

SECOND LEGAL REPORT ON: LEGISLATIVE AND REGULATORY REFORM OF THE VENTURE CAPITAL REGIME IN JAMAICA

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MYERS, FLETCHER & GORDON
ATTORNEYS-AT-LAW

Prepared by: Myers, Fletcher & Gordon

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Abbreviations

CIS	Collective Investment Scheme
DBJ	Development Bank of Jamaica
FSC	Financial Services Commission (Jamaica)
GOJ	Government of Jamaica
GOTT	Government of Trinidad & Tobago
JBDC	Jamaica Business Development Corporation
JVCP	Jamaica Venture Capital Programme
MFG	Myers, Fletcher & Gordon
MOF	Ministry of Finance
PE	Private Equity
QIC	Qualified Investee Company
TAJ	Tax Administration of Jamaica
VC	Venture Capital
VC Entity	Venture Capital Company
VCIP	Venture Capital Incentive Programme (Trinidad & Tobago)

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Executive Summary

Introduction

The Development Bank of Jamaica ("DBJ"), acting on behalf of the Government of Jamaica ("GOJ"), is desirous of establishing a Jamaica Venture Capital Programme ("JVCP") in order to develop and incentivize the venture capital industry within Jamaica. Pursuant to this aim, they have instructed the law firm, Myers, Fletcher & Gordon, to prepare this report, which seeks to advise on the legislative and regulatory environment that will be necessary to support the development of an effective venture capital and private equity industry within Jamaica.

This report complements the First Legal Report on The Venture Capital Regime in Jamaica ("the First Report"), which presented the current legal and regulatory framework for venture capital ("VC") and private equity ("PE") in Jamaica, in addition to identifying present deficiencies. This Second Report now seeks to make specific recommendations on the initiatives necessary for: (i) remedying the present regulatory deficiencies and (ii) implementing an appropriate legislative framework as gleaned from the international best practices recognized in the First Report. In doing so, this report is divided into three parts, which each present the recommended steps and changes that should be effected in the short term, medium term and long term respectively, in order to accomplish the overall objective.

Overall Objective

The aim is that this Second Report, in addition to the First Report and the reports of the Market Consultant, Patricia Freitas, will serve as a framework for reviving and galvanizing interest in the venture capital industry within Jamaica. It is hoped that the extensive consultations and comprehensive reports prepared will allow us to avoid the pitfalls suffered by previous efforts.

Time-Frame

The expectation is not that results will materialize instantaneously. It is understood that the establishment of an ideal venture capital programme will take time and resources. In light of the current economic realities in Jamaica, it is recognized that such resources may not be immediately available or accessible to the extent seen as best needed to galvanize the industry. As a result, we have proposed in this report short term, medium term and long term solutions for the way forward.

Summary of Recommendations

Short Term

1. Source financing.
2. Determine an appropriate structure into which DBJ funds may be invested for the purposes of jumpstarting VC activity.
3. Assist in the establishment of the Jamaica Venture Capital and Private Equity Association.
4. VC Entity entity may apply for Approved VC Entity status under the *Income Tax Act*.
5. Establish how target companies will be identified and the criteria to be satisfied by such companies

Medium Term

1. Improve the vehicles available to be used as VC Entity, for e.g. introducing true limited partnerships and other suitable vehicles.
2. Lobby for necessary legislative amendments, e.g. *Copyright Act*; *Pensions (Superannuation Funds and Retirement Schemes) (Investment) Regulations*, etc.
3. Foster education and training.
4. Encourage the establishment of venture capital funds.

Long Term

1. Introduce VC-specific legislation
2. The underlying policy of the legislation should be to provide incentives to venture-capitalists and to regulate the industry (a mixed regime)
3. The Trinidad and Tobago *Venture Capital (Amendment) Act (No. 2) (2004)* is recommended as the base model legislation.
4. The JVCP should be regulated by the FSC.

Introduction

As presented in the First Report, a loose framework currently exists within Jamaica in which VC activity can and has taken place. However, the low levels of VC activity within Jamaica may be considered evidence that the current regulatory framework is inadequate. Specifically, some of the gaps that have been identified include:

- **Lack of true limited liability partnership structure in Jamaica, which is the preferred vehicle for establishment of a VC fund;**
- **Limitation of the Approved Venture Capital Company (“VC Entity”) designation in the *Income Tax Act* to companies only;**
- **Discretionary nature of the Approved VC Entity designation which currently exists under the *Income Tax Act*;**
- **Restricted nature of current tax benefits as they apply to income tax only;**
- **Anticipated IMF-led changes to tax incentives, etc, the extent of which are not fully known at the date of this Second Report;**
- **Issues regarding the ownership of copyright, for e.g. for works commissioned by an employer; and**
- **Low levels of awareness of the tax benefits that currently exist.**

Part I: Short Term Proposals

In the short term, as a means of spurring initial activity in the venture capital industry, it is our understanding that DBJ proposes to make a pool of funds available to the industry. DBJ recognizes and appreciates, however, that, although they could more quickly enter the venture capital market if they were prepared to themselves set up a structure which others could be invited to join, they have been guided that the likelihood is that such a structure would be viewed as primarily a Government structure and would carry with it perceptions which would not enhance the wider development of the industry. The Strategic and Implementation Plan of DBJ, therefore, recommends “fostering the demand side of the ecosystem” by bringing together “fund managers who are fundraising venture capital funds” which “should be started and led by the DBJ alongside at least one strong partner”.¹ It proposes that “DBJ should try to invest in at least two funds per year alongside other investors”.

For the purposes of this discussion, the short term picture looks at the availability of structures through which DBJ may make funds available to the industry as they are at the date of this Report. It is recognized, as discussed in Part 2, which looks at the Medium Term Proposals that there are developments in terms of available legal vehicles and proposed changes to the investment rules governing potential investors. We have assumed, however, that for the short term, these developments and enhancements are not available. Accordingly, in the short term analysis we have considered what are the available models for DBJ’s investment.

Major Industry Players

The Venture Capital structure involves the following main players: (i) the venture capitalist – being the person with the capital and the expertise to assist the entrepreneur to develop; (ii) the target company – being the person with the business model in need of the capital and guidance of the venture capitalist. The venture capitalist will either bring to the table existing capital and expertise to assist the entrepreneurs or will seek to raise such capital and expertise from third parties. The venture capitalist therefore can either be an individual, typically known as the “angel investor”, a partnership, a limited liability company or a “collective investment scheme”. DBJ, in the short term, could therefore contribute its capital using any of the latter three options.

Investment Structure

We set out below considerations for DBJ making an investment into any of these three structures:

(A) Partnership

Under Jamaican law, a partnership is created as a matter of law where two persons come together to carry on business with a view to making a profit. A simple partnership agreement would be advisable, but the commencement of the business is all that would

¹ See Patricia Freitas, *Creating a Venture Capital Ecosystem in Jamaica – Strategic and Implementation Plan*, (Draft, July 2013).

be required to get this venture up and running once the parties have been determined. In a general partnership, however, the liability of each of the partners is unlimited.

The *Partnerships (Limited) Act* allows for the creation of a limited partnership under the laws of Jamaica “for the transaction of any mercantile, mechanical, agricultural, or manufactory business” where at least one of its partners remains as a general partner with unlimited liability, and the other partners can enjoy limited liability. In a limited partnership, it is the general partner alone who can transact the business of, sign on behalf of or bind the partnership. In order to commence a limited partnership however, a Certificate of Formation of Limited Partnership must be properly completed, executed and filed with the Island Records Office and the terms of the partnership must be published in the Gazette and at least two newspapers for at least six (6) weeks.

The vehicle of a partnership, however, presupposes that there is no need to raise any capital by way of a general invitation to the public. Where this is the case, this is the quickest and simplest means of establishing the “fund”. The partnership which is created would be free, either using the expertise of its partners or engaging the services of persons with the relevant expertise, to carry out the business of dealing with target entities. Note, however, that there is no separate legal personality for the partnership and that the partnership would not be eligible under the existing provisions of the Income Tax Act to be an Approved Venture Capital Company entitled to the tax reliefs thereunder (more particularly discussed in the Medium Term analysis).

(B) Limited Liability Company

There are two main types of limited liability companies that may be incorporated under the Companies Act of Jamaica: a private company or public company. A limited liability company will have separate legal personality from its members and directors.

(i) Private Company

Section 25 of the Companies Act sets out the criteria that must be met for a company to be registered as a private company. They are:

- (a) the company is to be owned by at least one and no more than twenty shareholders (not including employees and former employees);
- (b) the right to transfer shares in the company is restricted (right to transfer shares may be restricted by the fact that Board of Directors must approve the transfer or by granting pre-emptive rights to shareholders);
- (c) the company is prohibited from issuing shares to the public, that is, the company cannot put out a general advertisement to the public inviting members to subscribe for shares;

- (d) the company is also prohibited from making any invitation to the public to deposit moneys with the company whether for a fixed period or not and whether bearing interest or not and;
- (e) generally prohibits persons other than a holder of interest in the company from owning shares.

A company which does not meet these requirements will be registered as a public company (see below). A private company will be able, by way of a private placement, without making any kind of offer to the public, to raise financing from specifically targeted persons. It is important however to ensure that the offer does not constitute an offer to the public within the meaning of section 55 of the Companies Act which provides that:

55.-(1) Any reference in this Act to offering shares or debentures to the public shall, subject to any provision to the contrary contained therein, be construed as including a reference to offering them to any section of the public, whether selected as members or debenture holders of the company concerned or as clients of the person issuing the prospectus or in any other manner, and references in this Act or in a company's articles to invitations to the public to subscribe for shares or debentures shall, subject as aforesaid, be similarly construed.

(2) Subsection (1) shall not be taken as requiring any offer or invitation to be treated as made to the public if it can properly be regarded, in all the circumstances, as not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation, or otherwise as being a domestic concern of the persons making and receiving it, and in particular —

- (a) a provision in a company's articles prohibiting invitations to the public to subscribe for shares or debentures shall not be taken as prohibiting the making to members or debenture holders of an invitation which can properly be regarded as aforesaid; and*
- (b) the provisions of this Act relating to private companies shall be construed accordingly.*

With this vehicle, please bear in mind that it is possible that you may also elect to have a Shareholders Agreement which may seek to set out in more detail more information than what you may wish to state in the Articles of Incorporation (although the details could also be set out there). For example, the Shareholders Agreement may spell out the understandings between the members as to who will be responsible for managing the company, the reporting obligations, how

financing for the entity will be raised, what types of target persons will be considered, etc.

Pros and Cons:

The option of establishing a private company will be particularly attractive where all the investors in the fund have already been selected and already possess sufficient capital to invest in the company.

The main drawbacks of this vehicle will be that the ability of the fund to raise financing will be limited and they will be restricted from making any general approach to the public to invest capital directly into the company. The sale of the shares in this entity will also be subject to transfer tax and stamp duties unless this company is first converted to a public company and then listed on the stock exchange and the shares transferred over the exchange.

(ii) Public Company

On the other hand, if the desire (whether at inception or afterwards) is to have a general call for persons to contribute capital to the company by acquiring shares in the company then a public company may be established at creation, or later by way of conversion.

Public companies are those companies which do not meet the requirements for being a private company under the Companies Act. They are entitled (but are not obligated) to raise capital by inviting subscription for shares from the public. Public companies may also apply to be listed on either the main or junior stock exchange. Please note also that public companies are subject to minimum capital requirements under the Companies Act of J\$500,000 and must have a minimum of 3 directors, at least two of whom are independent (a private company may have only one director). Note also that directors can be corporate entities and therefore an entity with the requisite skill to manage the capital of the company can be appointed as its director.

If listing on the exchange, the company will need to meet the stock exchange requirements for listing, the Securities Act Regulations relating to the issue of the prospectus and also the relevant provisions of the Companies Act. It is also advisable that the company appoints and works with stockbrokers, accountants, attorneys, valuers and investment bankers and a public relations and marketing firm to ensure the success of the public offering.

Pros and Cons

The major advantages of using a publicly listed company are that the fund will have additional opportunities for raising capital other than from the initial

shareholders; it may, if listed, be easier to dispose of its shares and such disposal of shares will not attract transfer tax; and the fund would be more attractive to potential investors such as pension funds that prefer to deal with listed companies. However, being public will entail greater registration requirements.

(C) Collective Investment Schemes²

Although a regular limited liability company can be used as the vehicle for establishing a VC fund, it does not without more have the immediate attractiveness of being able to pool financing from various places in the most attractive manner, in order for them to be utilized for the purpose of VC financing. Instead, subscription for shares would be subject to the ordinary requirements under the Companies Act and each subscriber will in doing so need to consider for itself the implications of acquiring shares in such entity when agreeing to make the investment.

A collective investment scheme ("CIS fund") is a way of investing money alongside other investors in order to benefit from the inherent advantages of working as part of a group, with the scheme being overseen by a professional investment manager. In Jamaica, the law currently provides for only two types of collective investment schemes: unit trusts and mutual funds, which were previously governed by the *Unit Trusts Act (2001)* and the *Securities (Mutual Funds) Regulations (1999)* respectively. They are now governed by the *Securities (Amendment) Act (2013)* and the *Securities (Collective Investment Scheme) Regulations (2013)* ("the CIS Regulations"), which were passed into law on December 30, 2013.

