



**CONSULTATION PAPER:
EXCLUDED CATEGORIES OF SERVICES UNDER THE
TRUST AND CORPORATE SERVICES PROVIDERS ACT,
2017 (the “TCSP Act”)**

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Excluded Categories of Services

LEGISLATIVE REFERENCE: Trust and Corporate Services Providers Act, 2017
Section 15

1.0 PURPOSE

1.01 The purpose of this consultation is two-fold. Firstly, by virtue of the power vested in the Financial Services Commission (the “FSC”) pursuant to section 15(2) of the Trust and Corporate Services Providers Act, 2017 (“TCSP Act”), trust services not considered appropriate to be subject to the provisions of the said Act may be excluded. Section 15(2) of the TCSP Act stipulates that:

“The Commission may, by order published in the Gazette, exclude from the provisions of this Act, such categories of trust services as the Commission does not consider appropriate to be subject to this Act.”

1.02 In this regard, the purpose of this consultation paper is to first propose the trust services to be included in the Order and to solicit feedback on these proposals. Immediate steps will thereafter be taken to have the Order gazetted at the end of the consultation period taking into account the feedback received as necessary.

1.03 Secondly, just as there are certain trust services that the FSC considers should not be subject to the TCSP Act, there are also certain corporate services that are not considered appropriate to be subject to the said Act, as the guiding principles that result in it being practical to exclude certain trust services would also apply to certain corporate services. However, there are no express provisions under the TCSP Act excluding a corporate service from its application, and a power similar to that provided under section 15(2) of this Act has not been vested in the FSC in respect of corporate services.

1.04 The purpose of this paper is therefore to also invite comments regarding the corporate services the FSC proposes in this document to be exempted from all or some of the provisions of the TCSP Act. This second set of the proposal, if it finds favour, will of necessity require the FSC to seek for an amendment to be made to the TCSP Act. In this regard, submissions will be made to the Ministry of Finance and the Public Service to facilitate the exclusion of corporate services if relevant stakeholders agree with the matters proposed to be excluded.

2.0 WHO MAY BE AFFECTED BY THIS CONSULTATION PAPER

This paper will be of particular interest to all persons (individual and corporate entities) regulated by the FSC under the TCSP Act.

3.0 THE FSC'S REGULATORY OBJECTIVES

3.01 The objectives of the FSC as set out in section 3 of the TCSP Act includes, among other things:

(c) protecting the interests of entities and service providers through the licensing and supervision of service providers; and

(f) detecting and preventing any illegal activity within the services sector and in particular, money laundering, the financing of terrorist activity, illegal drugs, illegal firearms and other weapons.

3.02 The proposals in this consultation paper are relevant to these two objectives. The FSC considers that a balanced approach to legislation should be adopted, complementing the need to have an effective system for identifying and dealing with misuse of legal persons or legal arrangements for money laundering, terrorist financing, and the financing of proliferation whilst addressing concerns to minimize regulatory burden and compliance costs on businesses. Further, the regulatory measures should be commensurate with the risks that they seek to mitigate, without incurring undue burden on regulated entities (individuals and corporate entities). The proposed exclusion of certain corporate or trust services and identification of those who rely on any exclusions afforded under the TCSP legislation will help to reduce financial crime, thereby protecting the interest of service providers.

4.0 INTRODUCTION

4.01 Concerns have been identified about the potential for unnecessary duplication of regulatory oversight functions for money laundering or terrorism financing, particularly where such requirements are satisfied by other legislation administered by the FSC. The FSC also recognizes that the TCSP Act was not intended to apply to particular types of businesses or organizations when this Act was being developed having, for example, regard to section 15(3) of the TCSP Act which expressly excludes superannuation funds and retirement schemes. The exclusion under section 15(3) was intended to be broader than just the exclusion of the creation of superannuation funds and retirement schemes. It was also intended that the TCSP legislation would seek to capture only services provided by professional trustees.

4.02 Further, other entities that would appear to be required to be licensed under the TCSP Act as currently worded, would also be justifiably excluded such as the administrator and investment manager of a superannuation fund or retirement scheme. Trustees, administrators, and investment managers of superannuation funds and retirement schemes, and responsible officers connected with those administrators and investment managers are regulated under the Pensions (Superannuation Funds and Retirement Schemes) Act ("Pensions Act").

