



CONSULTATION DOCUMENT ON THE REVIEW OF THE TRUST COMPANIES ACT 1949

The Companies Commission of Malaysia (SSM) invites comments on the Review of the Trust Companies Act 1949 exercise as set out in Section B of this consultation document by **30 April 2018**. Please provide your name and the organisation you represent (where applicable) and to provide reference on the question(s) you are commenting.

Comments must be forwarded by email to: lrpia@ssm.com.my

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SECTION A

REVIEW OF THE TRUST COMPANIES ACT 1949

EXECUTIVE SUMMARY

1. Taking into consideration that the Trust Companies Act 1949 (“TCA”) is in existence since 1949 and has never been reviewed in principal, SSM is taking the initiative to modernise the TCA to better suit the current economic environment. This is critical to ensure that trust companies will be better equipped to carry out the fiduciary capacity in discharging their obligations under the various kind of trust, agencies and in managing estates as trustees.

2. This review exercise aims at seeking comments, feedback and recommendations towards establishing a robust regulatory framework for trust companies, either through an amendment or a repeal of the TCA. The proposed key areas for review are recommendations made after considering the existing trust company law regime in Malaysia and after identifying several comparable legal frameworks from foreign jurisdictions for benchmarking purposes.

3. The Companies Commission of Malaysia (SSM) seeks views on the following policy statements which are proposed to be considered as the basis of formulating a more efficient registration process and better framework for the governance of trust companies in Malaysia:

- (a) That the concept of mandatory registration regime for all trust companies be introduced before any company is allowed to carry on trust business;
- (b) That certain categories of persons will be exempted from the mandatory registration regime;
- (c) That a central registry particularly for the purpose of collecting the beneficial ownership information of trust business, trust companies and trust arrangements managed by the trust companies be introduced;
- (d) That the requirement for all trust companies to maintain mandatory professional indemnity insurance policy at all times be introduced;
- (e) That a definition of “trust business” be inserted to clarify the scope of activities carried out by trust companies;
- (f) That all provisions relating to authorised capital and annual return be harmonised with the Companies Act 2016 (CA 2016);
- (g) That the present requirement to terminate the trust companies by way of winding up should be extended to allow cessation of trust business by trust companies;
- (h) That trust companies should be provided with an option to transfer their trust business together with the assets of the trust business to other trust company before they cease to carry on their trust business;

- (i) That the law should allow criminal sanctions be imposed against the officers of the trust company for certain breaches including breach of trust;
- (j) That the present mandatory requirement of holding not more than one-fifth of the issued capital of the company is not facilitative and should be amended to ensure the trust business is adequately protected;
- (k) That the present provision relating to Singaporean trust companies be deleted as the reciprocal provisions in the trust law in Singapore have been abolished; and
- (l) That the same framework relating to electronic filing under the CA 2016 be adopted.

SECTION B

INTRODUCTION

1. Trust companies in Malaysia are currently regulated by SSM under the current TCA. TCA came into force on 28 September 1949 for West Malaysia and 1 January 1973 for East Malaysia.

2. TCA provides for the registration and regulation of trust companies in Malaysia, which only applicable to public company. This Act has never been reviewed since its last revision which came into force on 15 March 1973.

3. The aims of reviewing the TCA are as follows:

- (a) To provide clarity and certainty in law and to avoid inconsistent and overlapping provisions in different statutes;
- (b) To provide all modern powers necessary for the efficient management of trust companies;
- (c) To modernize the trust company law to facilitate more effective trust administration;
- (d) To promote the trust business and strengthen the competitiveness and attractiveness of trust companies services industry in Malaysia;
- (e) To harmonize the law with international standard; and

- (f) To abolish outdated and complicated rules which create uncertainties with regard to the registration process and reporting procedures.

AREAS FOR REVIEW AND COMPARATIVE BENCHMARKING

4. This document will discuss specific issues with the objective to revamp the TCA and invites the views of interested parties in the following areas:

- (i) Part A – Dynamics of the law;
- (ii) Part B – Parameters of activities under the TCA;
- (iii) Part C – Mandatory registration regime;
- (iv) Part D – Management of Trust Companies; and
- (v) Part E – Miscellaneous.

PART A – DYNAMICS OF THE LAW

5. In recent years, several major common law jurisdictions have reviewed and reformed their trust laws, some of which are inclusive of their trust company's regulatory regime.

6. Many of such jurisdictions reviewed their laws to introduce a more effective regulatory regime for trust companies. In the meantime, the development at the international front relating to

anti-money laundering activities and terrorist financing also necessitates review of the TCA.

7. Malaysia has been a full member of the Financial Action Task Force (FATF)¹ since 2016. According to a report² published by FATF on trust companies in relation to money laundering and terrorist financing, trust and company service providers (TCSP) play a key role in the global economy as financial intermediaries, providing an important link between financial institutions and many of their customers.

8. Whilst majority of the TCSP appear to be established for legitimate purposes, some are being used, unwittingly or otherwise, to help facilitate the misuse of trust and corporate vehicles³. Due to the potential threats of the misuse of trust companies, there is a need to change and strengthen the legal framework of trust company law in Malaysia to effectively curb the impending hazards.

9. Malaysia's immediate neighbour, Singapore started to reform its Trust Companies Act (STCA) in 2004 to introduce new regulatory framework for trust companies through amendments to the STCA in order to elevate the standards of trust services in Singapore.