The CIS Regulations aims to provide a comprehensive framework for the regulation and promotion of all lawful forms of collective investment schemes, such as unit trusts and mutual funds. The new framework gives the FSC extensive investigative powers over CIS funds and their service providers. All CIS funds being offered within Jamaica are now required to be registered, unless they have been granted express exemption from registration. A CIS may be exempt from registration under the Regulations if:

- a) The scheme is an investment club
- b) The scheme is sold only to accredited investors
- c) Each investor in the scheme purchases a minimum of \$10 million
- d) The scheme is a private issuer and offers its securities to only specific persons.

² On December 30, 2013, the *Securities (Amendment) Act 2013* and *Securities (Collective Investment Scheme) Regulations 2013* were passed into law. Please refer to Annex III to see some of the key changes made by these pieces of legislation.

The FSC will closely examine all disclosures made by CIS funds, such as their financial statements, annual reports and offering documents, for compliance with the law. Such disclosures must be up-to-date and must contain all relevant information about the fund, its operators, managers and other key service providers. The CIS Regulations also sets standards for how the fund's portfolio of assets and cash are required to be held. In particular, the assets must be segregated and it must be patently clear that they belong to the fund and its investors, and not the entity acting as custodian, that is, the manager or operator. Registration and Approval

There are different requirements for the registration and approval of local versus overseas CIS funds. The main differences are that overseas CIS funds must be from a "recognized foreign jurisdiction" and must show that they are in good standing in that jurisdiction. They must also sell their securities in Jamaica through local licensed securities dealers and have greater periodic reporting requirements.

Local CIS funds must apply to the FSC for registration by submitting their completed application form along with their offering document, most recent audited financial statements, organizational documents and the fit and proper documents for all directors and officers of the scheme.

The FSC will generally grant approval where the following minimum requirements are met by the CIS fund:

- a) The minimum value of its securities is not less than the equivalent in Jamaican dollars at the prevailing rate of exchange, of three hundred thousand United States dollars (US\$300,000.00);
- b) The custodian or trustee is independent of the manager and operator to be appointed to hold the assets of the scheme;
- c) The disclosure documents and marketing material that are to be supplied to the investors are acceptable to the FSC; and
- d) The operator, responsible officer and all service providers are fit and proper persons.

Consequential amendments were made to the Companies Act, by virtue of the *Companies (Amendment) Act (2013)*, in order to facilitate local CIS funds incorporated as companies in Jamaica. These amendments were necessary to exempt CIS from a number of previous sections, which were considered too onerous to make local CIS funds operationally viable. Some of the amendments include:

- a) A definition of a CIS which gives a CIS incorporated as a company the authority to redeem or purchase shares without reducing its authorized share capital.

b) The CIS Articles of Association summarizes various provisions that should be includes, such as:-

- i. the fact that they intend to issue investors shares where the money is pooled to buy assets;
- ii. that they are managed by a management company; and
- iii. the holders of shares in a CIS are entitled to any surplus assets available for distribution on a winding up of the CIS ahead of any other shareholders in the company.

(a) Overseas Entity with Local Registration

VC Entities also have the option of operating as an overseas company, though this will still require them to have a registered address within Jamaica. Overseas companies which have established a place of business in Jamaica are required to be registered under Part X of the Companies Act. Note that this entity does not create a separate legal entity from the entity in its country of incorporation. Rather, the entity is viewed merely as having established a branch within this jurisdiction.

It should be borne in mind that while registering overseas may provide tax benefits, it is also possible that the Jamaican authorities may consider that an overseas company, though registered overseas, is taxable in Jamaica because it effectively operates within Jamaica where its effective "mind and management" are located in Jamaica. In any event, income arising from activities here in Jamaica will likely be taxable here in Jamaica.

(b) Considerations for Offshore Vehicles

Stigma of Offshore Entities

If it is decided that an off-shore structure is the vehicle to be used, then DBJ should be aware of the particular anti-tax avoidance parameters that currently exist. Tax mitigation is ordinarily viewed as an acceptable business practice; however, tax avoidance is illegal. The difference between the two should be clearly understood. Tax mitigation refers to the reduction of a taxpayer's income in accordance with specific deductions allowable under the statute, whereas tax avoidance refers to the reduction of a taxpayer's income pursuant to an arrangement which does not involve any actual loss or expenditure on the part of the taxpayer and is not specifically provided for by statute. It should be noted that recent case law out of the United Kingdom has even suggested that

the tolerance for tax mitigation may even be waning. Great care must therefore be taken when seeking to establish corporate vehicles for any tax advantage or mitigation reasons.

The general understanding in legislation across the Commonwealth Caribbean, and certainly in Jamaica, is that "where the Commissioner (of Taxes) is of the opinion that any transaction which reduces or would reduce the amount of tax payable by any person is artificial or fictitious, or that full effect has not in fact been given to any disposition, the Commissioner may disregard any such transaction or disposition, and the persons concerned shall be assessed accordingly". Section 18 of the *Income Tax Act* asserts that any person who obtains a tax advantage must show that the transaction was carried out either for *bona fide* commercial reasons or in the ordinary course of making or managing investments, and that none of them had as their object, or one of their objects, to enable tax advantages to be obtained.

Keeping this in mind, DBJ will need to take great care in any off-shore structuring. There is an obvious downside to a government entity setting up an off-shore company for tax benefits. The action would suggest that the government themselves when entering into public-private partnerships are cognizant of the overwhelming burden placed on businesses by their own tax code that they themselves try to mitigate against them at all costs. The public perception of such practices may weigh negatively against the project.

FSC Regulation

Pursuant to Jamaica's *Securities Act*, individuals and entities that carry on a business of providing investment advice or hold themselves out as providing investment advice in Jamaica must be licensed with the Financial Services Commission ("FSC") as investment advisers. Likewise, those carrying on a securities business or holding themselves out as carrying on a securities business in Jamaica (i.e., marketing, soliciting, offering or attempting to offer, trading (selling or purchasing), or negotiating investments in Jamaica) whether as a principal or agent must be licensed and approved to do so by the FSC as a dealer. Considering the activities that a fund manager or the fund itself is likely to be engaged in, for e.g. soliciting, encouraging and/or advising individuals on VC transactions, it is possible that such activities of the fund manager or the fund may fall within the threshold of "carrying on the business" of an investment advisor or security dealer, thereby requiring registration with the FSC. Such registration and/or licensing will be required whether or not the fund is set up through a local or overseas vehicle, once it can be considered that the entity is "doing business" in Jamaica.

These requirements however do not apply to “exempt dealers” or “exempt distributions” or to a transaction on a particular occasion by a person who does not hold himself out as dealing in securities on a day to day basis. In this regard, the Act includes in the definition of “exempt dealer” *“a person who carries on a business of dealing in securities only through the holder of a dealer’s licence on his own account”* and *“an investment adviser whose dealing in securities is solely incidental to his carrying on the business of managing a portfolio of securities on behalf of a client.”* Such persons enjoy a relaxed form of registration and the person who handles the matter must be licensed. As it relates to exempt distributions, pursuant to the Financial Services Commission’s Guidelines For Exempt Distributions, which came into force on June 15, 2008, certain categories of dealings are treated as “exempt distributions” with the consequence that provided that they comply with the requirements of a category of exempt distribution, the registration requirement under section 26(1) is deemed to have been satisfied and a prospectus does not have to be registered with the FSC. There are four (4) categories of exempt distributions. These are:

- Securities offered to accredited investors³;
- Securities that have an acquisition cost to the purchaser of not less than ten million dollars, paid in cash at the time of the purchase;
- Securities offered by an issuer having an assigned rating of at least BBB+ (or equivalent rating) by a recognized rating agency, where the issuer is already a reporting issuer; and
- Securities issued by a private issuer to connected persons.

Investment Restrictions for certain types of potential investors

It should be noted also that the country of incorporation may also have implications for the ability of other local investors to invest in the VC Entity. Section 24 - 27 of the *Pensions (Superannuation and Retirement Schemes) (Investment) Regulations* provide as follows:

24. *A fund or scheme may invest in ordinary shares listed on a recognized stock exchange of Jamaica or a recognized stock exchange of a recognized jurisdiction,*
25. *A fund or scheme may invest in the shares of a 'company offering shares in an initial public offer, where*

³ Please refer to Annex VI for a definition of “accredited investor”.

- (a) *the company intends to list on a recognized stock exchange of Jamaica or a recognized jurisdiction; and*
 - (b) *the initial public offer meets the requirements for registration under the Securities Act.*
26. *A fund or scheme shall not, either by itself or in conjunction with any other person acquire, hold or control, without the prior written approval of the Commission, in excess of thirty per cent of the voting shares in a body corporate or the interest in any entity.*
27. (1) *A fund or scheme may invest in preferred or guaranteed shares (other than ordinary shares) of any solvent institution to which this regulation applies.*
- (2) *This regulation applies to an institution created or existing under the laws of Jamaica or of a recognized jurisdiction, the prior obligations and prior preferred stocks, if any, of which, at the date of acquisition by a fund or scheme are eligible as investments and adjustment income or other contingent interest obligations.*

It is to be noted, that unless dealing with shares listed on a recognized stock exchange or being offered in an initial public offering, Regulation 27(2) appears to only clearly permit investment in preferred or guaranteed shares of an institution created or existing under the laws of Jamaica or a recognized jurisdiction. The term "recognized jurisdiction" is defined under the Regulations as "Canada, the United States of America, the United Kingdom or any other country so declared by the Commission". It is to be noted therefore that this list does not include CARICOM or other jurisdictions and territories.

Jamaica Venture Capital and Private Equity Association ("the Association")

A further step contemplated by the Strategic Plan is the establishment of a Venture Capital and Private Equity Association to help to foster and promote the importance of a VC industry and the benefits that can be attained by the country as a whole from a vibrant VC programme. Such an association may be established as a company limited by guarantee or depending on the timing of the implementation of the new 2013 *Charities Bill*⁴, as a charity under that legislation

⁴ Tabled in Parliament on September 17, 2013, passed in the Lower House on October 29, 2013 and currently before the Senate for review.

or as an unincorporated association. The benefits of incorporation, however, which include separate legal personality, limited liability and perpetual succession, should be kept in mind when contemplating establishing such a venture for the long term. The initial members of this association may include all or any of the relevant stakeholders involved in the industry, for example: DBJ, the Private Sector Organisation of Jamaica (PSOJ) and the Jamaica Stock Exchange (JSE). The Association may initially be managed by an Executive Committee being the representatives of these initial members. The corporate documents for the association will detail how persons can become members, whether any subscription is to be required, the objectives of the Association, as well as how the Executive Committee is to be comprised and to carry on its business.

As a charity, the Association ought to be entitled to tax benefits in relation to its charitable activities. The Association could also, as a part of its activities, seek to obtain donations, with tax benefits related thereto, which could form part of the funding and other resources provided to the VC Entity which is established.

Time-Frame

It is envisioned that the short-term targets can be achieved within three (3) to six (6) months, provided that clear decisions have been made regarding the type of structure to be used, how they will operate, and that initial sources of financing have been identified.

Steps Required

DBJ's short term initiative may be broken down as follows:

- 1. Identification of the source of funding and desired type of vehicle for the VC Entity**

DBJ, working with its other partners will try to identify other persons ready to invest in venture capital activity. Once determined, the partners will need to ascertain what type of vehicle best suits the venture (given the considerations mentioned above), how much and what method will be used for the injection of capital into such vehicle. See, for example, Annex I.

- 2. Establish how target companies will be identified and the criteria to be satisfied by such companies**

Once the type of vehicle is determined, consideration may be given to entrenching in the governing documentation the criteria for identifying suitable target companies for which the capital contributed may be used.

- 3. Identification of the manner in which the VC Entity will provide support and assistance to the target entities**

To some extent, although this concept needs to remain fluid, some broad parameters should be established and may also be entrenched in the governing documentation for the vehicle selected. See for example the parameters attached as Annex I.

4. Identification of the exit strategy for the VC Entity from the target entities

A suitable exit strategy should be devised beforehand. The VC Entity may, for example, set a maximum time-frame within which it must exit from each entity, as well as the means of determining earlier periods for exiting the entity. See for example what we propose for the long term, we would suggest that the VC Entity consider a maximum time frame of ten years. However, the VC Entity should also provide for early exit from the target company if it satisfactorily reaches a point on which it can be listed on any exchanges, or has raised sufficient capital to successfully support the venture.

5. Consider application for Approved Venture Capital Company status for the VC Entity

Depending on the type of vehicle established consideration should be given as to whether or not the criteria for approved venture capital status under the *Income Tax Act*.

6. Establish the Jamaica Venture Capital and Private Equity Association and seek relevant tax exemptions

The framework for the Association may be determined and the Association set up so as to facilitate the background preparation and guidance which will be needed for the development of the industry.