4.03 The FSC is committed to ensuring that a clear, effective, equitable, and appropriate regulatory environment is achieved with efficient use of available resources.

5.0 BACKGROUND

- 5.01 The Financial Services Commission (the “FSC”) is responsible for the administration of the TCSP Act and the Trust and Corporate Services Providers (Licensing and Operations) Regulations, 2022 (the “TCSP Regulations”).
- 5.02 A corporate service under the TCSP Act means any service specified in section 14 of the TCSP Act that is provided in or from Jamaica as a business. Section 14 of the TCSP Act provides that:
- “A licensed corporate service provider may provide the following services to an entity, namely:-*
- (a) acting as a coordinator or an assistant in the formation, management or administration of a firm or company;*
 - (b) acting as (or arranging for another person to act as) a director or secretary of a company, an alternate director or a partner of a firm;*
 - (c) providing a registered office, business address, correspondence address or administrative address, for a company or firm or for any other person;*
 - (d) acting as (or arranging for another person to act as) a nominee shareholder for another person;*
 - (e) arranging the establishment of any legal entities not covered by any of the foregoing paragraphs and providing any of the foregoing services to such entities; and*
 - (f) any other service that the Minister may, by order published in the Gazette, prescribe as a corporate service.”*

5.03 Under section 15 of the said Act, a licensed trust service provider may provide the under listed services in or from Jamaica as a business:

 - (a) creation of the trust;
 - (b) acting as trustee, executor or administrator in relation to the trust;
 - (c) arranging the for any person to act as trustee in respect of the trust;
 - (d) administration services in relation to the trust; and
 - (e) any other service that the Minister may, by order published in the Gazette, prescribe as a trust service.

5.04 Accountants, auditors, and other persons who engage in the preparation and filing of tax returns, the preparation of financial statements, or the auditing of accounts on behalf of persons are not required to obtain a licence under the TCSP Act unless they also engage in the provision of a trust service or corporate service as defined in sections 14 and 15 of the TCSP Act as a business.

5.05 Similarly, Attorneys-at-Law who do not provide any of the services described in sections 14 and 15 of the TCSP Act as a business are not required to be licensed under this Act.

5.06 Superannuation funds and retirement schemes are excluded from the operation of the TCSP Act under section 15(3) of the TCSP Act.

6.0 ISSUES WITH THE CURRENT LEGISLATION

- 6.01 It is noted that the word “administration” as used in sections 14(a) or 15(1)(d) of the TCSP Act is not defined. Therefore the term “administration” could apply to investment management and portfolio services as is the case, for example, for plan administrators in the Province of Ontario, Canada where, for example, the responsibilities of an administrator include “*managing the pension fund and making investments based on requirements in the pension plan's documents and all relevant laws ...*” (see the Financial Services Commission of Ontario Pension Guide <https://www.fsco.gov.on.ca/en/pensions/pension-plan-guide/pages/HRPPW-Roles-of-the-Pension-Plan-Administrator-and-Pension-Plan-Advisory-Committee.html>).
- 6.02 It has also been observed that in respect of the provision of directorship services by individuals, there exists a level of difficulty in determining whether all such persons are required to be licensed under the TCSP Act to undertake the activity of acting as a director. Consequently, it would appear that this is an area open to different interpretations and lacks clarity as to whether or not directors who are only acting as such in the course of their duties as an employee are required to be licensed or where they act as an official of an entity that holds a licence issued by the FSC come within the scope of that licence.
- 6.03 The fundamental provision in the TCSP Act for determining who is required to apply for a licence is the element of “a business” stipulated in section 2A of the TCSP Act. Section 2A stipulates that –
- “This Act applies to an individual, a firm or a company that provides a trust or corporate service as a business.”*
- 6.04 It should also be noted that the section of the TCSP legislation which speaks to the concept of “a business” has not been tested in our courts. Since the term is not defined in the legislation, several areas of services that may be provided are subject to differing interpretations, and therefore lack certainty.
- 6.05 It is posited, notwithstanding, that any interpretation used in respect of the foregoing would exclude persons conducting any of the activities stipulated in sections 14 and 15 of the TCSP Act if they carry out such activities in an honorary, recreational, or charitable capacity. By extension, the receipt of payment for a service would create a strong inference for an individual to be considered as meeting the threshold test of “a business” stated in section 2A of the TCSP Act. This would also suggest that if an individual is acting with a view for reward in the sense of fees or benefits in kind, this may be an important indicator of “a business.” It is however acknowledged that the receipt of income or fees is possibly not the only characteristic of what constitutes “a business.” The TCSP Act should therefore be amended to put this issue to rest.
- 6.06 Other factors which could also indicate that a particular activity is being undertaken as “a business” include inter alia the under-listed which is non-exhaustive:
- (a) the individual has no other employment;
 - (b) the amount of time taken to fulfil the responsibility is significant;
 - (c) the level of income received (both in terms of the quantum and as a proportion of the individual’s total income) is significant;
 - (d) the individual receives significant non-financial benefits/benefits in kind;