¹ FATF is an independent inter-governmental body that develops and promotes policies to protect the global financial system against money laundering and terrorist financing.

² The FATF Report, "Money Laundering Using Trust and Company Service Providers", October 2010, p 4.

³ Ibid.

10. New Zealand reformed its Trustee Companies Act 1967 (NZTCA) which was introduced to the New Zealand Parliament on 21 September 2007 and the proposals include reforming trustees' power to insure and power to appoint agents and dealing with advisory trustees and protectors.

11. Offshore jurisdictions like the British Virgin Islands and the Cayman Islands have made various legislative amendments to their trust law to include concepts which are unconventional to common law jurisdictions.

12. Trust has been a major activity in the British Virgin Islands due to its flexible legal and regulatory framework. Trusts in the British Virgin Islands have a basis in common law and trust companies are governed by the Banks and Trust Companies Act 1990 (BVIBTCA). In 2013, the British Virgin Islands amended BVIBTCA to offer more flexibility and open wider markets for the British Virgin Islands trusts.

13. The Cayman Islands is known as a strong, stable and highly reputable platform for the creation and administration of trusts. The country introduced the first statutory modifications in 1967 and made further modifications in response to market opportunities and meet industry demand. The Cayman trusts regime provides for few types of trust namely, ordinary trust (duration of 150 years regardless of the rules against perpetuity), exempted trust (may be exempted for up to 50 years from all taxes that in future may introduced) and STAR trust which allow trust for any purpose (charitable, non-charitable or any mix thereof).

14. The nearest comparison for TCA is the Labuan Financial Services and Securities Act 2010 (LFSSA) under the purview of Labuan Financial Services Authority (LFSA) that governs all trust companies in Labuan.

15. In 2010, a radical change was made to Labuan legal framework to transform Labuan business scene as an international business and financial hub. Due to that changes, LFSSA was introduced as an Omnibus Act to replace four (4) Acts namely, Labuan Trust Companies Act 1990, Offshore Banking Act 1990, Offshore Insurance Act 1990 and Labuan Offshore Securities Industry Act 1988. Under LFSSA, the trust laws are set to attract more foreign as well as local investments.

16. In light of the current environment of the trust company law and having the opportunity to look into the reforms of trust law in other jurisdictions such as Singapore, Hong Kong, New Zealand, the Cayman Islands, the British Virgin Islands and Labuan, SSM proposes several key areas in its review of the TCA as discussed in the ensuing parts of this document.

PART B – PARAMETERS OF ACTIVITIES UNDER THE TCA

Definition of “Trust Business”

17. At present, the TCA does not expressly provide for any trust business activities that are being regulated under a defined list. However, inferences could be made by referring to the objects of trust companies which shall not exceed the following:

“The objects of a trust company may be any or all of, but shall not exceed, the following:

- (a) to accept and execute the offices of executor, administrator, trustee, receiver, receiver and manager, assignee, liquidator, guardian of the property of an infant, committee of the estate of a mentally disordered person or other like office of a fiduciary nature;*
- (b) to act as attorney or agent for the collection, receipt and payment of money, and for winding up estates, and for the sale or purchase of any movable or immovable property;*
- (c) to act as agent for the management and control of movable and immovable property for and on behalf of the owners thereof, or for or on behalf of executors, administrators or trustees;*

(d) to act as investing and financial agent for and on behalf of executors, administrators and trustees or any other persons whatsoever, and to receive money in trust for investment and to allow interest thereon until invested; and to undertake for and on behalf of executors, administrators and trustees or any other persons whatsoever the negotiation of loans of all descriptions and the procuring and lending of money on the security of any description of property, immovable or movable, or without taking any security on such terms as may be arranged, and to advance and lend moneys to protect any estate, trust or property entrusted to the company as aforesaid and to charge interest upon any such advances:”⁴

18. As reported⁵ by FATF, companies carrying on trust business activities are potentially being used for money laundering and terrorist financing if they are not properly regulated. In the absence of such definition in the current TCA, it is proposed that the definition of trust business activities that a trust company may undertake be inserted to clarify the scope of activities that can be carried out by the trust companies.

19. As such, it is important that the scope of the activities be carefully defined to include all relevant trust business activities under the new regime.

⁴ Section 8(1) of the TCA.

⁵ Ibid, note 3, p 5-6.

20. In Singapore, the First Schedule of the STCA stipulates the following activities as “trust business”:

“The following businesses constitute trust business for the purposes of this Act:

- (a) the provision of services with respect to the creation of an express trust;*
- (b) acting as trustee in relation to an express trust;*
- (c) arranging for any person to act as trustee in respect of an express trust;*
- (d) the provision of trust administration services in relation to an express trust.”⁶*

21. A simpler approach taken by the British Virgin Islands that “trust business” has been defined under the Banks and Trust Companies (Amendment) Act 2006 (BVI BTCAA06) as follows:

“trust business” means the business of

- (a) acting as a professional trustee, protector or administrator of a trust or settlement; or*
- (b) managing or administering any trust or settlement;”⁷*

⁶ Section 2 and First Schedule of the STCA (to be read together).

⁷ Section 3 of the BVI BTCAA 2006.