TAX TREATMENT

TERM	COMPANY	CORPORATE BODY	IF APPROVED VC ENTITY	INVESTOR
Short Term	Overseas Mutual Fund	Taxed at 25%	N/A	<p>If paying dividend to another company this is liable to tax at 33⅓%.</p> <p>If paying dividend to an individual this is liable to 25% tax.</p>
	Local Mutual fund	Impractical	Impractical	Impractical ⁵
	Unit Trust ⁶	Exempt under s.12 (t) Income Tax Act.	N/A	<p>Security Dealer withholds tax on gains and issues a tax certificate (pursuant to s.39 Income Tax Act).</p> <p>If paying dividend to another company this is liable to tax at 33⅓%.</p> <p>If paying</p>

⁵ Note that with the introduction of the Securities (Collective Investment Schemes) Regulations, 2013 on December 30, 2013, this is no longer applicable. Local Collective Investment Schemes can be introduced. See discussion at Medium Term below.

⁶ Note that with the introduction of the Securities (Collective Investment Schemes) Regulations, 2013 on December 30, 2013 the Unit Trusts Act was repealed, however, the tax benefits were retained for what is known as "qualified collective investment schemes".

TERM	COMPANY	CORPORATE BODY	IF APPROVED VC ENTITY	INVESTOR
				dividend to an individual this is liable to 25% tax. Tax Certificate redeemable if condition are met under s.39 Income Tax Act.
	Private Company	Taxed at 25% for unregulated companies. Taxed at 33 $\frac{1}{3}$ % for regulated companies.	10 - 20 year tax relief if conditions are met. (pursuant to s.36 Income Tax Act)	Residents – 15% Non- Residents - Between 25% and 33 $\frac{1}{3}$ % (subject to rules governing double-taxation)
	Listed Company (Main Stock Exchange)	Taxed at 25% for unregulated companies. Taxed at 33 $\frac{1}{3}$ % for regulated companies.		Residents – 15% Non- Residents - Between 25% and 33 $\frac{1}{3}$ % (subject to rules governing double-taxation) Profits or gains from transactions carried out on the JSE in shares, stock or securities to an individual (who is not a dealer) which do not exceed 50% of his statutory

TERM	COMPANY	CORPORATE BODY	IF APPROVED VC ENTITY	INVESTOR
				<p>income are exempt from income tax pursuant to s.12 (v) Income Tax Act.</p> <p>Disposal of shares via the JSE does not attract transfer tax or stamp duty.</p>



Part II: Medium Term Proposals - Addressing Present Deficiencies

Introduction

The Medium Term outlook would be geared towards finding ways to actively encourage other players in the Jamaican market to get involved in the VC industry. In this respect, therefore, consideration needs to be given to removing some of the existing road blocks to their involvement.

Steps Required

1. Identify sources of financing

As we indicated previously, Jamaican entities have traditionally been reluctant to enter into the equities market, resulting in part from the receipt of higher returns without the risks normally associated with the equities market, and also by concerns as to whether the regulatory requirements declared such investment as unallowable. These restrictions include, amongst other things, concentration limits, lack of clarity as to the effect of prohibiting "speculative" investments, and a lack of clarity as to the ability to purchase ordinary shares in non-listed companies. The recent changes in interest rates have resulted in persons looking for places to invest available cash outside of government securities, which had become the staple investment. Regulators, however, need to play "catch up" and reorient their requirements to allow certain investments involving equity to stand as allowable.

In this respect, therefore, we would recommend that the regulatory requirements, with respect to the pensions and insurance markets be relaxed in the manner proposed in Annex II to better allow these industries to participate in the VC industry:

- (a) Pensions;
- (b) Insurance;

With the relaxation of these regulations, there will be an increased potential for additional funds from these sources to flow into VC Entity vehicles with more persons being prepared to invest in such vehicles and with that, more entities will look at establishing VC Entity vehicles. Moreover, an increase in the number of VC Entity vehicles will result in a greater opportunity for deserving entities to receive the benefit of the kinds of assistance that a VC Entity can provide. It must be noted that since these entities deal largely in trust funds, then the rationale behind the restrictions imposed must be borne in mind. However, imposing clear limits within which the restrictions may be relaxed will allow for achieving the benefit without putting the industry at significant added risk.

2. Improve the vehicles available to be used as VC Entities

a. Limited Partnerships and Limited Liability Corporations

Jamaica's current statute regarding limited partnerships is wholly out-of-date and no legislation currently exists for general partnerships which are subject to general common law principles. The advisors to the Jamaica International Financial Services Authority noted that there would be great benefit to the introduction in Jamaica of Limited Partnerships (LPs)⁷, Limited Liability Partnerships (LLPs)⁸ and Limited Liability Corporations (LLCs)⁹ each of which would have the ability to enjoy separate legal personality. If these additional vehicles are introduced into the Jamaican market, with the benefits recommended by the advisors, which allow for these entities to be treated as flow-through entities, taxed at the level of the partner/member, the ability to reduce some of the bureaucracy may serve to encourage greater participation in VC activity.

b. Collective Investment Schemes¹⁰

In December 2013, the Securities (Collective Investment Scheme) Act 2013 ("CIS") was passed. The regulations give specific guidance to pertinent issues which under the former framework were vague, such as who would be allowed to invest in a CIS, how these schemes are to be registered, which schemes would be exempt from registration, and how an overseas CIS can partake in the industry.

An accredited investor under these regulations includes (amongst others) government authorities, banks, pension funds, trust companies, and

⁷ A limited partnership is a form of partnership similar to a general partnership, except that in addition to one or more general partners, there are one or more limited partners.

⁸ A limited liability partnership is a partnership in which some or all partners have limited liabilities. It therefore exhibits elements of partnerships and corporations. In an LLP, one partner is not responsible or liable for another partner's misconduct or negligence.

⁹ A limited liability corporation is a hybrid business entity having certain characteristics of both a corporation and a partnership or sole proprietorship (depending on how many owners there are). The primary characteristic an LLC shares with a corporation is limited liability, and the primary characteristic it shares with a partnership is the availability of pass-through income taxation.

¹⁰ On December 30, 2013, the Securities (Amendment) Act 2013 and Securities (Collective Investment Scheme) Act 2013 were passed into law. Please refer to Annex III to see how these changes may have affected the recommendations contained in this Report.

individuals whose income exceeded J\$10m before taxes in the two most recent calendar years.

The regulations grant registration exemptions to smaller schemes such as 'investment clubs', which pursuant to the regulations cannot have more than 20 members. If a particular CIS meets specific requirements of the type of investors and the size of their investments, they too qualify for the registration exemption.

The registration process for a non-exempt CIS is not particularly onerous but it places some of the usual filters in place such as fit and proper requirements, and disclosure documents and subscription agreements being presented to the Commission. The new framework requires periodic reporting requirements where a CIS will have to, file financial statements, give immediate notice of any regulatory or criminal action brought against the CIS's operator or service provider, and alert the Commission of any material changes in the initial regulatory documentation.

The regulations also detail the process by which a manager of a CIS can be appointed as well as the qualifications that the manager must have. The general obligations, standard of care, and functions of delegation that a manager must adhere to is also laid out in the regulations.

Under these regulations, a CIS is mandated to comply with diversification and investment restrictions where they can have no more than 15% of the schemes net assets invested in illiquid assets and no more than 10% of the scheme's net assets in securities of one issuer. Also a CIS is not be able to borrow more than 10% of the aggregate market value of the scheme's assets at that time.

The regulations which govern the CIS framework in Jamaica are quite comprehensive. In our view these create a coherent, transparent and accessible vehicle for investors and managers alike. This is certainly an avenue that VC funds would want to look into if and as these regulations have now been passed.¹¹

3. Foster education and training

Encouraging and working with possible VC targets and fund managers through the efforts of the Association to strengthen develop and take advantage of existing opportunities through intensified efforts and hands-on training in matters related to

¹¹ Notwithstanding the replacement of the existing mutual funds regime with the new proposed CIS regime, it is our recommendation that the legislative changes to the *Companies Act* mentioned above and set out in Annex III remain relevant.

good corporate governance, financial accounting, preparing business plans and preparing for export and other relevant matters. The aim is that such efforts will prepare the target entities not only to be seen as good targets for the receipt of VC funds, but also prepare them to continue to succeed after the VC company exits the business.

4. Encourage the establishment of funds

Additionally, DBJ, through the Association, may assist in the medium term to encourage the establishment of other private funds. This may be done by creating additional joint projects in which both DBJ and the private entity would provide funding, possibly by way of matched financing as a co-investment fund. In this way, DBJ could seek to target particular entities which they view as providing much needed resources, beyond mere funding, to VC targets through "how to" coaching, networking events, assistance schemes, as well as possible direct assistance within particular industries.

With regards to DBJ's investment into a VC fund specifically, one of the policies which has been adopted in other jurisdictions which also acts as a positive catalyst towards propelling the VC industry is a matching scheme. Under this tool, the fund will contribute an additional percentage of the monies raised by other investors. Some schemes have been known to match as much as 1:1 (add \$1 to every \$1 individually sourced) and some as low as 1:3 (add \$1 to every \$3 privately sourced). The ratio must be determined by budget. These schemes serve to encourage investors to look to their own access to resources which would then be amplified by the matching effect.

Although one of the recommendations in this report is not to have an industry specific benefit scheme as far as tax is concerned, the matching scheme is one paradigm which could facilitate the targeting of VC activity in particular industries if so desired. The matching scheme could also be designed in such a way that the benefits are only assigned to funds which are managed by Jamaican nationals or residents.

Another policy worth considering is that of a safety net for institutional investors. Under this policy, the VC Entity would absorb a percentage of any losses incurred by institutional investors. This has proven to influence institutional investors to make preliminary VC investments. The institutional investors generally need more of an incentive to participate in VC activity as they notoriously carry quite conservative portfolios. The safety net policy is another version of a matching scheme as the risk is shared. The safety net policy can at times be even more attractive than matching as some matching schemes are formed under an equity loan design, whereby the matching entity ends up owning a portion of the target company.

Further, the introduction of new corporate vehicles such as Limited Partnerships (LPs) and Limited Liability Corporations (LLCs) may further encourage entities to establish Private Venture Capital funds.

5. Amendments to Copyright Act

In order to ensure that work produced by the VC target becomes the property of the VC target, thereby possibly enhancing the value of the VC target, a “work for hire” amendment to the *Copyright Act* should be introduced. The suggested amendments to allow for “work for hire” provisions are set out at Annex IV. These amendments would render the often overlooked step of written assignment of such copyright from the creators unnecessary as the entire benefit of such created work would by law belong to the VC target.

6. Guidelines for the Income Tax Act

In the medium term also, in order to encourage other private entities to establish private venture capital companies, we would also suggest that benefits may accrue from greater certainty and transparency regarding how the Minister will exercise the discretion which he holds under the *Income Tax Act*. Assuming therefore that actual amendment to provide additional incentives is not feasible in the short or medium term, we would suggest that provision be made for regulations or guidelines to be issued which will clearly specify when and how an entity will be entitled to the designation “Approved Venture Capital Company”, the requirements for the entitlement to an extension of such certificate, how hearings will be conducted in relation to any proposed cancellation of a certificate and what procedure the VC Entity should follow to demonstrate its entitlement to the income tax reliefs under the *Income Tax Act*.

Amendments to the VC Entity provisions in the *Income Tax Act* may also be advisable to ensure that the provisions are not overly restrictive. In particular, the following amendments to the criteria for eligibility contained in section 36B may be considered:

- Section 36B(1)(a) provides that at least 80 per cent of the property owned by the Approved VC Entity must consist of money; or shares, bonds, notes, debentures or debenture stock issued by a company resident in Jamaica, or such other security prescribed by the Minister. We suggest that this figure be reduced to 75 per cent.
- Section 36B(1)(b) prohibits any one shareholder from holding more than 25 per cent of the shares in the Approved VC Entity. We consider that this threshold should be increased or removed altogether as it does not appear in other jurisdictions.
- Section 36C grants Approved VC Entitys tax relief by way of a deduction from their chargeable income of any distributions¹² made pursuant to a venture capital

¹² According to section 36C(3), “without prejudice to the provisions of section 34 or 35, where an approved venture capital company uses its income to engage in a venture capital transaction as defined

transaction¹³. Furthermore, section 36C(2) grants full relief to the Approved VC Entity from income tax if the total amount of its distributions amount to at least 90 per cent of its chargeable income. It is suggested that a staggered approach, such as that which obtains in Trinidad and Tobago, may be more beneficial, as it may be difficult for an entity making VC investments to fully distribute as much as 90 per cent of its chargeable income in any given year. In Trinidad, for example, the VC Entity must invest by the end of the second year of its registration, at least 50 per cent of its equity capital and this percentage is increased to at least 75 per cent by the end of its fourth year and onwards. Similar provisions also appear in the VC legislation of the Canadian province of British Columbia.

Time-Frame

It is envisioned that the medium term targets will take approximately nine (9) to twelve (12) months to accomplish.

