate legal personality, investment in the business and transferability of investments, limitation of liability and the separation of management from ownership. The corporate form is a significant driver of private business enterprise and the economy as a whole.

1.3. The inclusion of the provisions of the Bill, all having the specific purpose outlined in 1.1 above, together in a separate Part will help to avoid possible confusion in the interpretation thereof by reference to the provisions of any other part of the Act (which have the purpose outlined in 1.2). A definition section to the new Part VIII will expressly be applicable only to the provisions of that Part and will not conflict with or otherwise affect the meaning of the same defined terms when used in other parts of the Act and so avoid confusion.

1.4. Some examples of possible confusion are the following:

1.4.1. Under the current Act there are definitions of "beneficial interest" and "beneficial ownership" which definitions are relevant to the following provisions of the Act.

- Section 137 – providing for the establishment of an Unanimous Shareholder Agreement

- Sections 140 and 148 regulating the solicitation of proxies and voting of shares held by a broker/nominee of a "beneficial owner."
- Section 186 dealing with the right of Legal personal representative of a deceased beneficial owner to be registered.
- Section 227 which deals with dissenter rights limiting such rights to shares held on behalf of a beneficial owner
- Section 4 The definition of "associate" which is itself relevant to a number of other sections of the Act
- Section 42 – circumstances in which a company may hold shares in itself or its subsidiary
- Section 161 – dealing with auditor qualification
- Section 303 – providing for a definition of "insider"

1.4.2. The provisions of the Bill may to some extent contradict entrenched company law principles enshrined in the Act, for example the mandatory requirement for disclosure of trusts is clearly in conflict with Section 186 of the Act, which will be avoided if mandatory disclosure is expressly limited to the circumstances set out in the new Part VIII.

We therefore submit that inclusion of these provisions in a separate Part of the Act will avoid any confusion with the existing principles applicable to regulating corporate affairs and will also clearly highlight the obligations applicable to achieve the objectives set out at 1.1 above.

## 2. Exemption for public companies and companies regulated under other legislation

We recommend that there should be exemptions for public companies which are already subject to the Reporting Issuer regime under the Securities Act and the substantial shareholder reporting regime under sections 181 to 185 of the Companies Act as well as companies regulated under the Financial Institutions Act, Insurance Act and Securities Act.

2.1. Public companies generally have shareholders numbering in the thousands and shares are tradeable on a daily basis with resultant daily changes in beneficial ownership. Application of a regime requiring determination of beneficial interests of all such shareholders, even if only done on a quarterly basis as intimated in the draft legislation, will present a significant compliance burden on the companies, increasing their cost of doing business without any resultant benefit over and beyond that achieved by the regimes under the existing legislation.

2.2. The Financial Institutions Act, Securities Act and Insurance Act (both the existing Act and pending Bill), all contain provisions whereby regulatory approval is required for the holding of a substantial or controlling interest of insurance companies, banks, non-bank financial institutions, broker-dealers, investment advisors, underwriters. The requirement for maintenance of a beneficial ownership register for such entities will require a duplication of effort, again

increasing the compliance burden and the cost of doing business when there are already in place requirements to achieve the objectives outlined in 1.1 above.

2.3. In addition to the above it should be noted that each of the Insurance Act, Financial Institutions Act and Securities Act include provision for the regulator to:

> "ensure/aid in compliance with the Proceeds of Crime Act, any other written law in relation to the prevention of money laundering and combating the financing of terrorism .. (Section 6 of the Securities Act with similar provisions in Section 10 of the Financial Institutions Act and Section 7 of the Insurance Bill No. 6 of 2016)

3. We submit that rather than create an additional reporting requirement for these companies it would be preferable to review and if necessary strengthen the provisions already in place regulating controlling interests in such companies.

**4. Custody and Access to the Register of beneficial owners**

There are many valid reasons for nominee/trust arrangements which have nothing to do with criminal activity but do require secrecy. For instance, achieving control for the purpose of a valid take-over, fear of being targeted due to wealth, or fear of reprisals for the type of business of the company in which the shares are held (e.g. fur trade, weapons, chemicals, animal testing, etc.).Therefore, consideration needs to be given to the exclusion of certain cases, including those identified above, from the requirement to disclose beneficial ownership.

We note that there are no provisions in the proposed amendment addressing these concerns.

We consider that the approach in the UK which allows companies to maintain an internal register which would be available for viewing upon request **or** to opt to keep information relating to its beneficial owners on a register maintained by the Registrar General instead. This would allow companies to take into account the potential administrative burden on the company (of filing the returns with the registry) as well as the privacy of the beneficial owners with the benefits of having the information filed with the registry (such as avoiding requests being made by the public to the company itself where the information is already available through the registrar).

There is a similar approach in other jurisdictions such as the Cayman Islands which assures the access by the relevant authorities to the information yet preserves the privacy of those with bona fide reasons for maintaining same.

We urge that this legislation is incomplete without the inclusion of such provisions.

**5. External Companies and Companies without a share capital**

We have recommended that the Bill exclude these companies. See comments under Section 177E. In particular we are concerned that extension of these provisions to external companies is unnecessary and would be a deterrence to establishment of businesses here by foreign entities.

**6. Limitation of beneficial ownership regime to controlling or significant interests**

The need for reporting on beneficial ownership will increase the administrative burden both on companies as well as the Companies Registry. Our review of similar legislation in other jurisdictions suggests that the focus should be on beneficial ownership of controlling or substantial interests in companies and not the beneficial ownership of every single share. We recommend that adoption of such a position for this amendment.

**7. Regulations**

We have commented on the Bill without the benefit of Regulations which are required to operationalise these proposed provisions.

**8. Other Jurisdictions**

We have looked at applicable legislation in several jurisdictions where the concept of "beneficial owners" and the creation of 'beneficial ownership registers" exist including the United Kingdom, the Cayman Islands and Jamaica. We have found the Cayman Islands legislation to be the most helpful with provisions for a clearly articulated regime.

**9. Other Amendments**

We appreciate the limited purpose for which the Act is being amended here but perhaps the opportunity could be taken to make other important amendments to the Act including but not limited to:

9.1 Establishing direct legal rights of the shareholder for shares held in a Securities Depository. At this time the Depository is the only shareholder legally recognized and

recognition of the legal shareholder is achieved through agreements with the brokers/TTCD and company by-laws.

9.2 Consolidating or at least bringing into alignment the differing reporting requirements for substantial shareholders and company directors and officers of listed companies. There are currently dual requirements under the Companies Act (sections 181 to 185 mentioned above and section 136 and 137 of the Securities Act) with different definitions, differently assigned responsibilities and different timelines.

9.3 Correction of the typographical error in the definition of "stated capital account". It seems that the reference therein should be to section 35, not 37 (i.e. "stated capital account" means an account maintained pursuant to section 35).

9.4 Removal of the restrictions on financial assistance which were repealed in Canada some time ago ( Section 56)

9.5 Making making the provisions applicable to take-overs more cohesive with the regime under the Securities Legislation..

**10. Errors**

We have found the Bill to contain a fair number of spelling errors and recommend that it be further carefully reviewed by its framers before further circulation.

Attached hereto is a table of comments on the Bill.