22. The Cayman Islands under the Bank and Trust Companies Law (2013 Revision) (CIBTCL) defines “trust business”⁸ simply as follows:

“trust business” means the business of acting as trustee, executor or administrator;”

23. Compared to the British Virgin Islands and the Cayman Islands, Labuan under LFSSA provides for more specific definition of “trust company business” as follows:

- “(a) establishing or using a share transfer office or share registration office;*
- (b) administering, managing or otherwise dealing with property as an agent, legal personal representative or trustee, whether by servant or agent or otherwise;*
- (c) maintaining an agent for the purpose of soliciting or procuring business, whether or not the agent is continuously resident in Labuan;*
- (d) maintaining an office, agency or branch, whether or not that office, agency or branch is also used for any purpose by another entity;*
- (e) the provision of-*
 - (i) Management and accounting services to;*
 - or*
 - (ii) Directors, secretaries and registered offices for,*

⁸ Section 2 of the CIBTCL.

Labuan companies incorporated or registered under the Labuan Companies Act 1990 and foreign Labuan companies registered under that Act;

- (f) incorporating or registering companies under the Labuan Companies Act 1990 and generally acting as a lodging agent for any document required to be lodged by a company or person under that Act; and*
- (g) providing such other services as may be approved by the Authority from time to time, to or on behalf of any person;”⁹*

24. The definition provided under the FATF relating to trust business are as follows:

“Trust and Company Service Providers” refers to all persons or businesses that are not covered elsewhere under these Recommendations, and which as a business, provide any of the following services to third parties:

- acting as a formation agent of legal persons;*
- acting as (or arranging for another person to act as) a director or secretary of a company, a partner of a partnership, or a similar position in relation to other legal persons;*
- providing a registered office; business address or accommodation, correspondence or administrative*

⁹ Section 59 of the LFSSA.

address for a company, a partnership or any other legal person or arrangement;

- *acting as (or arranging for another person to act as) a trustee of an express trust or performing the equivalent function for another form of legal arrangement;*
- *acting as (or arranging for another person to act as) a nominee shareholder for another person.*

25. Thus, SSM recommends that the term “trust business” be given a broader definition similar to the definition provided under the section 2 and First Schedule of the STCA but which also include the activities specified and defined by the FATF as carried out by the TCSP. The proposed definition is aimed at ensuring that trust activities can be effectively monitored and the risk of trust companies being used to facilitate improper or illicit purposes particularly relating to money laundering and terrorism financing could be minimised.

26. To address the potential overlapping issues that may arise, SSM recommends that the law shall not cover trust arrangements or businesses of any person which are carried on or regulated under other written laws such as the Trustees Act 1949, Trustees (Incorporation) Act 1952, the Capital Market Services Act 2007 or the Financial Services Act 2013.

27. Despite the proposal that the law should provide a clear definition of “trust business or activities”, SSM also proposes that any trust company is still required to have a constitution specifying its specific objects. This is similar with the mandatory requirement

for a company limited by guarantee (CLBG)¹⁰ and a management company for interest scheme¹¹. As the constitution will be binding on the trust company, its directors and shareholders, SSM is of the view that the requirement will serve as a control mechanism over trust company for monitoring purposes.

Questions for consultation:

- (1) Do you agree that the definition of “trust business” should be broader and to include similar definition provided in the STCA as well as the activities carried out by TCSP as specified by FATF?**

- (2) Do you agree that the mandatory requirement to have a constitution with specific objects will serve as a control mechanism over a trust company, its directors and shareholders?**

PART C – MANDATORY REGISTRATION REGIME

28. The current TCA does not impose mandatory registration requirement for trust companies in Malaysia. Instead, the registration of trust companies in Malaysia under the TCA is only required provided that a company fulfils the requirement of paragraphs (a) to (g) of section 3:

¹⁰ Section 38(1) and (3)(b) of the CA 2016.

¹¹ Sections 6(1)(b), 7(1)(b) and 8(1)(b) of the Interest Schemes Act 2016.

“3. Any public company incorporated in Malaysia may apply to the Registrar to be registered as a trust company:”

29. In this light, it is proposed that a clearer wording of law prohibiting a company from carrying on a trust business or activities unless registered under the law is recommended.

30. The requirement for mandatory registration would facilitate the establishment of centralised registry for trust companies in Malaysia for regulating and monitoring purposes. As trust companies will be required to comply with more stringent requirements under the reporting and governance framework, a central registry would be most effective in ensuring that these categories of companies could be monitored more effectively.

31. It is also proposed that the current framework which only allows public companies limited by shares incorporated under the CA 2016 to be registered under the TCA be retained. This will enable easier and more effective facilitation of the monitoring mechanism over trust companies in Malaysia by SSM.

32. In Singapore, a company can only apply for a trust business licence if that company is incorporated under the Companies Act (Cap. 50):

“5. (1) The Authority shall not grant a trust business licence to an applicant therefor unless the applicant is -

- (a) a company incorporated under the Companies Act (Cap. 50); or
- (b) *a foreign company registered under Division 2 of Part XI of the Companies Act.*¹²

33. Similar with Hong Kong, a company may apply to be registered as a trust company after being locally incorporated under the Companies Ordinance (Cap. 622):

*“(1) Any company incorporated in Hong Kong (not being a private company within the meaning of section 11 of the Companies Ordinance (Cap. 622) may apply in writing to the Registrar of Companies to be registered as a trust company under this Part. (Amended 28 of 2012 ss. 912 & 920)”*¹³

34. With reference to the aforementioned jurisdictions, SSM proposes that in addition to the mandatory registration or incorporation under the CA 2016, the registration of trust companies be made mandatory under the TCA to facilitate the monitoring mechanism of the following activities¹⁴:

- (a) Providing services with respect to the creation of a trust;
- (b) Acting as trustee in relation to a trust;

¹² Section 5(1)(a) of the STCA.