TAX TREATMENT

TERM	COMPANY	CORPORATE BODY	IF APPROVED VC ENTITY	INVESTOR
Medium Term	LLP	Pass-through status		Between 25% and 33⅓% (subject to rules governing double-taxation)
	LLC	Pass-through status		Between 25% and 33⅓% (subject to rules governing double-taxation)

in subsection (7) of section 36 it shall be regarded, for the purposes of subsection (2), as having made a distribution."

¹³ Section 36A(7) defines "venture capital transaction" as such investment activity (including loan financing) as would in the Minister's opinion, by its influence on new or developing enterprises, be beneficial to the economic development of the Island. As indicated above, some guidelines as to how the Minister will exercise his discretion would be useful.

TERM	COMPANY	CORPORATE BODY	IF APPROVED VC ENTITY	INVESTOR
	Collective Investment Scheme (This will replace Mutual Funds and Unit Trusts)	To be announced		To be announced
	Private/Public Company	Same as above		Same as above

Part III: Long Term Proposals - The Introduction of Specific Legislation

Introduction

As stated in the First Report, a well-developed legislative and regulatory framework is a critical component for achieving sustained VC activity within an economy.¹⁴ Accordingly, the long term objective of the JVCP is to encourage the Government to implement specific and comprehensive legislation governing the VC and PE industry within Jamaica. This section therefore seeks to provide guidance as to the structure and content of such legislation, having regard to the international best practices identified in the First Report. If it is the desire of the JVCP, the option also exists to build on the current provisions in the Income Tax Act, while addressing their deficiencies of uncertainty and lack of clarity.

Time-Frame

It is envisioned that the long term targets, could, subject to fiscal constraints, be completed within the next 2 years.

Steps Required

The primary objective to be accomplished in the long term is for specific and comprehensive legislation to be introduced which governs the VC and PE industry within Jamaica to provide clarity for the various stakeholders in the industry. The following therefore seeks to identify a suitable model legislation to follow, including the amendments to be made to such legislation to keep it in line with our local circumstances.¹⁵

Policy Orientation

Our survey of international best practices in the First Report noted that legislation on VC typically aims to either primarily (a) incentivize the growth of VC activity; or (b) regulate and monitor VC activity; or (c) a balance of both. The first is usually done in jurisdictions that do not currently have a very active VC regime, whereas the second is done in jurisdictions where the concept of VC is well developed and there is already heavy VC activity.

Given the underdeveloped nature of our local VC industry and the aim of DBJ to not only encourage local VC activity, but also to streamline the industry, perhaps DBJ should consider adopting a mixed regime. This mixed regime would be one that marries an incentive-based approach with a regulatory approach. It would, however, ultimately

¹⁴ Myers, Fletcher & Gordon, 'Legal Report: The Venture Capital Regime in Jamaica' June 7, 2013 at p. 36.

¹⁵ Deletions will be marked by a ~~strike through~~, whereas insertions are noted in **bold**.

be up to GOJ to determine the policy approach for the legislative framework. Accordingly, we present below both the options of providing incentives and of regulating the industry through legislation.

Incentives

While we consider that the JVCP should have an incentives-based element, given the current IMF-led changes, including the proposed changes to the discretionary tax waivers and the proposed introduction of omnibus tax incentives legislation, with the laying in Parliament on October 28, 2013 of the *Income Tax Relief (Large Scale Projects and Pioneer Industries Bill (2013))*¹⁶, we are not prepared to make blind recommendations as to what the tax incentives ought to be. This is compounded by the fact that in a recent meeting of the various stakeholders with the Minister of Justice, the Minister cautioned on being overly ambitious or generous with the tax incentives, as while he recognized that in order to be effective the JVCP may need to provide some level of incentives, the GOJ is severely constrained in its capacity to forgo revenue. Accordingly, the following merely presents incentive-based options used in other jurisdictions, including the model legislation, as opposed to concrete recommendations. The main options include: tax credits, capital gains tax exemptions, taxation as flow-through companies and a matching scheme.

Tax Credits

Currently, Jamaica already operates a system of tax credits under sections 36A to 36C of the Income Tax Act to companies that have been designated an

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1. ¹⁶ This Act became effective on 1st January, 2014 and may provide alternate incentives to the VC industry. The *Income Tax Relief (Large-scale Projects and Pioneer Industries) Act* provides for the Minister of Finance to make an order, subject to affirmative resolution by Parliament, to designate certain projects as approved large-scale projects and certain economic activity as approved pioneer industries, which would grant 'specified' income tax incentives to such projects or economic activity. Under section 4, before a project can be designated an approved large-scale project, the Minister must be satisfied that:
- (i) the project is consistent with the strategic priorities of the GOJ;
 - (ii) the projected amount of capital investment or jobs created under the project is the same or more than the value of the tax incentives being given; and
 - (iii) the project is likely to make a substantial contribution to Jamaica's economic growth and development.

"Approved Venture Capital Company" by the Minister of Finance.¹⁷ Such designation is granted by way of a certificate from the Minister, with respect to specified VC transactions, which "in the Minister's opinion" would "by its influence on new or developing enterprises, be beneficial to the economic development of the Island". The certificate affords Approved VC Entities with special income tax relief where distributions (defined for the purposes of determining the income tax relief as including where the VC Entity uses its income to engage in a venture capital transaction) are made in that year of assessment. This relief includes:

- Chargeable income is calculated following a deduction of the amount of any distribution made by the Approved VC Entity in that year of assessment and in respect of which an account is submitted to the Commissioner of Taxpayer Audit and Assessment as to the nature and amount of the distribution and the name of the person to whom it was made.
- Income tax exemption for any year of assessment where in that year of assessment the total amount of distributions of the Approved VC Entity, whether in money or otherwise, is equivalent to 90% or more of the chargeable income of the Approved VC Entity before the deduction of its distributions.
- Any shareholder in an Approved VC Entity is exempt from income tax in respect of any dividend paid to him by the Approved VC Entity where the shareholder is resident in a country that benefits from a double taxation treaty with Jamaica, and he is exempt in that country from the payment of income tax with respect to that dividend.¹⁸

However, certain restrictions are imposed on when a VC Entity can claim such relief, which will be considered in each year of assessment. In particular, the Act specifies in section 36B that:

- (a) at least 80% of the property owned by the Approved VC Entity in the year of assessment must consist of -
 - (i) money; or

¹⁷ Section 36A provides that a company that is (a) incorporated under the *Companies Act* or other law of Jamaica; (b) resident in Jamaica; and (c) engaged, or proposes to engage, in venture capital transactions¹⁷ in Jamaica, may apply to the Minister of Finance for a certificate designating that company as an Approved VC Entity. An Approved VC Entity certificate will be subject to such conditions as the Minister deems fit and will be valid for a period of ten years, and may be renewed for a further period of ten years.

¹⁸ This is provided for in section 38A of the *Income Tax Act*.

- (ii) shares, bonds, notes, debentures or debenture stock issued by a company resident in Jamaica; or
 - (iii) such other security as may be prescribed by the Minister by order published in the *Gazette*;
- (b) no shareholder of an Approved VC Entity shall, at any time during the year of assessment, hold more than 25% of its issued shares; and
- (c) at least 95% of the gross income of the Approved VC Entity for the year of assessment shall be derived from sources within Jamaica and comprised wholly of-
 - (i) interest in respect of loans made to companies resident in Jamaica;
 - (ii) dividends paid by companies resident in Jamaica;
 - (iii) gains arising or accruing from the sale or other disposition either of real property owned by the Approved VC Entity and situated in Jamaica, or of other property, that is registrable in Jamaica, so owned and registered in Jamaica;
 - (iv) gains arising or accruing from the provision to any person resident in Jamaica of industrial or commercial information or advice or management or technical services or similar services or facilities or plant or equipment on hire (otherwise than under a bona fide hire-purchase agreement as defined in subsection (1) of section 2 of the Hire-Purchase Act); and
 - (v) such other sources of income as the Minister may, by order, prescribe.¹⁹

If the Approved VC Entity fails to satisfy any of the above requirements in a given year, it will be liable to pay income tax as if it were not an Approved VC Entity for that year of assessment.

GOJ may consider retaining the current income tax exemptions. However, despite the existence of this framework of tax incentives specific to VC activities, VC activity in Jamaica remains low, which suggests that these statutory provisions have not been fully effective in galvanizing this market.

Additionally, as a conditionality of the 2013 Agreements with the International Monetary Fund ("IMF"), GOJ has committed to removing the majority of discretionary tax waivers by the end of the 2013/2014 fiscal year. According to GOJ, "discretionary waivers, excluding those granted to charitable organizations and for charitable

¹⁹ No other sources of income have yet been prescribed by the Minister.

purposes, will no longer be granted except when this is required to satisfy the GOJ's contractual or other legal obligations."²⁰ In light of this, Parliament has passed a *Charitable Organizations (Tax Harmonization) (Miscellaneous Provisions) Act* and has tabled a *Charities Bill* and a new *Omnibus Tax Incentives Bill*, respectively aimed at "harmonizing the tax treatment for charities across tax types and removing ministerial discretion to grant waivers for charities and charitable purposes" and "eliminating ministerial discretionary powers to grant or validate any tax relief". Accordingly, the legislative framework on tax incentives, which presumably, includes the Approved VC Entity provisions within the *Income Tax Act*, may already be undergoing IMF-led changes.

However, it is notable that the *Fiscal Incentives (Miscellaneous Provisions) Bill*, which forms part of the *Omnibus Tax Incentives Bill*, effectively repeals the majority of sector-specific tax incentives, but did not interfere with the VC Entity tax exemptions under the *Income Tax Act*.²¹ Instead the Bill amends the *Income Tax Act* to include fiscal incentives that are of general application, fixes the corporate income tax rate for all unregulated companies to 25 per cent and 33¹/₃ for regulated companies; and introduces an employment tax credit against income tax payable by companies and individuals carrying on trade, profession or vocation. Additionally, beneficiaries of incentives that are being repealed are given the opportunity to elect whether to continue their entitlement or to benefit from the new incentives regime.

Similarly, the *Income Tax Relief (Large Scale Projects and Pioneer Industries Bill (2013))* proposes to offer tax credits to initiatives designated as approved large scale projects or economic activities of approved pioneer industries, which include those that are (i) consistent with the strategic priorities of GOJ; (ii) that is likely to make a substantial contribution to Jamaica's economic growth and national development and (iii) whose capital investment and job creation will not be less than the amount prescribed by the Minister.

Incentives under the Trinidadian Legislation

The Trinidadian Act allows the actual investor in a VC Entity to claim for a tax credit certificate which provides a tax credit of 30 per cent under section 48K of the *Income Tax Act* of Trinidad and Tobago.

²⁰ Government of Jamaica, "Letter of Intent, Memorandum of Economic and Financial Policies, and Technical Memorandum of Understanding" (April 17, 2013).

²¹ Dr. The Hon. Peter Phillips in his presentation to Parliament on the Omnibus Incentives Act (October 29, 2013) noted that GOJ would retain broad-based incentives for investment and employment creation (see p. 4 of the presentation available at http://www.japarlament.gov.jm/attachments/1127_Dr.%20Peter%20Phillips%27%20Presentation%20on%20Omnibus%20Incentive%20Legislation.pdf). It is perhaps on this basis that the Approved VC Entity tax exemptions were retained.

48K. (1) *In this section —*

“Administrator” means the Administrator of the Venture Capital Incentive Programme appointed by the President under section 3 of the Venture Capital Act;

“marginal rate percentage” means the percentage equivalent to the highest marginal rate of tax for persons in a year of income;²²

“tax credit certificate” means a tax credit certificate issued by the Administrator under the Venture Capital Act in respect of shares issued by a venture capital company;

“venture capital company” means a company registered as a venture capital company under section 5 of the Venture Capital Act.

- (2) *Subject to this section, a person who is resident in Trinidad and Tobago and who obtains a tax credit certificate under the Venture Capital Act in respect of shares issued by a venture capital company is entitled to a tax credit equivalent to the marginal rate percentage of the amount received by the venture capital company for those shares.*
- (3) *The tax credit is allowed only—*
- (a) *to the original purchaser of the shares issued by the venture capital company; and*
 - (b) *for the year of income in which the shares were purchased.*
- (4) *Notwithstanding subsection (3) and section 48A, where the amount of the tax credit as computed under subsection (2) cannot be wholly set-off against the tax assessed for the person, the amount of the unclaimed tax credit may be carried forward by the person and set-off against his tax assessed for succeeding years of income.*
- (5) *The amount of the unclaimed tax credit may be set-off as far as possible against the tax assessed for the person in the first succeeding year of income, and in so far as it cannot be so set-off, then against the tax assessed for the next succeeding year of income and so on.*

Flow- through companies

In jurisdictions such as Australia, “portfolio companies” (being the target company) are taxed as a flow through entity and not as a company. Accordingly, tax is only assessed

²² This is currently at the rate of 30% of the investment made.

when the VC Entity is exiting from the target company or when a distribution has been made. Similarly, in the United States of America, the portfolio companies do not have to file taxes as they are given "pass-through" status. This is an added bonus from a compliance standpoint as it reduces the bureaucracy at another level. One consideration would thus be to allow for the target company to be exempt from filing taxes as long as the VC Entity is also a Jamaican company and holds an interest in the target company.²³ In this regard, the tax would be collected at the time of sale of the shares in the target company by the VC Entity or when private dividends are paid out.

