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August 8, 2011

Mr. John Carlson  
Principal Administrator  
2, rue Andre-Pascal  
75775 Paris Cedex 16  
France

Re: Consultation Paper, June 2011

Dear Mr. Carlson,

The American College of Trust and Estate Counsel (“ACTEC”) submits the following comments in response to the invitation by the FATF to provide written comments on the Consultation Paper, June 2011.

ACTEC is a national professional association of approximately 2,600 lawyers elected to membership by their peers on the basis of professional reputation and ability in the field of trusts and estates and on the basis of having made substantial contributions to these fields through lecturing, writing, teaching, and bar activities. Fellows of ACTEC have extensive experience in rendering advice to taxpayers on matters of federal taxes, with a focus on estate and gift tax planning and compliance. ACTEC offers technical comments about the law and its effective administration, but does not take positions on matters of policy or political objectives.

Principal responsibility for preparation of these comments was exercised by Duncan E. Osborne, of Osborne, Helman, Knebel & Deleery LLP in Austin, Texas (512) 542-2010, Leigh-Alexandra Basha, of Holland & Knight LLP in McLean, Virginia (703) 720-8081, Robert C. Lawrence III of Cadwalader, Wickersham & Taft LLP in New York, New York (212) 504-6211, and Henry Christensen, III of McDermott, Will & Emery in New York, New York (212) 547-5658. Members of your staff should not hesitate to contact any of them for more information regarding these comments.

These comments primarily address paragraph 1.3 of the Consultation Paper “Recommendation 34 – Legal Arrangements” as its focus is trusts.

As a preliminary matter, it is essential to emphasize that trusts are not legal entities: they have no separate juridical identity.<sup>1</sup> As the Consultation Paper states, the trust is a legal arrangement. It is created when a settlor transfers assets to a trustee pursuant to an agreement,

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<sup>1</sup> *What is a trust?*, BANKING IN SWITZERLAND & LIECHTENSTEIN NEWS QUARTERLY (B.S.L. Law & Consulting, London), Issue No. 6 of 2011, at 3.

whereby the trustee agrees to, and has the duty to, protect, conserve and administer those assets for the benefit of one or more third parties, the beneficiaries. The trustee has legal title to the trust assets in its capacity as trustee, with trust assets being held separately from the trustee's own assets for any legal purpose.

The trust is an arrangement used frequently in common law jurisdictions primarily for estate planning purposes (e.g., transmitting wealth to family members, dealing with the incapacity of the settlor, dealing with the special needs of the beneficiaries, avoidance of the administrative burdens of probate, etc.). Once established by the settlor, the primary parties to the relationship are the trustee and the beneficiaries. The trustee owes fiduciary duties and obligations to the beneficiaries, and the beneficiaries are the only persons who can enforce their rights under the trust agreement. The trust agreement and the proper law of the trust jurisdiction (e.g., by statute or common-law) govern these duties, obligations and rights.

It is important to note that the trust arrangement, the parties and the trust administration may involve many jurisdictions. In order to focus on the goals of the FATF, consider the following somewhat artificial, but didactically helpful example.

Settlor who is domiciled in Austria wants to create a trust. He retains a lawyer in Belgium to draft the trust agreement. They decide to use the trust law of a province in Canada (other than Quebec) as the governing law of the trust. The Trustee is in Denmark. The assets are to be custodied in Switzerland. A Beneficiary is in France. Another Beneficiary is in Italy. A third Beneficiary is in Germany. The Trustee hires an investment advisor from Japan. The Trustee hires a bookkeeper from the Netherlands to keep the books and records.<sup>2</sup> The Trustee hires a tax specialist from Luxembourg to prepare all tax returns.<sup>2</sup>

Thus, the challenge is to determine in which of the eleven (11) countries would the FATF recommend that laws be passed to require transparency and prevent money laundering and terrorist financing? Although the above example may go to extremes by having connections with 11 countries, it is necessary to keep in mind that under The Hague Convention on the Law Applicable to Trusts and Their Recognition numerous civil law countries, including Italy, the Netherlands, Switzerland and Luxembourg, now recognize trusts.

Emphatically important is the first measure set forth in the Consultation Paper for the prevention of the misuse of trusts:

- “● Giving trustees a legal obligation to obtain and hold beneficial ownership information about trusts (as noted above in the context of Recommendation 5).”

This first measure is appropriate and correct. It is the trustee who has the duty and the responsibility to custody, protect, conserve and care for the assets of the trust. Furthermore, it is the trustee who must know the beneficiaries and their details and who will know and effectuate

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<sup>2</sup> Please note that in the subsequent paragraphs of this letter, where the terms Settlor, Trustee and Beneficiary are capitalized, they are referring back to this example.

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the distribution of the assets to the beneficiaries. Requiring the trustee to perform “know your client” and other due diligence on the settlor and to perform initial and ongoing “know your client” and due diligence on the beneficiaries is consistent with the trustee’s duties.