¹³ Section 77(1) of the Trustee Ordinance (Chapter 29)

¹⁴ Save for the regulated activities stated in Schedule 2 of CMSA

- (c) Arranging for any person to act as trustee in respect of a trust; and
- (d) Providing trust administration services in relation to a trust.

Questions for consultation:

- (3) Do you agree that with the current framework that only allows public companies limited by shares incorporated under the CA 2016 to be registered under the TCA be retained?
- (4) Do you agree that the purpose of mandatory registration is as control mechanism to monitor all trust companies that carrying on trust business activities?

Exemption from the registration requirement

35. As stated in paragraph 27 above that the law shall not cover trust business or activities which are governed under other written laws, therefore certain category of persons carrying out trust business activities would be exempted from the registration requirement under the TCA. Other than this exemption, SSM proposes that no other category of persons shall be exempted from the registration requirement.

36. Singapore introduced mandatory licensing for trust companies with limited exemptions for lawyers and accountant,

private trust companies, banks and merchant banks and for overseas persons visiting Singapore as specified in section 15(1)(2)(3) and (4) of the STCA and regulation 4(1) of the Singapore Trust Companies (Exemption) Regulations (STCER).¹⁵

¹⁵ Section 15 of the STCA states:

(1) Subject to subsection (9), the following persons shall be exempt from the requirement to hold a trust business licence in respect of the carrying on of trust business:

- (a) any bank licence under the Banking Act (Cap. 19) in respect of—
 - (i) the provision of services in relation to the creation of an express trust;
 - (ii) the arrangement for any person to act as trustee in relation to an express trust; or
 - (iii) the provision of trust administration services which are procedural and non-discretionary;
- (b) any merchant bank approved as a financial institution under the Monetary Authority of Singapore Act (Cap. 186) in respect of—
 - (i) the provision of services in relation to the creation of an express trust;
 - (ii) the arrangement for any person to act as trustee in relation to an express trust; or
 - (iii) the provision of trust administration services which are procedural and non-discretionary;
- (c) any holder of a capital markets services licence, or any person who is exempt from holding a capital markets services licence, for providing fund management or custodial services for securities under the Securities and Futures Act (Cap. 289), in respect of the provision of fund management or custodial services for securities;
- (d) such other person or class of persons as may be prescribed; and
- (e) any other person not falling within the description of paragraphs (a) to (d) whom the Authority may, on the application of the person, by notice in writing so exempt.

(2) Any bank providing any trust business service referred to in subsection (1)(a)(i) or (ii) shall—

- (a) within 3 months from the date of commencement of this Act or 1 month from the date of commencement of its trust business, whichever is the later, notify the Authority in writing that it is providing such service; and
- (b) as soon as practicable, notify the Authority if it ceases to provide such service, but in any case no later than 14 days from the date of cessation.

(3) Any merchant bank providing any trust business service referred to in subsection (1)(a)(i) or (ii) shall—

- (a) within 3 months from the date of commencement of this Act or 1 month from the date of commencement of its trust business, whichever is the later, notify the Authority in writing that it is providing such service; and
- (b) as soon as practicable, notify the Authority if it ceases to provide such service, but in any case no later than 14 days from the date of cessation.

(4) The Authority may prescribe the provisions of this Act that apply to persons referred to in subsection (1)(a), (b) and (c).

Regulation 4 of the STCER states:

(1) For the purposes of section 15(1)(d) of the Act, the following persons shall be exempt from the requirement to hold a trust business licence in respect of the carrying on of trust business:

- (a) any private trust company;
- (b) any practicing solicitor, foreign practitioner, Singapore law practice, Joint Law Venture, Formal Law Alliance or Qualifying Foreign Law Practice, in respect of -
 - (i) the provision of services in relation to the creation of an express trust;
 - (ii) the arrangement for any person to act as trustee in respect of an express trust;
 - (iii) the provision, in relation to an express trust, of trust administration services--
 - (A) which are procedural and non-discretionary; or
 - (B) which relate to the drafting of legal documentation, and the giving of professional legal advice in connection with the drafting of legal documentation; or
 - (iv) the carrying out of any trust business that is not described in subparagraphs (i), (ii) and (iii), if all of the following conditions are complied with:
 - (A) the total amount of financial assets, excluding real property, settled by any client in one or more trusts in connection with the trust business does not exceed \$2 million;
 - (B) the practicing solicitor or foreign practitioner, or each practicing solicitor or foreign practitioner in the Singapore Law practice, Joint Law Venture, Formal Law Alliance or Qualifying Foreign Law Practice, as the case may be, has not more than 30 clients;
 - (C) each client of the practicing solicitor or foreign practitioner, or each client of a practicing solicitor or foreign practitioner in the Singapore Law practice, Joint Law Venture, Formal Law Alliance or Qualifying Foreign Law Practice, as the case may be, is not also the client of another practicing solicitor or foreign practitioner in the same Singapore law practice, Joint Law Venture, Formal Law Alliance or Qualifying Foreign Law Practice, as the case may be;
 - (D) the practicing solicitor or foreign practitioner (through his Singapore law practice, Joint Law Venture or Qualifying Foreign Law Practice) or the Singapore law practice, Joint Law Venture, Formal Law Alliance or Qualifying Foreign Law Practice, as the case may be, notifies the Authority in Form 8 that he, or it, is carrying on such trust business within one month after the date of commencement of the trust business;
- (c) any public accountant who is registered under the Accountants Act (Cap. 2), or any accounting corporation which is approved under the Act, in respect of--
 - (i) the provision of services in relation to the creation of an express trust;
 - (ii) the arrangement for any person to act as a trustee in respect of an express trust; or
 - (iii) the provision, in relation to an express trust, of trust administration services which are procedural and non-discretionary or which relate to the drafting of accounting documentation and the giving of professional accountancy advice in connection therewith;
- (d) any overseas person, in respect of -
 - (i) the provision of services in relation to the creation of an express trust; or