Capital Gains Exemption

A formal system of exempting capital gains should also be adopted whereby exiting investors will enjoy relief from transfer tax and stamp duty. Shareholder or partners in VC companies should be exempted from tax on their share of the income and gains derived from, or disposal of, eligible VC investments if certain requirements are met. Coupling the tax benefit with a regime of compliance with the FSC should prove to be an effective measure to promote self-regulation within the industry.

The requirements that are set to grant eligibility for the tax benefits can act to calibrate the type of investment that enjoys this relief. These requirements should lay out:

- the size of the necessary investment
- the period of time for which the VC Entity must hold its interest in the target company.

Matching Scheme

In jurisdictions such as Mexico under the *Fondo de Fondos Mexico I* and in Israel under the Yozma programme, venture capital injection is encouraged through a matching scheme spearheaded by a government entity. In such a programme, the government invests an initial specified amount that is matched by private entities. DBJ may consider, if accessible, using funding from the Multilateral Investment Fund to operate its fund on a matching basis, whereby the initial capital offered by DBJ is required to be matched by that of private investors. This is advantageous in that matching schemes represent one of the few instances where it is considered appropriate for a government entity to actively participate in VC transactions, though they do not participate on the deal side.

Model Selected

With the success of the INOVAR programme in Brazil, the Brazilian VC model was closely scrutinized for beneficial aspects which have informed many of our recommendations. We found it prudent to highlight some generic differences between

²³ It is suggested that an interest of at least forty percent (40%) would be advisable.

the Brazilian and Jamaican financial landscapes which would make us reluctant to recommend the adoption of the Brazilian model.

A few of these differences are:

1. A large percentage of VC funding in Brazil comes from pension funds. Under Jamaica's current Investment Regulations under the Pensions (Superannuation Funds and Retirement Schemes) (Investment) Regulations, speculative investments are prohibited. VC by its very nature may be viewed as speculative and so a clearer definition is required.
2. Early stage financing for projects in specific industries (such as technology) are granted interest credit loans from state banks in Brazil. With the view being to promote a healthy VC industry as a whole, Jamaica may be reluctant to grant special benefits on an industry-specific basis.
3. There is a vast amount of investment opportunities in Brazil, due to the relatively easily accessible credit facilities and growing middle class as compared with Jamaica's current framework which renders access to credit limited and Jamaica's contracting, not growing, middle class.
4. Financial Transaction Tax for acquiring shares in a private equity investment fund is 0% in Brazil. Whereas in Jamaica stamp duties and/or transfer taxes are ordinarily payable in relation to such transactions, which may amount in aggregate to six per cent (6%).
5. In Brazil, income tax and capital gains is 0 per cent for foreign investors in certain investment vehicles. They also have stipulations for local financial vehicles whose income is tax-free if the taxable income is remitted abroad to a beneficiary that performs financial operations in Brazil. In Jamaica, income tax is payable on dividends paid to foreign persons (subject to double taxation treaties) at the rate of 25 per cent for non-resident individuals and non-resident unregulated companies, and 33½ per cent for non-resident regulated companies, save for a few financial vehicles, such as entities listed on the Junior Stock Exchange, retirement schemes and the few qualifying venture capital entities which have been approved and those other existing entities which currently benefit from some industry-specific incentive relief.
6. Only qualified investors are allowed to invest in VC funds in Brazil. This would not be an ideal starting point from a developmental standpoint in Jamaica.

It is for these reasons that we consider that, while the INOVAR programme has been quite successful in Brazil, it may not be the most suitable model for introduction into Jamaica, though some of its initiatives may serve as a guide for the JVCP.

On the other hand, Trinidad and Tobago, Australia, and the Canadian province of British Columbia, were identified in the First Report as jurisdictions forming part of the Commonwealth which currently have legislation that specifically and exclusively deals with VC activity. Of these three, we recommend that the Trinidad and Tobago *Venture Capital (Amendment) Act (No. 2) (2005)* serve as the base model legislation, with amendments being made, as appropriate, to take into account the peculiarities and needs of the local environment.²⁴

Trinidad and Tobago's Venture Capital Act

Trinidad and Tobago remains the only Commonwealth Caribbean country to have enacted legislation dealing specifically with the regulation of VC. The *Venture Capital Act* of Trinidad and Tobago was first enacted in 1994 to provide for the establishment, regulation and administration of a VC industry in Trinidad and Tobago. The Act was subsequently amended on two occasions by the *Venture Capital (Amendment) Act (No. 1) (1999)* and the *Venture Capital (Amendment) Act (No. 2) (2005)*.

Although we recognize that Trinidad and Tobago still has not enjoyed significant VC activity in its jurisdiction, the Trinidadian legislation is attractive for several reasons. First, the fact that Trinidad and Tobago is a fellow Commonwealth Caribbean nation with very similar local circumstances and legal system cannot be discounted. This, coupled with the fact that the underlying legislative policy rationale (to stimulate VC activity) also appears to be similar, means that less changes may need to be made to the legislation for it to meet the requirements and realities of our local economy. Secondly, Trinidad and Tobago's Venture Capital Incentive Programme has been in operation for almost two decades, and they have already revisited their VC legislation twice, further to reviews conducted by a local task force and international consultants. Jamaica is therefore in a fortunate position to not only be able to borrow from the work done by our Trinidadian counterparts in drafting VC legislation, but more importantly, to incorporate the lessons learned in Trinidad, in an effort to avoid the shortcomings that their Venture Capital Incentive Programme is reported to have initially experienced.

Recommendation: The Trinidad and Tobago *Venture Capital (Amendment) Act (No. 2) (2005)* should be used as the base model legislation, hereinafter referred to as "the Trinidadian Act".

Name of the Legislation

The options for the name of the legislation include:

- The Venture Capital Act
- The Venture Capital and Private Equity Act

²⁴ The Trinidadian Act appears as Annex V.

- The Venture Capital Incentives Act
- The Venture Capital Incentives and Regulation Act

Recommendation: The legislation should be called The Venture Capital Act hereinafter referred to as "the Act".

Structure of the Legislation

The following is the structure followed in the Trinidadian legislation, which we recommend, subject to certain amendments, be adopted for our legislation.

- I. Preliminary
- II. Registration of Venture Capital Companies
- III. Business and Investments
- IV. Prohibitions
- V. Investment Protection Account and Eligible Investments
- VI. Reporting, Examination and Payments to Minister
- VII. Taxation Incentives
- VIII. Offences
- IX. Miscellaneous

Main Players

The main players recognized as being involved in the VC industry are as follows:

PLAYER	TRINIDAD ACT	RECOMMENDATION FOR JAMAICA
1. The VCIP which acts as the Administrator	<p>This is the program established by GOTT – It regulates and advises the other Players in the VC Industry</p> <ul style="list-style-type: none"> - Provides training to key stakeholders - Promotes the concept of venture capital financing - Registers VC Entities 	<p>Unlike in T&T we would suggest that the regulatory requirements undertaken by the VCIP could be carried out in Jamaica by the FSC who would be the Administrator. This would include registering VC Entities and receiving Post-notification of investment in target entities. We, however,</p>

PLAYER	TRINIDAD ACT	RECOMMENDATION FOR JAMAICA
	<ul style="list-style-type: none"> - Registers QICs - Issues tax credit certificates 	recommend that administering entitlement to incentives be carried out by the Ministry of Finance and/or the Tax Administration of Jamaica. The VC Association in Jamaica would be responsible for undertaking the other activities geared at promoting venture capital financing.
2. Intermediaries – being the individuals of companies that assist in the Venture capital deal making process (e.g. attorneys, accountants, business consultants)	Not expressly regulated under the Act, save for Fund Managers the requirements for which are set out in the Act.	Not to be expressly regulated under the Act. Fund Managers are already subject to regulation under the <i>Securities Act</i> of Jamaica and it is suggested that where fund managers are to be utilized in a given structure they should satisfy the regulatory requirements under the <i>Securities Act</i> . Fund Managers ought not to be required for all VC structures. However, where a VC Entity proposes to raise financing from the public, a fund manager regulated under the <i>Securities Act</i> (subject to any exemptions allowable under that Act) should be required.
3. The Investors	Individual or companies entitled under the Act to enjoy the tax credit provided they are resident or incorporated in Trinidad and Tobago	No restrictions should be imposed on the type of entity which can invest in VC Entity and thereby enjoy the benefit of any incentive under the Jamaican Legislation.
4. Venture Capital Companies	Restricted to companies incorporated in Trinidad and Tobago which make eligible and permitted investments and provide business and	No restrictions should be imposed on the type of entity which can be registered as a VC Entity provided that it has separate legal personality and

PLAYER	TRINIDAD ACT	RECOMMENDATION FOR JAMAICA
	managerial expertise to QIC's	has been established in Jamaica and makes eligible investments.
5. Qualifying Investee companies, QICs or target companies	These are the entities which receive the benefit of the investment or expertise from the VC Entity. The Act requires such entity to be registered and only entities incorporated in Trinidad and Tobago or designated a Caricom enterprise under the CARICOM Enterprise Act may be so registered.	We recommend that under the Jamaican legislation there be no qualification requirement for registration of QICs. We suggest however that there be a post-notification requirement to advise the Administrator of target entities into which VC Entities have invested and provided such target entities are established in Jamaica would entitle the VC Entity to enjoy the benefits of whatever incentive regime the extent of which will be determined based on level of investment in the target entity. Note that we do not require for this purpose that the VC Entity be incorporated under the <i>Companies Act</i> but suggest that it should be a separate legal person.
6. Administrator	The Ministry of Trade under Act	The FSC, with the exception of the issuance of tax credits, which will remain within the remit of the Ministry of Finance and/or Tax Administration of Jamaica.

Preliminary

The Preliminary Part of the legislation will include the Short Title, the Interpretation section, and provisions dealing with the establishment of the JVCP and its administrative organ.

Short Title

The Short Title of the Trinidadian Act will be retained.

Interpretation

The definitions of the following will remain, as defined in the Trinidadian Act:-

- Affiliate
- Associate
- Eligible investment
- Equity capital
- Equity share
- Exit opportunity

The following terms will be required to be redefined to refer to the Jamaican equivalent legislative references:

- Chargeable Profits
- Company
- Court
- Financial Institution
- Minister
- Permitted investment
- Tax credit certificate
- Venture capital company
- Venture Capital Incentive Programme

Administrative Body

It is envisioned that the regulatory functions will fall under the purview of the Financial Services Commission ("FSC") as this is consistent with their current scope of authority.²⁵ References to the Administrator (as in the Trinidad legislation) are therefore references to the FSC. However, if tax incentives are to be provided, then their determination and grant may need to fall within the remit of the Ministry of Finance.

Promoting Entity

DBJ wishes to establish, along with other stakeholders, a Jamaica Venture Capital Association. We do not consider it appropriate for the Association to have any functions under the legislation as it will consist of parties with an interest in the subject matter. The following chart shows a non-exhaustive breakdown of functions that are envisioned to be carried out by the Jamaica Venture Capital Association (acting on its own motion and not with statutory authority) and the FSC (as Regulator acting with statutory authority):-

Association

Conduct training programmes
Foster entrepreneurship
Galvanize the stakeholders
Promote creation of local funds

Regulator

Register VC Entities
License Fund Managers
Maintain register
Monitor the industry

Receive Disclosures

1. Investigation powers

2. Regulate market conduct

③ Unnecessary Burden by having govt back to Minister.

Recommendation: The JVCP should be regulated by the FSC as Administrator, with the incentive regime governed by either the Ministry of Finance or the Tax Administration of Jamaica. The Jamaica Venture Capital and Private Equity Association will not be a statutory body.

- * ⇒ Provide Legal counselling to clients) DBJ will provide help
- ⇒ Best practice in terms of regulation and investigative powers of the FSC.
- ⇒ Sublime Mair → spoke about equity.

²⁵ This may require amendments to the Financial Services Commission Act and other related pieces of legislation. Additionally, the FSC has noted that while it is willing to take on this responsibility, additional resources will be required, including additional staffing, and perhaps the establishment of a new division within the FSC. Since the FSC is self-financing, the additional costs may perhaps be offset by the registration fees for VC Entities.

⇒ The PSO's needs to examine the VC land space

and make specific recommendations.
⇒ Venture cap. workshop join with the DBJ. *

Registration of Registered Venture Capital Companies

It is our recommendation that registration under the Act should not be a prerequisite for undertaking VC activity, but a system of registration with the FSC should be required for persons wishing to engage in venture capital transactions and enjoy the benefits of any incentives under the VC legislation. The fund managers of VC Entities raising capital from the public should be required to be licensed by the FSC under the *Securities Act*, but subject to exemptions and reliefs depending on the transactions and investors involved as now exists and is proposed under the *Securities Act*. We, however, caution that the registration of the VC Entities should not be overly bureaucratic, so as not to discourage new entrants in the industry. A system of exempt VC Entities should be permitted which would therefore allow a VC Entity that is restricted to sophisticated investors and operating with regulated fund managers and intermediaries to be subject to very limited registration requirements.

