

▪ Revision of Recommendation 25- White Paper for Public Consultation

The Financial Action Task Force (FATF) is conducting a review of Recommendation 25 (R.25) on the transparency and beneficial ownership (BO) of legal arrangements. The FATF's objective is to improve R.25 and its Interpretive Note to better meet its stated objective to prevent the misuse of legal arrangements for money laundering or terrorist financing. FATF's work in this area is ongoing, and will benefit from hearing views from stakeholders, including trustees, financial institutions, designated non-financial businesses and professions (DNFBPs), and non-profit organisations. The FATF would welcome comments in particular on the questions highlighted below:

- I. ***Scope of Legal Arrangements, risk assessment and foreign trusts*** – To clarify the scope of legal arrangements (other than express trust) which should be subject to R.25 requirements, the FATF is considering to revise the definition of legal arrangements by referring to Article 2 of the Hague Convention on the law applicable to trusts and their recognition so that jurisdictions can use this as a basis of whether legal arrangements have a similar structure or perform a similar function to an express trust.

Further, in light of the variation of legal arrangements across countries and similar to the R.24 requirements, FATF is considering whether countries should apply measures to understand the risk posed by trusts and similar legal arrangements governed under their law or which are administered in their jurisdictions or whose trustees are residing in their jurisdictions, and to take appropriate steps to manage and mitigate these risks. For other legal arrangements, the FATF is considering to limit the scope of risk assessment and mitigation obligations to such legal arrangements that have sufficient links with the countries.

1. In this context, are the following concepts sufficiently clear? If not, how could they be improved?
 - a “governed under their law”
 - b “administered in the jurisdiction”
 - c “trustee residing in the jurisdiction”
 - d “similar legal arrangements” (as compared with express trust).
2. What could be the pros and cons associated with the new suggested risk assessment? What could be the potential “sufficient links” for foreign-created legal arrangements (e.g. residence of trustee, location of asset etc.) for the purpose of risk assessment?
3. Are there any other considerations with respect to scope of legal arrangements or risks posed by legal arrangements that FATF should factor into its review of R.25?

- II. ***Obligations of trustees under R.25*** – FATF is considering how to further clarify obligations on trustees (and persons holding an equivalent position in a similar arrangement) to obtain and hold adequate, accurate and up-to-date information, related to parties to a trust. Inter alia, R.25 currently requires trustees to obtain and hold information on beneficiaries (defined to cover persons entitled to benefit from any trust arrangement) or classes of beneficiaries. This requirement does not extend to objects of powers of discretionary trusts, who may derive a benefit from a trust

in the future, notwithstanding that there is a likelihood that such an object will become entitled, e.g., they are named in a letter of wishes, or they may present a higher ML/TF risk. Specifically, the FATF is considering to set the nexus of such obligations to countries where the trustees reside and/or where the trusts are administered. Also, the FATF is considering to bring professional and non-professional trustees under the same set of requirements by extending the requirement for records to be kept for at least 5 years to such non-professional trustees.

4. What are the pros and cons of expanding the extent of information which trustees should hold to include the objects of power in the context of discretionary trusts? Is the concept of “objects of power”¹ sufficiently clear and reasonable? Are there any other terms that you would recommend FATF use instead of “objects of power”?
5. Do you agree with the proposed nexus of such obligations based on residence of trustees or location where the trusts are administered? Compared to the current obligation incumbent on countries that have trusts governed under their law, do you see pros and cons from such a change, (e.g., would there be a difference in terms of efforts to collect the information in cases where a trust may have trustees that are resident in more than one jurisdiction, and where a trust may be administered in a country in which a trustee is not resident)?
6. Do you see challenges in respect of record-keeping obligations for non-professional trustees noting that all other obligations under R.25 apply to such trustees?

III. Definition of Beneficial Owners – The FATF defines beneficiaries and beneficial owners differently. FATF is looking into whether a clarification of the definition of beneficial owner in the case of legal arrangements is warranted. A separate definition could further clarify the concept of ownership and control in the context of legal arrangements. Under this approach, beneficial ownership information could include the identity of each: (i) settlor; (ii) trustee(s); (iii) protector (if any); (iv) beneficiary, or where applicable, class of beneficiaries or objects of a power; and (v) other natural person(s) exercising ultimate effective control over the arrangement. In the case of a legal arrangement similar to an express trust, beneficial owner refers to the natural person(s) holding an equivalent position to those referred above. When the trustee and any other party to the legal arrangement is a legal person, the beneficial owner of that legal person should be identified.