- (e) the existence of a business relationship through which habitual or frequent or regular appointments are introduced; and
- (f) the turnover of engagements (for example as a director) is significant.

6.07 It would therefore be useful for the meaning of “a business” to be included in the TCSP Act.

6.08 It is noted also that by virtue of the definition of “company” in the TCSP Act, certain statutory agencies could be considered a company under the TCSP Act. Some activities conducted by such entities which are done for remuneration therefore could be considered a corporate service without clarity regarding the definition of “a business,” unless exempted under the TCSP framework. A company is defined in the TCSP legislation to mean “a body corporate incorporated or constituted under the laws of Jamaica or any other jurisdiction”.

6.09 Lastly, but in no way the least, it is noted that certain entities are required to be registered or licensed under the Insurance Act, Securities Act, or Pensions Act. As such it could be argued that there is a duplication of regulatory oversight. For example, securities dealers who provide investment management services for superannuation funds or retirement schemes must be licensed under both the Securities Act and Pensions Act. However, there is not a duplication because the regulatory oversight applied for purposes of pensions is separate from the regulatory oversight provided for activities in the securities sector. This is distinguishable from the duplication of being brought under the TCSP regime solely for anti-money laundering (“AML”), countering the financing of terrorism (“CFT”), or countering the financing of proliferation (“CFP”) considerations which are appropriately addressed under the aforementioned regulatory regimes administered by the FSC.

7.0 PROPOSED EXCLUSIONS

7.01 As a consequence of the wide definition surrounding the services that may be provided by a trust service provider and the pertinent foregoing concerns, a number of exemptions by way of an Order that will be published by the FSC in the Gazette in respect of trust services are proposed below in Table 1:

TABLE 1: PROPOSED EXCLUSION OF TRUST SERVICES

	Category of Trust Services to be Excluded	Rationale for Exemptions
1.	<ul style="list-style-type: none"> a) Trust services provided in relation to superannuation funds and retirement schemes under the Pensions (Superannuation Funds and Retirement Schemes) Act, by trustees, administrators, investment managers, and responsible officers. b) Trust services provided in relation to pension schemes established pursuant to the Tourism Workers Pension Act, by trustees, administrators, investment managers, and responsible officers. 	<ul style="list-style-type: none"> • The provisions of the TCSP Act as currently worded exclude superannuation funds and retirement schemes only. Given that the provision applies to services and not entities, section 15(3) may need to be amended to expressly reflect that the exclusion is the creation of superannuation funds and retirement schemes. Furthermore, this exclusion as currently worded does not cover trustees’ services or the services provided by an administrator or investment manager. • The TCSP Act was not intended to apply to trustees of superannuation funds and retirement schemes when the Act was developed.