Target companies should not be required to be registered, to enable VC Entities the freedom to choose target entities and to allow a wide net of potential beneficiaries. At the most, perhaps consideration could be given to a post-notification requirement for the purposes of statistics gathering and as a means of confirming VC activity for the purposes of receiving incentives, if thought desirable. We further recommend that certain provisions of the Trinidadian legislation on eligible investments be borrowed if tax incentives are provided as they seek to prevent abuse of the incentives.

Application for Registration

Sections 4 and 5 of the Trinidadian Act provide:

4. (1) *A person ~~company~~²⁶ intending to carry on the business of a venture capital entity shall, before commencing that business, apply to the Administrator to be registered as a Registered Venture Capital Company²⁷.*
- (2) *The company shall, together with its application for registration under this section, submit to the Administrator a proposal stating—*
 - (a) *the name of the company and the date of its incorporation;*

²⁶ Under the Trinidadian Act, only companies may register as a qualified venture capital company. We, however, do not recommend such a limitation; both legal and natural persons should be allowed to register. Therefore, references to "company" throughout these sections and the Act generally should be changed to "person" and consequential amendments should therefore be made with respect to references to "articles", "shares" and "directors".

²⁷ References throughout this section to "VC Entity" or "Venture Capital Company" shall be taken to refer to a "Registered Venture Capital Person" not limited only to a company and not requiring all qualified persons to be registered under the Act.

- (b) *the address of its registered office;*
 - ~~(c) *(Revoked by Act No. 13 of 2005);*~~
 - (d) *the number of issued shares and the amount received for the shares;*
 - (e) *the number of any additional equity shares which the company proposes to issue and the proposed price for the issued shares;*
 - (f) *the nature and amount of any outstanding debts of the company;*
 - (g) *the number, names and addresses of its directors, officers and shareholders, and the number of shares held by each; and*
 - (h) *any other prescribed information.*
- (3) *A proposal submitted under subsection (2) shall —*
- (a) *be signed by at least one director and one officer of the company; and*
 - (b) *be accompanied by a certified copy of the articles of incorporation or continuance and the by-laws of the company.*
5. *The Administrator may register a company as a qualified venture capital company where he is satisfied that the company —*
- (a) *is incorporated, registered or continued under the Companies Act or such other legislation in Jamaica creating a separate legal entity;*
 - ~~(b) *has a name or description which includes the words “venture capital”;*²⁸~~
 - ~~(c) *has not previously carried on business;*²⁹~~

²⁸ We do not consider this as necessary to meet the objectives of the Act.

²⁹ We do not consider this as necessary to meet the objectives of the Act.

- (d) *has, at the time of its application for registration as a venture capital company, equity capital of not less than fifty thousand dollars³⁰ and not more than one hundred million dollars³¹;*
- (e) *has equity shares only;*
- (f) *has articles of incorporation or continuance and by-laws that restrict the objects of the company to assisting the development of business by—*
 - (i) *making investments allowed under this Act;*
 - (ii) *providing business and managerial expertise to companies in Jamaica in which it has made or proposes to make an eligible investment;*
- (g) *meets other prescribed conditions.*

The above differs from the present requirements under the *Income Tax Act* in that the latter merely requires that the Approved VC Entity is (a) incorporated under the Companies Act; (b) resident locally and (c) engaged, or proposes to engage in venture capital transactions in Jamaica.³² Additionally, the *Income Tax Act* requires that the application is made to the Minister of Finance, and the grant of the VC Entity Certificate falls solely within his discretion. It is for these reasons, among others, that the First Report considered the current regime under the *Income Tax Act* as being unclear, unpredictable, discretionary and overly restrictive. Conversely, the proposed provisions have been recommended to provide the benefit of being more comprehensive, objective and predictable.

Recommendation: It is recommended that sections 4 and 5 be adopted with the above amendments to reflect that registration is not limited to companies.

Maintenance of Registration

- 6. *A registered venture capital company shall, within thirty days of its registration, establish and maintain a place of business in ~~Trinidad and Tobago~~ Jamaica.*
- 7. (1) *The Administrator may suspend or cancel the registration of a registered venture capital company where he is satisfied that the company—*

³⁰ Approximately US\$7,800 at an exchange rate of TT\$6.40 to US\$1. A rate reflective of Jamaican realities determined based on discussions with players in the industry should be imposed.

³¹ Approximately US\$15.6 million, at an exchange rate of TT\$6.40 to US\$1.

³² See section 36A (1), *Income Tax Act*.

- (a) *obtained its registration fraudulently by furnishing false or misleading information or documents;*
 - (b) *failed to supply prescribed information or records;*
 - (c) *supplied information pursuant to the Act which contained false or misleading information;*
 - (d) *failed to comply with any condition of approval given by the Administrator under the Act;*
 - (e) *contravened the provisions of the Act.*
- (2) *The Administrator shall in writing—*
- (a) *notify the company of his intention to suspend or cancel its registration; and*
 - (b) *give reasons and invite the company to show cause why the suspension or cancellation shall not take effect within fourteen days of the receipt of the notice.*
- (3) *Where the Administrator suspends the registration of a registered venture capital company, he may—*
- (a) *in writing state conditions to be complied with by the suspended company; and*
 - (b) *reinstate the registration of the company with or without conditions.*

Recommendation: It is recommended that sections 6 and 7 of the Trinidadian Act subject to amendments mentioned above, be copied verbatim.

The FSC, as Administrator should also maintain a list of registered Registered VC Entities in accordance with section 8 of the Trinidadian Act:

8. (1) *The Administrator shall establish and maintain a register of venture capital companies registered under this Act.*
- (2) *The register shall contain the following information pertaining to every registered venture capital company :*
- (a) *the name of the company;*
 - (b) *the date of its registration;*

- (c) *the address of its registered office;*
- (d) *the name of its principal officer;*
- (e) *the name of its fund manager; and*
- (f) *other information prescribed by the Minister.*

(3) *The Administrator shall —*

- (a) *make the register available for inspection by members of the public during normal business hours;*
- (b) *provide copies of the register to members of the public,*
upon payment by the member of the public of a fee to be prescribed by the Minister.

Recommendation: We recommend that section 8 be adopted, as amended above.

Registration and Licensing of Fund Managers

Sections 5A and 5B of the Trinidadian Act are not dissimilar to that of section 2 of the *Securities (Licensing and Registration Regulations (1996)*, which provides with respect to persons qualified to become licensed dealers and investment advisers:

- 2 (1) *Subject to regulation 5, an individual is eligible to apply for a dealer's licence or an investment adviser's licence if-*
 - (a) *he satisfies one of the following requirements, that is to say-*
 - (i) *he holds a degree in economics, accounting or business related subjects; or*
 - (ii) *has a professional qualification in law or accounting; or*
 - (iii) *has successfully completed a programme of study in securities approved by the Commission; and*
 - (b) *has worked for at least two years in the securities industry; and*
 - (c) *has a net worth of at least two million dollars or has acquired indemnity insurance for at least that amount.*
- (2) *A company is eligible to apply for a dealer's licence if it maintains free assets of at least five million dollars.*

- (3) *A company is eligible to apply for an investment adviser's licence if it maintains free assets of at least one million dollars.*
- (4) *An application for registration as a dealer's representative or an investment adviser's representative may be made in relation to an individual who-*
 - (a) *satisfies the requirements specified in paragraph (1) (a); or*
 - (b) *holds a diploma or certificate in economics, accounting or business related subjects from a tertiary institution approved by the Commission.*
- (5) *Where prospective applicants carry on business as a partnership, application under paragraph (1) shall be made by each partner.*
- (6) *In this regulation-*
"free assets" in relation to a company, means the net asset worth of the company held in the form of cash and readily convertible securities;
"net worth in relation to an individual, means the difference between his assets and his liabilities.

Recommendation: We would recommend that this section be amended to require that fund managers be registered and licensed as either "securities dealers" or "investment advisers", as the case may be, in accordance with section 2 of the Securities (Licensing and Registration) Regulations and subject to the rules and guidelines set out under the Securities Act.

Registration of Target Companies

The Trinidadian Act, in section 14, provides that:

- 14. *The Administrator may grant a certificate of approval to a company as a qualified investee company where he is satisfied that the company—*
 - (a) *is incorporated ~~or either~~ registered under the Companies Act ~~or is designated a CARICOM enterprise under the CARICOM Enterprises Act~~;³³*
 - (b) *has no more than the issued and fully paid share capital at the time of the application as prescribed by the Minister;*
 - (c) *is not established for the purpose of carrying on any of the prohibited categories of business as may be prescribed;*

³³ This has been deleted as Jamaica does not have a similar CARICOM Enterprises Act.

Recommendation: We do not recommend that the target companies require registration, as we feel this may be an unnecessary hindrance that may have the effect of narrowing the net of potential target companies. Unless the tax incentives regime selected is one in which the target companies are the beneficiaries of the tax incentives (for example, as in Australia) there would seem to be little purpose other than information gathering to registration and this may introduce an unnecessary level of bureaucracy. At most, we suggest that section 14 be amended to provide for a post-notification requirement, whereby a Registered VC Entity shall notify the FSC in writing within thirty (30) days of investing in a target company using, where applicable, such form as may be specified for the purpose.

Business Restrictions and Allowable Investments

Sections 9 to 15 of the Trinidadian Act deal with restrictions on the business of VC Entities and the investments which they may make. We consider that these provisions are useful safeguards, especially if tax incentives are to be provided. However, if it is decided that the JVCP will not introduce new tax incentives, but rather build on the current incentives provided in the *Income Tax Act*, then these provisions may be disregarded to allow for a lesser regulation.

We recommend that these sections should be adopted, with the following amendments:

- Subsection 9(2) should be deleted.
- Subsection 10(1) should be deleted. Sections 10(2) will therefore stand alone and the marginal note changed to "restrictions on shares".
- The amount in section 11(1) should be changed to reflect Jamaican currency.
- Sections 13 and 15 may be adopted verbatim.

The section will therefore appear as follows:

9. (1) *A registered venture capital company shall not carry on any activity other than —*
- (a) *making eligible investments;*
 - (b) *providing business and managerial expertise to a target company in which it has made or proposes to make an eligible investment;*

- ~~³⁴(2) Except with the approval of the Administrator, a qualified venture capital company shall not carry on business with equity capital in excess of one hundred million dollars.~~
- (3) A registered venture capital company shall not borrow money for any reason.
- (4) The contravention of this section does not invalidate the acts of a registered venture capital company, including the disposition of property to or by that company.
- ~~10. (1) A venture capital company shall not, without the written approval of the Administrator, alter its articles of incorporation or continuance or its bye laws.~~
- (2) All the issued shares of a registered venture capital company shall be fully paid for in cash.
11. (1) A registered venture capital company shall within twelve months from the date of its registration, have and maintain at least ~~five hundred thousand~~ dollars³⁵ in paid-up equity capital.
- (2) The Administrator shall cancel the registration of a registered venture capital company which fails to comply with subsection (1) and the provision of section 7(2) apply in relation to such cancellation.
13. (1) A registered venture capital company shall, within seven days of the issue of additional equity capital, notify the Administrator of such issue.
15. Subject to the provisions of this Act, a registered venture capital company may make an investment in a target company, which investment shall consist of the direct acquisition from the target company of equity shares issued for the purpose of raising new equity capital.

Prohibitions

The Trinidadian Act sets out in Part IV (sections 16 to 20) certain prohibitions on the actions that may be taken by Registered VC Entities, such as the degree of ownership and control that they may take in the target company, the types of investments that they

³⁴ We consider that the distinction between "eligible" and "permitted" investments is unnecessary.

³⁵ Relevant amount to be amended for a suitable Jamaican dollar equivalent.

may make and the minimum period for which they may hold their shares in the target company. These provisions ensure that venture capital transactions remain arm's length dealings in new ventures and thereby seek to prevent abuse of any incentives provided.

Sections 16 to 20 are reproduced below for ease of reference:

16. (1) *A registered venture capital company shall not make or hold an investment in a target company where the proceeds of that investment are directly or indirectly used or intended to be used, in whole or in part, by the target company—*
- (a) *for lending;*
 - (b) *for investment outside of ~~Trinidad and Tobago~~ Jamaica,*
except where the investment is directly in support of the activities of the company, as determined by the Administrator;
 - (c) *for investment in land, except where the use of the land is directly in support of the activities of the company;*
 - (d) *for purchasing goods or services from a director, shareholder or other officer of a venture capital company other than goods or services that are sold at fair market value to the company in the ordinary course of the business of the vendor;*
 - (e) *for acquiring securities;*
 - (f) *for the payment of all or part of a debt obligation, unless the Administrator considers that the payment is necessary for the financial viability of the company or the debt was incurred with the prior approval of the Administrator in anticipation of an investment in the company by the qualified venture capital company;*
 - (g) *as part of a transaction or series of transactions directly or indirectly involving—*
 - (i) *the purchase or redemption of previously issued shares of the company;*
 - ii) *the discharge of any part of the liability of a shareholder of the company;*
 - (iii) *the payment of dividends;*

- (iv) *the funding of all or part of the purchase by the company of any of the assets of a proprietorship, partnership, joint venture, trust or company at a value that is greater than the open market value of the assets purchased;*
 - (v) *other prescribed events;*
 - (h) *for such other disbursements as may be prescribed by the Minister.*
 - (2) *For the purposes of this section and sections 17, 18 and 19, a “target company” includes an affiliate or associate of the target company.*
17. ³⁶
19. (1) *Subject to subsection (2), a registered venture capital company shall hold each investment it makes in a target company for a period of at least five years but not exceeding ten years.*
- (2) *Notwithstanding subsection (1), a registered venture capital company may hold an investment in a target company for less than five years where the registered venture capital company —*
- (a) *is permitted under the Act to dispose of the investment at an earlier date;*
 - (b) *disposes of the investment at an earlier date pursuant to an exit opportunity and immediately invests an amount equal to the original cost of the disposed investment in an investment in another target company.*
20. (1) *Where the investment of a registered venture capital company is or becomes prohibited, the company shall, within six months of the date of the prohibited investment, dispose of the investment.*

Recommendation: We recommend that sections 16 to 20 of the Trinidadian Act be adopted with the above amendments.