By comparison, the following is the current definition included in the FATF:

“Beneficial owner refers to the natural person(s) who ultimately owns or controls a customer² and/or the natural person on whose behalf a transaction is being conducted. It also includes those natural persons who exercise ultimate effective control over a legal person or arrangement. Only a natural person can be an ultimate beneficial owner, and more than one natural person can be the ultimate beneficial owner of a given legal person or arrangement.”

7. Would you support the insertion of a standalone definition for beneficial owner in the context of legal arrangements (distinct from that for legal persons)? Or would it risk creating confusion with the definition of beneficial owners applicable to legal

¹. “Objects of power” means those persons who have an expectation or hope of a benefit arising from a trustee’s power of appointment in a discretionary trust.

persons? What relevance should control have in the definition of beneficial ownership of legal arrangement to address AML/CFT risk?

8. Does limiting the information regarding beneficiaries to only those who have the power to revoke the arrangement or who otherwise have the right to demand or direct (that is, without the consent of the trustee) distribution of assets seem reasonable?
9. Do you have any specific suggestions for a different standalone definition?

IV. Obstacles to transparency – In light of potential complexities of legal arrangements, FATF would like to gather further input on how legal arrangements could be misused for money laundering/terrorist financing purposes. Themes which are under consideration include complex ownership structures, flee/flight clauses etc.

10. What features of legal arrangements do you see being used for obscuring ownership? Are these linked to their involvement in the creation of broader complex structures or inherent to legal arrangements?
11. What are the legitimate uses of flee/flight clauses? What are the challenges associated with these clauses?
12. What are the key obstacles to transparency of trusts and other legal arrangements?

V. Approach in collecting beneficial ownership information – FATF is considering ways to strengthen the requirement for countries to have access to BO information in respect of legal arrangements and contemplating whether countries should be required to use mechanisms besides trustees, including for example: (i) a public authority or body holding information on the beneficial ownership of trusts or similar legal arrangements, (ii) asset registries, (iii) information collected by other competent authorities, or (iv) information collected by other agents or service providers including trust and company service providers, investment advisors or managers, accountants, or lawyers.

13. Can such an approach ensure that competent authorities have timely access to beneficial ownership information in the context of legal arrangements?
14. Have you seen any issues/challenges with including information collected by other agents or service providers including trust and company service providers, investment advisors or managers, accountants, or lawyers as a mechanism?
15. Do you think that a multi-pronged approach should be followed for accessing beneficial ownership information of legal arrangements, consistent with Recommendation 24? Or would the features of legal arrangements make a single-pronged approach preferable instead? What are the pros and cons, including in relation to administrative burden, from these approaches?
16. Are there any other mechanisms that FATF should consider as a reliable source of beneficial ownership information for competent authorities?

VI. Adequate, accurate and up-to-date information - FATF is considering how to clarify the key attributes of access to information by competent authorities, that access should be timely, and information should be adequate (to identify the natural persons who are the beneficial owner(s) and their roles in the trust), accurate (i.e. verified using reliable, independently sourced/obtained documents or other methods, on a risk-sensitive basis) and up-to-date (i.e. updated within a certain

period following any change). This would leverage the approach taken in the revised R.24, adopted in March 2022 (see R.24 Interpretive Note paragraph 9 for reference).²

17. Do you see any concerns with the suggested requirements?
18. In addition to trustees, who could play a role in the verification of BO information in the context of legal arrangements?
19. Can the notion of “independently sourced/obtained documents, data or information” in the definition of accurate information pose any issues for the private sector and, if so, how?

VII. General questions

20. What are the potential issues/challenges for the private sector regarding implementation of the R.25 requirements?
21. Do you see any challenges in obtaining information regarding beneficial ownership information of legal arrangements when the trustee (or equivalent) resides in another jurisdiction or when the legal arrangement is administered abroad?
22. Are there any suggestions to improve R.25 and its Interpretive Note to better meet its stated objective to prevent the misuse of legal arrangements for money laundering or terrorist financing?
23. What are the areas in particular where the private sector would benefit from guidance regarding implementation of R.25 requirements, including suggested revisions described above?

Please provide your response, including any drafting proposals to FATF.Publicconsultation@fatf-gafi.org with the subject-line “Comments of [author] on the draft Amendments to Recommendation 25”, by 1 August 2022 (18h00 CEST).

While submitting your response, please indicate the name of your organisation, the nature of your business, and your contact details. We will use your contact information only for the purpose of this public consultation and for further engagement with you on this issue. The FATF will not share this information with third parties without your consent.

At this stage, the FATF has not approved any draft amendments to R.25. The FATF will consider the views received and propose revisions to the text of R.25 for discussions at its October 2022 meetings. We thank you for your kind contribution.

². www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf