

Overview of Trust Beneficial Ownership and Transparency by Hilda Gituro

3 April 2024

An overview of the FATF Guidance on Beneficial Ownership and Transparency of Legal Arrangements published in March 2024 provides a road map that countries which do not have Trust Laws can borrow from to address the strategic deficiencies noted on this aspect.

The guidance supports the implementation of the Financial Action Task Force (FATF) Recommendation 24 & 25 requirements more specifically addressing Trust specific features and related Anti-Money Laundering (AML) /Combating Financing of Terrorism (CFT) transparency obligations.

The guidance supports adequate, accurate and up-to-date information to Financial Institutions (FIs) and Designated Non-Financial Businesses and Professions (DNFBPS) from competent authorities on the:

#settlor(s),
#trustee(s),
#protector(s) / appointer / guardian (if any) and
#beneficiary(ies),

or where applicable

#class(es) of beneficiaries and objects of power (where they exist) and
#any other person exercising ultimate effective control.

The guidance also provides clear definitions of each of the terms detailed above and expectations in terms of creating transparency thereof which would go a long way to support the country, FIs, DNFBPS in identifying what may constitute a legal arrangement like an express trust.

With respect to a Trust a beneficiary may include:

#a person explicitly named in the trust instrument (trust deed)
#a person not explicitly named but who is clearly identified as being entitled to the benefit of a legal arrangement (e.g., child of the settlor)
#a person who becomes a beneficiary at the occurrence of a specific event, such as the exercise of trustee discretion (objects of power) or the realization of an accumulation period.

Using the Risk Based Approach (RBA) and documented risk assessment a country may opt not to identify the individual beneficiaries of certain charitable or statutory permitted non-charitable trusts. Of course a key challenge that remains is that the differing standards across different countries with respect to the nature of the information as well as confidentiality and transparency laws with respect to disclosures. This should however, not become a deterrent as countries seek to address the gaps earlier noted with respect to beneficial ownership and transparency surrounding trusts.

Risks noted on Trusts with respect to AML/CFT:

#Not all parties' names need be included – names can be changed without any disclosure or notification.
#Settlor can retain control without expressly retaining rights in the trust instrument.
#Whilst the settlor has sight of the trust assets, the assets can however, be shielded from the beneficiaries' creditors.

#Power of the trustee or settlor to name future beneficiaries whether limited to members of a described class or otherwise.

#Possible to set up trusts without beneficiaries / class of beneficiaries in the case of statutory permitted non-charitable trusts.

#Settlor can retain a right to revoke the trust and reacquire the trust assets.

#Ease with which the legal owner can be changed either through appointing a new trustee or distributing to a beneficiary.

#Settlor may be the sole beneficiary – need to understand the purpose of such a trust is critical.

#Includes a Flee clause – a specific event may trigger the removal of the trustee and the transfer of the trust to another trustee in a different jurisdiction e.g. upon a service of process or information request by an authority, thus in effect protecting the trust from the claims or the action of law enforcement authorities or slowing down such action.

#Trusts governed by the law of a different country to manage their assets.

#Source and value of assets settled in the trust

#Status of the object of a power (PEP / High Risk)

#Deliberate concealment / undisclosed nominee relationships

How can this effectively evolve at the country level to support FIs and DNFBPS:

#Establish a register of trusts administered in the country; understand the type of trust related services provided, who provides the services and the nature of these services and the trust parties. This should include information on whether trustees of foreign legal arrangements (acting on a professional or non-professional basis) are resident in the country.

#Establish a register of trusts governed under the law of a country to ensure that a trust will not have a legal capacity without being registered.

#Licensing or registration requirements for professional trustees.

#Disclosure requirements at the country level for trusts that:

- @operate in
- @own significant assets (real estate, market securities etc.)
- @apply for registration in a country
- @receive funding from foreign sources deemed to have higher / elevated risk.

#Implement legislative measures to support enforcement actions, encourage disclosure, reporting and international co-operation.

In summary, the guidance provides excellent information with respect to adequacy, accuracy, access, verification and status of the beneficial ownership information for trusts and other similar arrangements. Privacy considerations, data privacy laws, confidentiality and data leakage would remain primary considerations even as countries seek to effectively implement the guidance. The guidance around risk assessment measures and mitigations can be applied by a Country, FI and DNFBPS with the enabling legislation. The document provides invaluable insights, and I would recommend it to Compliance Professionals as a reference tool for building up their internal Beneficial Ownership Due Diligence Framework.