Eligible and Permitted Investments

The legislation makes a distinction between “eligible investments” and “permitted investments”.

³⁶ We do not consider that this degree of regulatory oversight is necessary.

"Eligible investments" are defined as an investment in the equity shares of a qualifying investee company, whereas a "permitted investment means an investment in (a) liquid reserves on deposit at a licensed financial institution; or (b) other prescribed investments". We do not consider this distinction necessary for our purposes. We suggest that the term eligible investments should be defined to incorporate both definitions, provided that consideration should be given to incorporating restrictions on the percentage of assets which may be maintained in each category.

Sections 22 and 23 of the Trinidadian Act should be added to Part IV on Prohibitions as follows:

22. *A registered venture capital company shall not make an investment other than an investment in —*

(a) eligible investments;

23. (1) *Where a target company in which a registered venture capital company has made an eligible investment no longer complies with the requirements for qualification under section 14, the registered venture capital company shall, within six months of the date of the non-compliance, dispose of its investment in the target company.*
- (2) *Subsection (1) does not apply where, within six months of the date of non-compliance by the target company, the circumstances that caused the company not to qualify are changed to the extent that the company qualifies.*

Recommendation: We propose that sections 22 and 23 of the Trinidadian Act be adopted and included in Part IV dealing with "Prohibitions", rather than as a separate Part of the Act. DBJ should also consider whether it would like to adopt the provisions mandating the maintenance of an "Investment Protection Account" as provided in section 21 of the Trinidadian Act. However, due to its onerous nature, we are including it as a consideration, rather than a recommendation. Nevertheless, we consider that the maintenance of such an account may be viewed as an important concession particularly if pension and other trust type funds may be invested in such vehicles, and accordingly its inclusion may be viewed as advisable, provided that those funds are to be used primarily for the purpose of safeguarding investors and not merely for safe-guarding for the government the payment of taxes, as appears to be the primary contemplation of the Trinidadian Act, especially if tax incentives are granted.

For ease of reference, section 21 provides:

21. (1) *Every venture capital company shall establish and maintain at a financial institution licensed under the Financial Institutions Act an account to be known as an Investment Protection Account into which shall be deposited—*
- (a) *such percentage as may be prescribed by the Minister in respect of the consideration paid to the venture capital company in respect of the issue of shares for which a tax credit is applied for under section 29;*
- (b) *such percentage as may be prescribed by the Minister in respect of the amount received by the venture capital company from the disposal of an investment in a target company or such other percentage of the original cost of the disposed investment as may be prescribed by the Minister.*
- (2) *No withdrawals may be made from an Investment Protection Account without the prior written authorisation of the Administrator as specified in this section.*
- (3) *Subsection (2) does not apply to income earned on sums deposited into an Investment Protection Account and paid or credited to another account of the venture capital company.*
- (4) *Where the Administrator is satisfied that a venture capital company makes or proposes to make an investment in a target company in accordance with this Act, the Administrator may, upon such conditions as he may stipulate, in writing authorise a withdrawal from the Investment Protection Account for the benefit of the venture capital company of an amount equal to such percentage of the investment as may be prescribed by the Minister or the amount remaining in the account, whichever is the lesser.*
- (5) *Where a venture capital company is required to make a payment to the Minister under section 27, the Minister may, on the written authorisation of the Administrator, deliver to the financial institution at which the Investment Protection Account is maintained, a demand for payment of the amount due.*
- (6) *Where the financial institution receives a demand under subsection (5), the institution shall immediately withdraw from*

the Investment Protection Account of the venture capital company in question the amount demanded and pay the amount over to the Minister forthwith.

Reporting, Examination and Payments to the Minister

The Trinidadian Act specifies in Part VI (sections 24 to 28) the reporting obligations of VC Entities, the authority of the Administrator to examine records and appoint an investigator and the payments that need to be made to the Minister on the occurrence of certain events. It is recommended that the provisions on reporting and examination be retained, especially if additional tax incentives will be provided under the JVCP. However, the sections dealing with payments to the Minister may need to be amended or removed, depending on whether DBJ decides to adopt the requirement that VC Entities must maintain Investment Protection Accounts.

This Part would therefore provide as follows:

24. (1) *Every registered venture capital company shall—*
- (a) *keep adequate records and books of accounts at its place of business in ~~Trinidad and Tobago~~ Jamaica;*
 - (b) *within six months of the end of its financial year, prepare and file with the Administrator a return, in such form and containing such information as may be required by the Administrator.*
- (2) *A registered venture capital company required by this section to keep records and books of accounts shall retain every such record and book of account together with every account or voucher necessary to verify the information contained in such record or book of account for a period of at least six years from the year to which the records or books relate.*
- (3) *A registered venture capital company which contravenes this section commits an offence.*
25. (1) *The Administrator or a person authorised in writing by the Administrator may, during the normal business hours of—*
- (a) *a registered venture capital company;*
 - (b) *a company that was previously a registered venture capital company; or*

- (c) *a target company in which the registered venture capital company has made an investment, examine the books, accounts or other documents of those respective companies in order to determine whether the venture capital company or the company that was previously a registered venture capital company has complied with the provisions of this Act.*
 - (2) *A person who is authorised by the Administrator pursuant to subsection (1) shall, where requested by the company he is examining, produce evidence of his written authority to the company*
26. (1) *The Administrator may make an order —*
- (a) *appointing an investigator to carry out an investigation for the purposes of the Act at the expense of the registered venture capital company; and*
 - (b) *determining the scope of the investigation.*
- (2) *The Court³⁷ may, upon application made by the Administrator or by an investigator appointed under subsection (1) and, upon being satisfied by information on oath that it is necessary and in the public interest for any purpose relating to an investigation under subsection (1), make an order authorizing the investigator —*
- (a) *to enter the premises or property of a person during normal business hours for the purpose of carrying out the investigation;*
 - (b) *to require the production of any records, securities or things for the purpose of the investigation;*
 - (c) *on giving a receipt, to remove any records, securities or things inspected or examined for the purpose of further investigation;*
 - (d) *to require a person, by not less than fourteen days' notice in writing, to appear before him to give evidence on oath or in any other manner as the investigator considers necessary to conduct the investigation;*

³⁷ The Supreme Court of Jamaica.

- (e) *to do such other things as the Court considers necessary or expedient for the purpose of the investigation.*
- (3) *An application to the Court under subsection (2) may be made ~~ex parte~~ without notice and heard in camera unless the Court otherwise directs.*
- (4) *An investigation conducted pursuant to this section shall be completed as soon as practicable and the records, securities or things removed shall be returned to the person producing them, within thirty days of the completion of the investigation.*
- (5) *No person shall withhold, destroy, conceal or refuse to—*
 - (a) *give any information;*
 - (b) *produce any record, security or thing, reasonably required by an investigator for the purpose of conducting an investigation under this section.*
- (6) *A person required to appear before an investigator pursuant to subsection (2) may appear in person or through his attorney or agent.*
- (7) *A person who, without lawful excuse, fails or refuses to comply with the order of the Court under subsection (2) is liable on summary conviction to a fine of twenty-five thousand dollars³⁸.*
- (8) *Where, upon an investigation, it is found that a breach of this Act has been committed, the cost of the investigation shall be recoverable against the registered venture capital company that committed the breach in a Resident Magistrate's Court as a civil debt due to the Administrator, notwithstanding any limitation as to amounts recoverable under the Judicature (Resident Magistrates) Act.³⁹*

Offences and Miscellaneous

The final two Parts of the legislation will cover the offences under the Act and miscellaneous provisions. The provisions in the Trinidadian Act are fairly standard, and may therefore be adopted, with the only proposed amendment being to include

³⁸ An appropriate Jamaican dollar equivalent will have to be determined.

³⁹ Borrowed from section 47(3) of the *Insurance Act*.

appropriate sums in Jamaican currency. The provisions are reproduced below for ease of reference.

Offences

31. (1) *A person who knowingly makes a statement in any record, evidence or information submitted or given under the Act that—*
- (a) *is false or misleading with respect to a material fact; or*
 - (b) *omits to state a material fact, the omission of which makes the statement false or misleading, commits an offence.*
- (2) *A person who knowingly makes a statement in a proposal, report, return or other record required to be filed or furnished under this Act that—*
- (a) *is false or misleading with respect to a material fact; or*
 - (b) *omits to state a material fact, the omission of which makes the statement false or misleading, commits an offence.*
- (3) *A person who hinders, molests or interferes with a person doing anything that he is authorised to do under this Act commits an offence.*
- (4) *The director, shareholder or other officer of a registered venture capital company commits an offence where—*
- (a) *the director, shareholder or other officer supplies information to the Administrator which the director, shareholder or other officer knew or ought to have known to be false or misleading; and*
 - (b) *the Administrator issues a tax credit certificate to a shareholder under section 29 on the basis of the information supplied by the director, shareholder or other officer.*
- (6) *A person who commits an offence under this Act for which no penalty is provided is liable—*

- (a) *in the case of an individual, to a fine of ~~fifty thousand~~⁴⁰ dollars and to imprisonment for twenty-four months; and in the case of a company, to a fine of ~~one hundred~~⁴¹ thousand dollars.*

Miscellaneous

32. *The Minister may make Regulations, subject to negative resolution of Parliament, prescribing all matters that are required or permitted by this Act to be prescribed, or are necessary or convenient to be prescribed for giving effect to the purposes of this Act.*

⁴⁰ This is the equivalent of approximately US\$7,800 at an exchange rate of TT\$6.40 US\$1.

⁴¹ This is the equivalent of approximately US\$15,600 at an exchange rate of TT\$6.40 US\$1.



Potential Challenges

Although a seamless transition into a new framework would patently be ideal, it is prudent to lay out some of the anticipated obstacles that the transition and the programme will face.

These are as follows:

A general level of uncertainty: With the DBJ taking the approach of launching their VC fund prior to a formal eco-system being finalized, many desirable investors may be reluctant to follow suit. This would be due to, amongst other things, a level of doubtfulness in the investment atmosphere as it pertains to how the system will operate before and after the legislation takes effect. Investors have an affinity towards certainty, so their instinct would be to wait until the system is formalized.

A fight for scarce resources: The litany of financial products on the market, which are far more sophisticated than most VC opportunities, does not position VC well to initially be a strong magnet to investment dollars. Unfortunately, this could create an impression that the programme has false-started, thereby reducing the overall confidence and vigor of the project.

A perception of over-regulation: Oftentimes in Jamaica, the concept of the level of bureaucracy can completely dissuade even initial contemplation of entering an industry which notoriously has placed too much emphasis on “red tape”. The recommendations to the regulatory framework are finely balanced to allow for prudent oversight, but at the same time, not to stifle those who are interested. A facilitative approach from the very genesis of the programme must be a cornerstone of all operations to ensure that this possible hurdle does not become a reality.

Final Remarks

Enacting legislation to incentivize VC is a step in the right direction. However, the passage of the legislation alone will be insufficient to accomplish the goals of the drafters to stimulate VC activity if other structural elements are not also addressed. More specifically, in order to bear fruit, the legislation will have to be supported by measures, such as:

- **A facilitative regulatory body**
- **Mentoring and training programmes for SMEs**
- **Developing a culture of entrepreneurship and fostering innovation**
- **Leveraging the local scientific and research base**
- **Increasing awareness of venture capitalism and the JVCP**
- **Developing the local capital markets**

In this regard, we therefore agree with the statement of Patricia Freitas that “there is no ‘silver bullet’ or ‘one-size-fits-all’ set of policies that will create a lively VC ecosystem in any country”.⁴²

⁴² Patricia Freitas, “Market Report: The Venture Capital Industry in Jamaica”, at p. 51 citing Prof. Josh Lerner.