Category of Trust Services to be Excluded	Rationale for Exemptions
<p>c) Trust services carried on in relation to superannuation funds or retirement schemes under the Pensions (Superannuation Funds and Retirement Schemes) Act, by virtue of being an employee, director, or officer of a corporate trustee, administrator, or investment manager, or as the holder of an office in relation to any such superannuation fund or retirement scheme, or by a company in the same group as a licensee/registrant of the Commission under the direction of and in the course of business of the said licensee/registrant.</p> <p>d) Trust services carried on in relation to a pension scheme established pursuant to the Tourism Workers Pension Act, by virtue of being an employee, director, or officer of a corporate trustee, administrator, or investment manager, or as the holder of an office in relation to any such pension plan or pension scheme, or by a company in the same group as a licensee/registrant of the Commission under the direction of and in the course of business of the said licensee/registrant.</p> <p>e) Trust services provided to any Collective Investment Scheme approved by the Commission under the Securities (Collective Investment Schemes) Regulations.</p> <p>f) Trust services rendered by insurance intermediaries to superannuation funds or retirement schemes under the Pensions (Superannuation Funds and Retirement Schemes) Act, or to pension schemes established pursuant to the Tourism Workers Pension Act.</p>	<ul style="list-style-type: none"> • The trustees of superannuation funds and retirement schemes must be registered by the FSC under the Pensions Act. An individual who is a trustee is required to satisfy the criteria set out in sections 7(3) (a),(b), (c), and (e) while a corporate trustee must satisfy the foregoing criteria as well as 7(3)(d). Section 7(3) provides that – <ul style="list-style-type: none"> “ ... A person is a fit a proper person if he is a person- <ul style="list-style-type: none"> (a) <i>Who, whether in Jamaica or elsewhere –</i> <ul style="list-style-type: none"> (i) <i>Has not been convicted of an offence involving dishonesty; or</i> (ii) <i>Is not an undischarged bankrupt</i> (b) <i>Whose employment record does not give the Commission reasonable cause to believe that he carried out any act involving impropriety in the handling on moneys;</i> (c) <i>Who, in the opinion of the Commission, is a person of sound probity, is able to exercise competence, diligence and sound judgement in fulfilling his responsibilities in relation to a superannuation fund or retirement scheme and whose relationship with such fund or scheme will not threaten the interest of members, and for the purposes of this paragraph, the Commission shall have regard to any evidence that he has-</i> <ul style="list-style-type: none"> (i) <i>engaged in any business practice appearing to the Commission to be deceitful or oppressive or otherwise improper which reflects discredit to his method of doing business;</i> (ii) <i>contravened any provision of any enactment designed for the protection of the public against financial loss due to dishonesty, incompetence or malpractice by persons concerned in the provision of financial services or in the management of companies or due to bankruptcy</i> (d) <i>who has knowledge of and experience in the business of superannuation funds and retirement schemes;</i> (e) <i>who is not incapacitated by reason of mental disability.”</i> • Most trustees who are individuals provide services as trustees to a superannuation fund set up by their employers and do so on a voluntary basis. These trustees are supervised under the Pensions Act where there are appropriate AML safeguards consistent with international standards. Therefore, it is also not necessary to add new costs and regulatory hurdles for these trustees who operate

Category of Trust Services to be Excluded	Rationale for Exemptions
<p>g) Unremunerated trust services, where the trust service is carried on for no remuneration payable to, or received by the trustee or private trust company.</p>	<p>on a voluntary basis given that they already must comply with a regime that satisfies international standards.</p> <ul style="list-style-type: none"> • To avoid unnecessary duplication of regulatory oversight functions for money laundering or terrorism financing, or proliferation financing where such requirements are satisfied by other legislation. The FSC already has oversight of administrators, investment managers, and responsible officers under the Pensions Act which provides for robust regulatory and supervisory regimes. • The intention is to capture persons publicly offering and marketing themselves as trustees or who are operators of a business established for the purpose of providing trustee services. • The business or organization covered is at low risk of being exploited for money laundering, terrorism financing, or proliferation financing purposes. • The costs and effort of complying would be unreasonable compared to the risks such a business or organization faces. • The risk of private pension trusts being used for money laundering and terrorist financing purposes was low.
<p>2. h) Trust services carried on by a testamentary trustee, being a person who has received a grant of probate or letters of administration to administer the estate of a deceased person and where that trustee is not a business established to offer executor or administrator services to estates.</p>	<ul style="list-style-type: none"> • The estate of a known deceased person is not likely to be used for money laundering, terrorism financing, or proliferation financing. • The costs and effort of complying could be unreasonable compared to the risks the business or organization faces which are considered to be low risk.

7.02 The foregoing proposals do not include trust services provided to superannuation funds or retirement schemes, where such superannuation funds or retirement schemes are not approved by the Commission, and there is no application—

- a) submitted to the Commission, for the approval of any such superannuation fund or retirement scheme; or
- b) submitted to the Commission for the winding-up of any such superannuation fund or retirement scheme.

7.03 As a consequence of the wide definition surrounding the services that may be provided by a corporate service provider, certain categories of corporate services are likewise inadvertently covered by the TCSP legislation in its current form. The FSC proposes, as stated before, that the TCSP Act be amended to clearly provide for the exclusion of certain corporate services (see Table 2) that are inadvertently caught by the TCSP Act:

TABLE 2: PROPOSED EXCLUSION OF CORPORATE SERVICES

	Category of Excluded Corporate Services	Rationale for Exclusion
3.	<p>i) Corporate services carried on by virtue of being officers and corporate secretaries who hold the office of a director/alternate director and/or company secretary for a corporate entity under a contract of employment; including where the appointment extends to more than one company or firm within a group.</p> <p>j) Corporate services conducted in the capacity of a director/alternate director of a supervised body.</p> <p>k) Corporate services conducted in the capacity of a director/alternate director of a company or firm which is a subsidiary of, or wholly beneficially owned by, a company or other body supervised by the FSC or the BOJ.</p> <p>l) Corporate services conducted in the capacity of a director, alternate director, or corporate secretary who do not offer to provide, or attempt to induce a person or corporate entity to utilize those services as director, alternate director, or corporate secretary.</p>	<ul style="list-style-type: none"> • Out of an abundance of caution because “a business” is not defined in the TCSP Act, it may be necessary to exclude certain activities that are not intended to be captured as a business but are arguably captured because remuneration is involved. For example, such as serving as a director for a company or government entity. The intention is not to require people being compensated for serving as a director to automatically be required to be licensed under the TCSP Act. Instead, the intention is to capture persons publicly offering and marketing themselves as directors or who are operators of a business established for the purpose of providing directors for companies. • To avoid unnecessary duplication of regulatory oversight functions for money laundering or terrorism financing or proliferation financing where such requirements are satisfied by legislation administered by the Companies Office Jamaica. • To avoid unduly imposed regulatory burden.
4.	<p>m) Corporate services conducted in the capacity of a director, alternate director, responsible officer, and other officers of an administrator or investment manager under the Pensions Act; or any other entity required to be licensed or registered under the Pensions Act.</p>	<ul style="list-style-type: none"> • The business of an administrator or investment manager in respect of superannuation funds and retirement schemes is at low risk of being exploited for money laundering, terrorism financing, or proliferation financing purposes. • To avoid unnecessary duplication of regulatory oversight functions for money laundering or terrorism financing, or proliferation financing where such requirements are satisfied by other legislation. The FSC already has oversight of trustees, administrators, investment managers, and responsible officers under the Pensions Act. • The costs of complying will be passed on to relevant pension plans; thereby eroding the pension assets available to fund the retirement benefits of the members of the pension plans that would be impacted.

8.0 OTHER CONSEQUENTIAL AMENDMENTS

- 8.01 The proposed exclusions regarding corporate services will require amendments to be made to the TCSP Act. The FSC will also take the opportunity to deal with any miscellaneous amendments necessary to address any errors and omissions in the current legislation.
- 8.02 To facilitate and support effective oversight of the TCSP sector pragmatically and proportionately the proposed amendments to the TCSP legislation will also include one or more provisions that allow for the FSC to identify those persons who are relying on the exclusions that will be afforded under the TCSP legislation since their identification is germane to them being effectively supervised for compliance with the AML/CFT/CFP framework. Information about persons excluded from the operations of the TCSP legislation, in part or the whole, will assist the FSC to identify persons who are not licensed and who are providing a trust or corporate service in circumstances where a licence is required.

9.0 RESPONDING TO THE CONSULTATION PAPER

- 9.01 Continued dialogue with stakeholders is considered essential in the development of proposals by the FSC. Consequently, the FSC invites written comments from interested parties regarding the contents of this consultation document. The closing date for the submission of comments is November 30, 2022. Please direct your comments by email to RCTS@fscjamaica.org or by post to the following person:

Mr. Phillip Chin-See - Manager, Registration, Corporate & Trust Services Division
Financial Services Commission
39-43 Barbados Avenue
Kingston 5
Telephone (876) 906-3010-2
Facsimile (876) 906-3018

- 9.02 Comments provided with respect to any new proposals should include a clear rationale. It should however be noted that the comments received by the FSC may not result in a change to the foregoing proposals.
- 9.03 Professional bodies, trade associations, and other representative groups are asked to provide a summary of the people and organizations that they represent when responding, as well as the methodology used to gain members' input to the consultation process.
- 9.04 Personal data provided will only be used by FSC and/or other government departments/agencies for purposes that are related to this consultation.