However, the exempted persons will still have reporting obligations under the STCA¹⁶.

-
- (ii) the arrangement for any person to act as a trustee in respect of an express trust,
where the carrying on of such activity is effected under an arrangement between the overseas person and -
 - (A) a licensed trust company; or
 - (B) a person who is an exempt person under section 15(1)(a) or (b) of the Act;
 - (e) any person in respect of--
 - (i) the provision of services in relation to the creation of an express trust; or
 - (ii) the arrangement for any person to act as a trustee in respect of an express,
where the carrying on of such activity is effected under an arrangement between the person and a licensed trust company;
 - (f) any person engaging in trust business if that trust business is in relation to a trust that is created or proposed to be created in connection with the issuance of debentures;
 - (g) any trustee of any collective investment scheme that is approved under the Securities and Futures Act (Cap. 289) in respect of the provision of any trust business in connection with any collective investment scheme authorized under that Act;
 - (h) the Central Depository (Pte) Limited in respect of securities held by it on trust for its depositors pursuant to section 81SI of the Securities and Futures Act;
 - (i) any person carrying out introducing activities;
 - (j) any direct life insurer who is registered under the Insurance Act (Act.142), in respect of--
 - (i) the provision of services in relation to the creation of an express trust;
 - (ii) the arrangement for any person to act as a trustee in respect of an express trust; or
 - (iii) the provision, in relation to an express trust, of trust administration services which are procedural and non-discretionary,
where the carrying out of such activity is in connection with any life insurance policy issued by the direct life insurer; and
 - (k) any person engaging in trust business if that trust business is in relation to a trust that is created or proposed to be created to hold or administer any collateral given to secure any liability in connection with the granting of any credit facility, advance or loan by--
 - (i) that person together with any other person; or
 - (ii) any other person.

(2) A private trust company shall engage a licensed trust company to carry out trust administration services for the purposes of conducting the necessary checks to comply with any written direction issued by the Authority on the prevention of money laundering or countering the financing of terrorism.

(3) Any private trust company which contravenes paragraph (2) shall be guilty of an offence.

¹⁶ Section 16 of the STCA.

37. In the British Virgin Islands, the exemption also applies if there are other written laws applicable:

“(1) A person who is licensed under this Act is not required to be licensed under the Business, Professions and Trade Licenses Act, 1989 to carry on banking business or trust business.

(2) This Act does not apply to a person licensed under the Company Management Act, 1990;

(3) A person who is licensed under the Mutual Funds Act, 1996 as a manager or administrator and whose license authorizes him to act as the manager or administrator of one or more unit trusts, is exempted from the requirement to obtain a licence under this Act for the purposes of managing or administering any unit trust that he is authorised under his licence to manage or administer.”¹⁷

38. Having Singapore and the British Virgin Islands as comparison, SSM would like to propose that certain categories of persons be exempted from licensing as those to be exempted should already being regulated under any written law for the time being in force relating to the trust companies and/or carrying on trust business in Malaysia.

¹⁷ Section 6 of the BVIBTCA (to be read together with section 8 of the BVIBTCAA06).

Questions for consultation:

- (5) Do you agree that there should be categories of persons exempted from the registration requirement? If yes, who or which particular group of persons do you think should be exempted?**

- (6) Do you agree that the Minister has the power to exempt certain persons from having to register under the TCA?**

Financial Requirement

39. The existing requirement under the TCA is that the authorized capital of a trust company must have not less than five hundred thousand ringgit (RM500,000.00) divided into shares of not less than ten ringgit each (RM10.00).¹⁸

40. Along with the abolition of the authorised capital concept under the CA 2016, the traditional par value concept was also abolished. Therefore, it is proposed that the existing requirement of the authorised capital be replaced with a requirement for issued capital to be in line with the CA 2016 that abolished the par value regime in force for the Companies Act 1965. The requirement for a fully paid up capital will also ensure that a trust company registered under the TCA commits to its duties and has adequate capital and the ability to carry on the trust business.

¹⁸ Section 3(a) of the TCA.