ANNEXURES

ANNEX I

Criteria for Identification of Target Entities

The following represents some of the suggested eligibility criteria for identifying target entities:

- Be incorporated under the *Companies Act* of Jamaica, or other appropriate vehicle available under the laws of Jamaica and having separate legal personality;
- Maximum share capital held should not exceed the amount to be prescribed in the Regulations, for example, J\$50 million;
- Have a detailed business plan which highlights the innovativeness of the company and its proposal. (DBJ may want to specify certain industries that will be given preference, e.g. technology); and

The above requirements seek to ensure that the target entities which are identified are startups or small and medium enterprises that are offering an innovative product or service and demonstrate a strong potential for exponential growth and high profit returns. Entities which fulfill these criteria have a greater chance of providing adequate returns to VCCs and the attendant spillover effects into the national economy.

ANNEX II

Required Amendments to Pensions and Insurance Regulations

Pension Amendments

The *Investment Regulations* under the *Pensions (Superannuation Funds and Retirement Schemes) Act, 2004*, (“the *Investment Regulations*”) contain strict requirements as to the types of investments that pensions funds and retirement schemes are permitted to make, which oftentimes prevents them from participating in the VC industry. Examples of the relaxation of regulatory requirements which are necessary in order to allow pension funds to act as VC investors include:

- A general reduction of the concentration limits for investments by pension funds as set out in the *Investment Regulations*;
- Clarification in the *Investment Regulations* that pension funds may invest in ordinary shares of non-listed companies;
- Addressing the dichotomy between the high limit of investment allowed in foreign securities under the *Investment Regulations* (20%), and the low limit as prescribed by the BOJ (5%); and
- Clarifying the prohibition in the *Investment Regulations* in relation to “speculative investments”.

Insurance Amendments

The *Insurance Act* and its attendant Regulations places limits on the investment mix and asset concentration of insurance companies. Currently, there are various percentage limits that are prescribed as the allowable asset concentration, depending on the investment activity. Doubt therefore arises as to which percentage should apply for those activities (likely to include VC transactions) which may fit into more than one category. The following therefore provides some of the changes that would be required to allow insurance companies to properly participate in the VC industry:

- Listing VC activity as one of the permissible investments;
- Clarification as to the percentage limit that would apply to investments made by insurance companies into VC activity; and
- Consideration as to whether the general rule in section 42(1) that investment companies cannot invest more than 5 per cent of their total assets in any one entity could be relaxed so as to permit greater participation in VC activity, particularly through VCCs which may be involved in finding more than one entity, in which event, perhaps the restriction could be based on the concentration in the underlying investee company with a higher limit set for VCCs.

ANNEX III

Comparison of Recommended Changes to Securities Act and Actual Legislative Changes of December 2013

MFG Recommendations of August 2013 Suggested Changes to Securities (Mutual Fund) Regulations	Securities (Amendment) Act 2013 Securities (Collective Investment Scheme) Regulations 2013	Issue Addressed?
Regulation 2: "local mutual funds" are defined to mean funds "operating" locally. Perhaps this ought to read "registered or domiciled" locally.	Replaced by definition of "local collective investment scheme" which uses the suggested language.	Yes
Regulation 24(2): We are not sure of the reasoning behind the prohibition on the in-house management also being "principals".	A similar provision does not appear to be in the new Regulations.	N/A
Regulation 24(3): The "holders" or investors should not be given the power to call meetings and vote out the officers and management of the fund, nor should they have any power over the fixing of fees. These are matters for the directors or the voting Class B shareholders who will typically be the managers and promoters themselves.	A similar provision does not appear to be in the new Regulations.	N/A
Regulation 24(3)(b): The investors will typically have Class A shares which will have no voting rights and carry primarily the right to redemption in accordance with the prospectus. Investors will always have the power to take action against the managers or officers if the Fund is managed negligently or otherwise in a manner not in keeping with the law or the	Similar issue remains in Regulation 9(1)(a)(ii).	PARTIALLY: Where the CIS is structured as a trust, this requirement may be acceptable since the trustee owes the investors a fiduciary duty.

MFG Recommendations of August 2013 Suggested Changes to Securities (Mutual Fund) Regulations	Securities (Amendment) Act 2013 Securities (Collective Investment Scheme) Regulations 2013	Issue Addressed?
prospectus. This would also be cause for the Regulator to take action, but the general mass of investors in Mutual Funds are never given the powers of ordinary voting shareholders in a public company. This is partly why the Statute should perhaps include a section dealing with Investors rights as is done in overseas Mutual Fund legislation.		Where the CIS is structured as a company, however, this is perhaps not expected or desired. Accordingly, with the introduction of "investor shares" in the Companies Act, this requirement may no longer be seen as critical.
Regulation 26: This provision must respect and recognise the likely existence of a management contract, which will have terms binding the parties. It may be better to provide that that contract should include these terms or the licence may be withdrawn or not granted. This would be better than attempting to legislate provisions to override the management contract.	Regulations 8 and 10 refer to and show deference to the provisions that may be contained in the Scheme's constitutional documents or custodian agreement respectively.	YES
Regulation 30: The word "sponsor" needs to be defined.	The term is not contained in the new Regulations.	N/A
Regulation 33: The type of forced diversification prescribed by this section should be removed. The investor is best served when market forces are allowed to create competition and foster diversity and choice of products. Funds must be allowed to set their own	Regulation 33 reduces the limit of allowable investment in illiquid assets from 30% to 15% and retains the 10% concentration limit for investments in any one issuer.	NO. However, we are not of the view that this should necessarily impact a venture capital programme.

MFG Recommendations of August 2013 Suggested Changes to Securities (Mutual Fund) Regulations	Securities (Amendment) Act 2013 Securities (Collective Investment Scheme) Regulations 2013	Issue Addressed?
risk parameters and the Regulator must simply ensure that those risks are clearly declared.		
Regulation 35(c)(i): The failure of the Fund to resolve the "complaints" of investors ought not to be cause for any disciplinary action whatsoever. The Regulator should investigate the nature of the complaint and determine whether it reaches a level to justify any action being taken.	A similar provision does not appear to be in the new Regulations.	N/A
Investor Shares: The requirements under the <i>Companies Act</i> which relate to share capital are in many instances inappropriate for shares which are to be issued and redeemed on a continuous basis as part of the normal business activities of a mutual fund. These 'investor shares', as they may be described, should be exempted from the filing requirements under the <i>Companies Act</i> and other unsuitable provisions thereunder. These are found in sections 3, 39, 50-54, 56, 59, 60, 62, 67 and 79.	Section 27A has been amended with new provisions on investor shares, including an exemption from ongoing filing requirements, authorised minimum, etc.	YES
Prospectus: The prospectus requirements under the <i>Companies Act</i> and the <i>Securities (Mutual Funds) Regulations</i> are duplicated; such duplication is unnecessary and would impose undue costs on investors. The prospectus requirements under the Regulations are specifically	The suggested exemptions re investor shares and prospectus are contained in the amended section 27 A.	YES

MFG Recommendations of August 2013 Suggested Changes to Securities (Mutual Fund) Regulations	Securities (Amendment) Act 2013 Securities (Collective Investment Scheme) Regulations 2013	Issue Addressed?
<p>designed for mutual fund companies and are maintained within the securities regulatory regime so that they meet international standards for disclosure to collective investment scheme investors on an ongoing basis. Mutual fund companies should therefore be exempt, with respect to investor shares, from all provisions under the <i>Companies Act</i> relating to the prospectus, in particular sections 40-49 of the Act. Since the <i>Companies Act</i> already exempts mutual fund companies from the requirements of sections 41 to 47, further exemptions should be provided with respect to the related sections 40, 48 and 49.</p>		
<p>Other: There are other minor amendments being proposed in relation to the keeping of the register of members, the making of certain returns and investigation procedures which are considered to be cumbersome, duplicating, or otherwise inappropriate for mutual fund companies. These provisions include sections 109 and 121-1 of the <i>Companies Act</i>.</p>	<p>Sections 109 and 121-1 of the <i>Companies Act</i>, no longer applies to collective investment schemes.</p>	<p>YES</p>
<p>Definition of Mutual Fund: The definition of mutual fund in section 17A (as amended) of the Act is problematic in that: (i) it should clearly include corporate entities; (ii) it should not differ so much from the definition given in</p>	<p>The definition of "collective investment scheme" in Section 17A will apply right across the board and will be cross-referenced in other pieces of legislation such as the <i>Companies Act</i>.</p>	<p>YES</p>

MFG Recommendations of August 2013 Suggested Changes to Securities (Mutual Fund) Regulations	Securities (Amendment) Act 2013 Securities (Collective Investment Scheme) Regulations 2013	Issue Addressed?
<p>the <i>Companies Act</i>; and (iii) in section 17A (2) (iii) Consideration should also be made as to whether the word "or" should be "and" as all investors in companies have the right to "dispose" of their shares.</p>	<p>The definition of "collective investment scheme" refers to "any scheme in whatever form" which arguably makes clear that it includes corporate entities.</p>	

ANNEX IV

Amendments to Copyright Act to allow for “Work for Hire”

A work made for hire is described by Wikipedia as “a work created by an employee as part of his or her job, or a work created on behalf of a client where all parties agree in writing to the work for hire designation”. It is an exception to the general rule that the person who actually creates a work is the legally recognized author of that work”. Currently, section 14(1) of the Jamaican Copyright Act, provides:

“subject to subsection (a) and to such exceptions as may be specified in or pursuant to any other provision of this Act, the author of a literary, dramatic, musical or artistic work that is a protected work and the director of a film that is a protected work have, respectively, the right to be identified as the author or, as the case may be, direction of the work in the circumstances specified in this section.”

In the United States, however, the Copyright Act at 17 U.S. C. § 201 (b) states:

“In case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

A work for hire is defined in 17 U.S.C. §101 as:

1. A work prepared by an employee within the scope of his or her employment; or;
2. A work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as a n instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a “supplementary work” is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an “instructional text” is a literacy, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

Annex V

Establishing the Venture Capital Company

1. The company may be incorporated as a private limited liability company.
2. Once the potential investors are ascertained, the parties could enter into a Shareholders Agreement which would seek to address how the venture capital company would be established, how shares would be distributed to the investors and how the venture capital company would be managed. The parties could, for example, agree that the business of the Company, if desired, would be restricted to venture capital activity of a particular kind or to such type of activity as is approved by special resolution. For example, it could restrict the business to assisting the development of businesses of the type approved by special resolution by making investments into such business (including by way of loan financing), and by providing business and managerial expertise to companies in which it has made or proposes to make an investment and such other matters ancillary thereto.
3. The venture capital company could issue different classes of shares in order to distinguish between different types of investors or shareholders. For example, it could require the managers to also be shareholders of the venture capital company but require the manager, in that instance, to hold a class of shares which do not carry with them rights to receive dividends or any distribution beyond the return of capital. Where there are investors who are intended to be essentially only silent investors, those investors could acquire a class of shares which would carry with it the right to receive dividends, distribution and return of capital but carry no right to vote, save where the issue being considered related specifically to holders of that class of shares, for example, dealing with a variation of the rights attached to that class. If required, there could also be a class of shares which would entitle an investor to have both a say in the company, by virtue of having a right to a vote as well as a right to receive dividends, distribution and return of capital. The Shareholders Agreement could also expressly provide that holders of shares in the venture capital company must be accredited investors within the meaning of the Guidelines for Exempt Distributions (Guidelines SR-GUID-08/05-0016) issued by the Financial Services Commission under the Securities Act, as same may be amended, amended and restated or replaced.
4. The Shareholders Agreement could also further stipulate the period by which the parties agree that they will hold the shares for a particular period of time (or until a particular event occurs, for example, until the venture capital company achieves a particular

hurdle rate for the return on investment) before being entitled to transfer those shares. Further, the Shareholders Agreement could specify that the shares carry with them preemptive rights, entitling each such shareholder to maintain a proportionate share of ownership in the venture capital company by purchasing a proportionate share of any new shares issued by the venture capital company. Additionally, there could be restrictions on the right of transfer which require shareholders even after the agreed standstill period to first offer any shares proposed to be sold to the existing shareholders or otherwise receive the consent of the other shareholders to such transfer.

5. The Shareholders Agreement could provide for the entry into an agreement with the person who will act as investment advisor to the venture capital company and how that person is to be remunerated for the provision of that service, whether that person must also be a shareholder. Please note that a professional investment advisor must be registered under the Securities Act and must therefore meet the provisions under the Securities Act for, for example, fit and proper requirements.
6. The Shareholders Agreement could also provide for how the board of directors is to be comprised and may determine whether any particular class of shares or persons have the right to appoint or nominate persons to the board of directors and what essential reports are required to be provided to the board of directors and/or to the shareholders and at what frequency.
7. The Shareholders Agreement could further provide whether there is any kind of matter or transaction which would require a particular majority of all or a particular class of shareholders as a prerequisite for the venture capital company's authority to enter into or perform such matter or transaction. For example, issuing new shares in the venture capital company, selling all or a substantial part of the assets of the venture capital company, declaration and payment of dividends or change in the business of the venture capital company.

This report was prepared by Myers, Fletcher & Gordon as legal advice to the Development Bank of Jamaica. If you have any queries or comments, kindly contact:

Peter Goldson || Partner || peter.goldson@mfg.com.jm

Hilary Reid || Partner || hilary.reid@mfg.com.jm