The Consultation Paper sets out four (4) additional measures that are important. They are:

- “• Ensuring that competent authorities in all countries are able to access information on the identity of the trustee, the beneficial ownership of the trust, and the trust assets from one or more sources including financial institutions and DNFbps; registries of assets or trusts; or other competent authorities (e.g., tax authorities); of any trusts with a nexus to their country (i.e., where trusts are managed; trust assets are located, or where trustees live in the country).
- Requiring trustees to disclose their status to relevant authorities; and to financial institutions and DNFbps when entering a business relationship.
- Competent authorities should have powers to obtain information regarding trusts and share it as necessary; and
- Analogous requirements should also apply to other legal arrangements including Treuhand, Fiducie, and Fideicomisos.”

We concur with the last three suggested measures. With respect to the second measure beginning with “Ensuring that competent authorities...,” we have two observations which we believe are consistent with that measure.

First, in the context of trust law it is the trustee who is the “legal owner” (possesses legal title) of the trust assets and the beneficiaries who are the “beneficial owners” of them.<sup>3</sup> It is conceptually impossible for the “beneficial ownership” to lie anywhere else. Furthermore, unless the settlor is also a beneficiary, the settlor has no continuing role with respect to the trust or its assets.<sup>4</sup>

Second, since the first measure places the legal obligation on the trustee, and, if that measure is fulfilled, the following four measures will likewise be fulfilled, it is unnecessary to require other

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<sup>3</sup> We understand that in the FATF’s terminology “beneficial ownership” means the controlling person or the person with ultimate control, i.e., the trustee in the trust context. Indeed, the FATF’s concept of “beneficial ownership” does not strictly apply to a trust at all, because the beneficiaries of a trust are not like shareholders who have ultimate voting power. Instead, they are passive individuals who benefit ultimately from the actions taken by the trustee. If anything, the lack of control by a beneficiary of a trust emphasizes why it is the trustee, and only the trustee, that should matter to the FATF as a reporting person.

<sup>4</sup> A possible exception to this analysis is a trust that can be revoked or amended in which case the duties of the trustee and the rights of the beneficiaries are subject to alteration if the right of revocation or amendment is exercised. Even in that circumstance, the trustee must necessarily know about the change.

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sources of information. Although financial institutions which are not the trustee may conduct their own due diligence, requiring them to demand all the details of the trust would be excessively burdensome and necessarily violate legitimate privacy rights of the parties to the trust. The same is true with respect to any DNFBP which is involved but which is not acting as a trustee.

The concept of a registry of trusts is impractical. Undoubtedly, there are millions of trusts in the United States, and trusts often have multiple beneficiaries whose identity may change as circumstances change. These contingent beneficiaries have few or limited rights, may know nothing of the trust and may never receive a distribution. To require a trustee to obtain and file in some registry information on all such contingent beneficiaries would be unduly burdensome and time consuming, would produce information of little or no value, and would not further the goals of the FATF. Furthermore, in many cases the beneficiaries are listed in the trust deed as a class, such as “the descendants” or “issue,” of a person. In that sense, the trust deed itself is not even definitive in determining the identity of the beneficiaries.

Thus, when addressing trusts, the focus should be solely on the trustee. It is the trustee who receives the assets from the settlor, who administers the trust and has all the records, who controls the assets and who must be able to identify the beneficiaries who receive distributions.

In the context of the above example, it is Denmark, the Trustee’s country of residence which should have a law requiring the Trustee to have a legal obligation to obtain and hold information about the Settlor, the Beneficiaries and the assets. This law should be in effect even if Denmark does not otherwise recognize trusts. Additionally, the financial institutions in Switzerland would need to perform due diligence, but beyond that no other country in the example should have, or should need to have, laws, rules, or regulations with respect to persons or activities in its jurisdiction insofar as the trust is concerned.

It is particularly inappropriate to suggest that the country whose law is the governing law, i.e., Canada in the example, has any obligation or responsibility. There is no way Canada would even know that a Settlor in another country has chosen Canadian law as the governing law of the trust agreement.

With respect to the Beneficiaries in France, Italy and Germany, the Trustee could be obligated to inform the competent authority in the Trustee’s jurisdiction (Denmark) of a distribution. The competent authority in Denmark could forward relevant information to France, Italy, or Germany, as appropriate. The support personnel in Japan, the Netherlands, and Luxembourg do not have the power or permanency in their roles to have any obligations because the trust agreement gives them no authority and the Trustee can replace them at will.

We hope that you will give serious thought to our comments and allow us to work with you in the future to implement practical and effective anti-money laundering and counter-terrorist financing rules with respect to trusts. It is our goal to help the FATF meet its objectives without burdening private parties or law enforcement with time consuming or costly processes which serve no real practical function.

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Sincerely,

A handwritten signature in black ink, appearing to read "Mary F. Radford". The signature is written in a cursive, flowing style.

Mary F. Radford  
ACTEC President

cc: Chip Poncy, Director, Office of Strategic Policy  
Terrorist Financing and Financial Crimes  
Gary Sutton, Senior Legal Advisor for Financial Crimes,  
United States Department of the Treasury  
Sarah K. Runge, Policy Advisor, Office of Terrorist Financing and Financial Crimes,  
United States Department of the Treasury  
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