41. In the Cayman Islands, the financial requirements provided by the Bank and Trust Companies Law (2013 Revision) (CIBTCR) are based on maintenance of issued capital as follows:

“(1) The Authority may, by notice in writing, require a licensee to maintain such portion of its issued capital, in cash or cash equivalent instruments, in such amounts and in such manner, as the Authority considers appropriate, having regard to the risks arising from the activities of the licensee and such other factors as the Authority considers relevant.”¹⁹

42. Based on the above laws, SSM proposes that the minimum issued capital of the trust company shall be Ringgit Malaysia Three Hundred Thousand (RM300,000.00) in value of which half of the amount must have been bona fide paid up and the remaining half shall remain unpaid and is not liable to be called up, except in the event and for the purpose of the winding-up or dissolution of the trust company. In this regard, SSM also invites feedback on the appropriate minimum issued capital that should be imposed.

Question for consultation:

(7) Do you agree with the minimum issued capital of Ringgit Malaysia Three Hundred Thousand (RM300,000.00) proposed by SSM? If no, what is the appropriate amount to be imposed?

¹⁹ Section 9(1) of the CIBTCR

Insurance Requirement

43. Other than the financial requirement, the current TCA does not provide for a trust company to maintain a professional indemnity insurance policy. The amount of cover under the professional indemnity insurance policy must also commensurate with the levels of risk of the registered trust company's business. The Registrar should be empowered to give notice to the trust company requiring that the trust company satisfies the Registrar that it complies with the insurance requirements. This is similar with the practice in the British Virgin Islands, Singapore and the Cayman Islands.

44. In the British Virgin Islands, a trust company must maintain an adequate insurance policy against several expected risks:

“(1) The Inspector may require a licensee to effect a policy of insurance with a reputable insurance company against-

- (a) losses arising out of claim of negligence or breach of duty by the licensee or any employee;*
- (b) the dishonesty of employees or of the licensee;*
- (c) loss of documents; and*
- (d) such other risks as the Inspector may from time to time stipulate,*

in such amount and of such nature as the Inspector may determine to be fit and proper, having due regard to the nature and type of business carried on by the

*licensee; and in the event that the insurance is withdrawn, cancelled or not renewed, the licensee shall immediately notify the Inspector.*²⁰

45. Singapore also practices similar requirement as follows:

“(1) A licensed trust company shall maintain, at all times, a professional indemnity insurance policy that

–

(a) covers all liabilities arising out negligent discharge of the duties of the licensed trust company; and

(b) is commensurate with the levels of risk of the licensed trust company’s business.

*(2) The Authority may, at any time, by notice in writing, require the licensed trust company to satisfy the Authority that its professional indemnity insurance policy complies with the requirements of paragraph (1).*²¹

46. In the Cayman Islands, all trust companies are required to maintain adequate professional indemnity insurance subject to review by the Authority based on the relevant factors:

“(1) A licensee holding a Trust License shall obtain and maintain adequate professional indemnity insurance, or have in place other appropriate

²⁰ Section 23 of the BVIBTCA (to be read together with section 23 of the BVIBTCAA06).

²¹ Regulation 14 of the STCAR.

arrangements to cover risks, in respect of its trust business, and such insurance or arrangements shall be subject to review by the Authority.

(2) In conducting reviews under subsection (1), the Authority shall have regard to relevant factors including the nature and scope of the trust business, the financial position and reputation of the licensee and its parent company, and the existence of any group coverage or financial commitment made by the parent company or other appropriate body to cover risks in respect of the licensee's trust business."²²

47. SSM proposes that every trust company registered under the TCA must have adequate professional indemnity insurance policy at all times that covers all liabilities arising out of negligent discharge of the duties of a trust company.

Questions for consultation:

- (8) Do you agree that every trust company must have a professional indemnity insurance policy?**

- (9) How would you determine that the insurance policy taken is adequate to cover all liabilities or risks that the trust company has undertaken?**

²² Section 15 of the Banks and Trust Companies Law (2013 Revision).

Transparency of ownership and control

48. One of the reason of having centralised registration is to have one central depository of all trust companies in Malaysia to promote transparency of company ownership. In line with FATF recommendations, all trust companies are required to disclose not only the beneficial ownership information of the trust companies, but also required to disclose the beneficial ownership information of companies under the trust arrangements managed by them.

49. The problem with the issue of transparency of ownership is that a beneficial owner may hold interest in a company that being misused as a corporate vehicle for money laundering and terrorist financing purposes as highlighted in the Anti-Money Laundering and Counter-Terrorist Financing Mutual Evaluation Report on Malaysia released on September 2015.

50. FATF defines “beneficial owner” as a natural person(s) who ultimately owns or controls customer and/or natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise ultimate effective control over a legal person or arrangement.²³

51. Thus, it is important to ensure that there is adequate, accurate and up-to-date information for timely access by the law enforcement agencies when the need arises. Sanctions will be imposed for non-compliance to ensure adherence to the legal provision of the beneficial ownership regime.

²³ The FATF Recommendations, *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation*, February 2012, p 113.

52. The current TCA does not define “beneficial ownership” or “control”. In Singapore, STCA does not provide for such definition however, the Act provides for the definition of “control” that has similar concept. There are 2 related provisions namely, (a) control within the trust company, and (b) control of the trust company against its customers.

53. The term “controller” in STCA has been defined as follows:

“is in relation to a trust company which means a 20% controller, a 50% controller or an indirect controller as defined in section 16(3) of the STCA.²⁴”

54. Section 16(3) of the STCA mentioned above gives a more specific definition as follows:

““20% controller” means a person who, alone or together with his associates—

(a) holds 20% or more but less than 50% of the total number of issued shares in the licensed trust company; or

(b) is in a position to control voting power of 20% or more but less than 50% in the licensed trust company;

“50% controller” means a person who, alone or together with his associates—

(a) holds 50% or more of the total number of issued shares in the licensed trust company; or

²⁴ Section 2 of the STCA

(b) is in a position to control voting power of 50% or more in the licensed trust company;

“indirect controller” means any person, whether acting alone or together with any other person and whether with or without holding shares or controlling voting power in a licensed trust company—

(a) in accordance with whose directions, instructions or wishes the directors of the licensed trust company are accustomed or under an obligation, whether formal or informal, to act; or

(b) who is in a position to determine the policy of the licensed trust company,

but does not include any person—

(i) who is a director or other officer of the licensed trust company whose appointment has been approved by the Authority; or

(ii) in accordance with whose directions, instructions or wishes the directors of the licensed trust company are accustomed to act by reason only that they act on advice given by him in his professional capacity.”²⁵

55. When it comes to control of the trust company against its customers or trust arrangements managed by them, the STCA states:

²⁵ Section 16(3) of the STCA.

“(1) No licensed trust company shall, without obtaining the prior approval of the Authority, acquire or hold more than –

*(a) 20% of the total number of issued shares;
or*

*(b) 20% of the voting power,
in a corporation, unless it acquires or holds such shares or voting power in the course of acting as a trustee.”²⁶*

56. SSM proposes to adopt similar definition by FATF for the beneficial ownership by taking into consideration on the “control” aspects defined in the STCA. As such, the term “beneficial ownership” shall relate to a control of beneficial owner of a trust company including any persons under the trust arrangements managed by the company, who is an individual and meet the criteria based on a determined percentage of shareholdings and voting rights.

57. SSM also proposes that for the purpose of keeping adequate, accurate and up-to-date information, a trust company is required to identify and keep a register of beneficial owner or people with control besides other information as directed by the Registrar from time to time.

58. SSM also proposes that such register be made available for inspection by members of the public and for access by competent authorities including law enforcement agencies when the need arises. Additionally, SSM also proposes that as part of the annual

²⁶ Section 21(1) of the STCA.

reporting to the Registrar, trust companies will be required to submit information on the trust and business arrangement including the beneficial ownership information arising of a trust arrangement.

Questions for consultation:

- (10) Do you agree with the FATF's proposed definition of "beneficial owner" and the threshold as to what amounts to "control" adopted by Singapore?**
- (11) Do you agree with the proposed obligation imposed on a trust company to keep and maintain a register of beneficial owner or people with control in order to have a complete and up-to-date information?**
- (12) Do you agree that our legal framework needs to have a transparent information on ownership of trust company and trust arrangements managed by them in order to show Malaysia is a trusted country to do business? If yes, do you agree for such information be made available for public inspection or only accessible to competent authorities?**

PART D – MANAGEMENT OF THE TRUST COMPANY

59. Officers of a trust company are the persons entrusted with the responsibility to manage the trust company. Under the current TCA, there are no roles and responsibilities being stipulated together with any penalty imposed for any breach of conduct.

60. It is proposed that in addition to the duties and responsibilities stated in the CA 2016, directors of a trust company should also be entrusted with the following specific responsibilities:

- (a) To exercise due diligence and vigilance in ensuring that the covenants in a trust arrangement are carried out and delivered;
- (b) To exercise his duties in a timely manner²⁷.

61. In addition, as part of the approval of the registration, it is also proposed that the Registrar be given the power to impose any terms and conditions with regard to the qualification and experience expected of a director of a trust company.

Auditors

62. SSM is of the view that the mandatory appointment of auditors under the CA 2016 which is applicable to all companies are adequate for the purposes of trust companies. Thus, reliance on provisions in the CA 2016 with regard to duties and powers of auditors need not be replicated in the TCA.

Questions for consultation:

- (13) Do you agree that the existing provisions with regard to auditors contained in the CA 2016 are sufficient for purposes of TCA?**

²⁷ Similar to section 24 of the Interest Schemes Act 2016.

Remuneration

63. Under the current TCA, provisions relating to remuneration of trust company are briefly mentioned compared to New Zealand. NZTCA provides for a fixing of remuneration and review of charges where the power to fix the remuneration lies on the board of directors of the trust companies however, the court shall have the power to review any commission, fee or remuneration charged by trust company.²⁸

64. This practice is similar in Labuan where a trust company is entitled to and the court has power to review commission, fees, charges or expenses received by the trust company:

“(1) A Labuan trust company shall be entitled-

(a) where it holds an estate on behalf of any person, to receive out of the estate a commission, in addition to all monies properly expended by the Labuan trust company and fees payable to it and chargeable against the estate; and

(b) in all other cases, to levy fees, charges and expenses in respect of any work performed by the Labuan trust company for or on behalf of any person.

²⁸ Section 18 and 19 of the NZTCA

*(2) Where the Court is of the opinion that any commission, fees, charges or expenses levied in respect of any estate or in respect of any work performed by the Labuan trust company are excessive, the Court may, on the application of any person, on whose behalf the work was performed, review that commission, fees, charges or expenses, and may reduce it as it thinks fit.*²⁹

65. As such, SSM proposes that the existing provision relating to the remuneration of trust company be expanded and to provide clarity as to what could be received by a trust company, whose power to determine the remuneration and the court's power to review the decision.

Question for consultation:

(14) Do you agree that the remuneration, charges or fees of a trust company is to be fixed by the trust company itself through its board of directors but subject to review by the court in order to safeguard public interest?

PART E – MISCELLANEOUS

Restriction on cessation of business as a trust company

²⁹ Section 84 of the LFFSA.

66. The current TCA does not provide for a restriction on the cessation of business by a trust company, except for the special provision for winding-up order under section 23 of the TCA³⁰.

67. To protect the interest of beneficiaries, it is proposed that no trust company shall cease to carry on its trust business without the sanction of the court as practised in Singapore³¹ and for so long as any trust in respect of which the trust company is a trustee remains in whole or in part unadministered.

68. SSM proposes that when a trust company wishes to cease trust business but having trusts that are wholly or partially unadministered, such company should take either one of the following steps:

- (a) distribute the remaining assets in its trust; or
- (b) find a new trustee for the trusts.

69. Then, when a trust company finds itself unable to locate a new trustee, the trust company should be allowed to seek sanction from the court to cease its trust business while still acting as a trustee.

³⁰ Section 23 of the TCA states:

The Court may order the winding up of a trust company in accordance with the Companies Act 1965, and the provisions of that Act shall apply accordingly, subject, however, to the modification that the company may be ordered to be wound up on application made by or on behalf of the Minister of Finance showing-

- (a) that the company has made default in complying with a requirement of this Act and that default has continued for a period of two months after notice of default has been served upon the company; or
- (b) that from the consideration of the report of an inspector appointed under section 22 it appears to him that the company is insolvent or has committed a breach of trust.

³¹ Section 11 of the STCA.

Questions for consultation:

(15) Do you agree that a trust company is only allowed to cease its trust business with sanction from the court?

(16) What other steps could be taken by a trust company with wholly or partially unadministered trust in order to cease its business?

Scheme of Arrangement, Corporate Rescue Mechanisms and Winding up of Trust Business

70. The current TCA only provides for additional order to wind up a trust company in addition to the winding up provisions in the CA 2016. In addition to the circumstances in which a company can be wound up under the CA 2016, an application made on behalf of the Minister of Finance may be made to wind up a trust company if the trust company has failed to comply with the provisions of the Act or if the company has been insolvent or there has been a breach of trust. SSM proposes that these provisions be retained.

71. In view of the provisions relating to scheme of arrangements³² and corporate rescue mechanisms³³ (corporate voluntary arrangement and judicial management), SSM is of the view that trust companies, if still viable, should be given an option to explore the possibilities of utilising such schemes or mechanisms

³² Sections 365 - 371 of the CA 2016.

³³ Division 8 of Part III of the CA2016.

to continue its business. SSM is seeking views on this matter, and whether there should be restrictions and conditions that should be imposed on trust companies.

72. In Labuan, LFSSA provides for circumstances where the trust business wholly or in part may be transferred to other registered trust company.³⁴ Similar provision under the CA 2016 is reflected under section 370 of the CA 2016 and SSM proposes that similar arrangement be provided for trust companies registered under the Act.

Question for consultation:

(17) Do you agree that the provisions relating to the winding up of a trust company should be retained?

(18) Do you agree with the introduction of a scheme of arrangement and corporate rescue mechanisms for trust business when the trust business is still viable?

Electronic Services

73. The TCA does not accord any power to provide a service for electronic filing to facilitate the lodgement or filing of documents.

74. SSM acknowledges the importance of electronic filing as a tool to enhance the efficiency of filing or lodgement of documents and to ensure its currency. Currently, all documents which are

³⁴ Section 172 of the LFSSA.

required to be filed or lodged are submitted in a hard copy form over the counter and will be processed manually.

75. The electronic filing has been reflected in other Acts under SSM's purview such as the CA 2016, Interest Scheme Act 2016 and Limited Liability Partnerships Act 2012. To ensure timeliness of the documents and information kept by the Registrar, it is proposed that the law should provide for a mandatory electronic filing. The proposed electronic services provisions will reflect the provisions of section 604 of the CA 2016.

76. The proposed provision should also allow the Registrar to utilise the electronic services for the issuance of documents, orders, notices and others against the trust company to reflect the present provision of section 605 of the CA 2016 which state as follows:

"The Registrar may, by electronic means, issue a document which is to be issued by the Registrar under this Act."

77. The word "document" has been defined in section 2 of the CA 2016³⁵ and since the TCA does not provide for the same, it is also recommended that the law should provide for such definition.

78. It is noted that if the law proposed to have in place the electronic services in the TCA, the law should also provide for

³⁵ Section 2 of the CA 2016 states:
"document" has the meaning assigned to it in the Evidence Act 1950

evidentiary value of information and documents electronically supplied or certified by the Registrar.

79. As such, it is recommended that the law should empower the Registrar to supply and certify via electronic a true copy of the documents lodged or submitted to the Registrar and those documents will be sufficient to be admissible as prima facie evidence.

Questions for consultation:

- (19) Do you agree that the filing or lodgement of documents through electronic services is the most effective and quick way of dealing with SSM at any given time?**

- (20) Do you agree that the law should provide for the definition of 'document'? If yes, do you agree with the adoption of the same definition provided in section 2 of the CA 2016?**

- (21) Do you agree that Registrar has the power to issue documents, orders, notices and others to trust companies via electronic services?**

- (22) Do you agree that the law should provide for evidentiary value of documents supplied or certified by the Registrar via electronic services?**