STEP Society of Trust and Estate Practitioners

AETPF L'Association des Experts de la Transmission du Patrimoine Familial

FATF Secretariat
FATF / GAFI
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Dear Sirs

Milan meeting: Further feedback in relation to draft INR5 and INR 34

Further to the meeting held in Milan on Monday and Tuesday last week, we wish to thank you for the opportunity of providing some further input on the proposed revision of the FATF Recommendations and specifically the draft dated 28 October 2011. We would like to make the following comments:

1. Interpretive Note to Recommendation 5 – relevance of guidance on insurance policies to trusts

In the context of CDD for trustees, you will be aware that a matter that causes significant complexity and confusion amongst financial institutions and DNFBPs who are contracting with trustees and seeking guidance on appropriate CDD is what suitable documentation may be required in the context of paragraph 5b of the interpretive notes in identifying beneficiaries – especially given that in many cases for flexibly drawn trusts it will not be possible to determine the identity of the actual recipients of trust funds until a decision is made or an event occurs that requires a distribution to be made in a particular person or groups favour. It is also the case that in many cases, young and vulnerable beneficiaries may be unaware of the existence of a trust and that a request to provide their passport copy could alert them to the existence of trust funds at a stage when this may not be for their benefit.

On this basis, the issues concerned are precisely the same as those that are relevant in the context of insurance policies where it may not be possible or practical to determine the nature of beneficial interest in relation to insurance funds until the point at which a payment out is made.

In the circumstances, we think it would be enormously helpful to everyone concerned if the various practical proposals set out at paragraph 6b of the interpretive notes could be also

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applied to trusts, particularly those which are discretionary in character. We note that, in a UK context, many insurance policies are only, in any event, held in trusts so there is a good deal of overlap in this area already.

2. Interpretive Note to Recommendation 34

We had a detailed discussion in Milan about the wording of the first sentence of the Paragraph 1 of the Interpretive Notes which reads as follows:

"Countries should require trustees of any express trust governed under their law to obtain and hold adequate, accurate, and current beneficial ownership information regarding the trust. This should include information on the identity of the settlor, the trustee(s), the protector (if any), the beneficiaries or class of beneficiaries, and any other natural person exercising ultimate effective control over the trust. Countries should also require trustees of any trust governed under their law to hold basic information on other regulated agents of, and service providers to, the trust, including investment advisors or managers, accountants, and tax advisors."

As Mr Osborne from ACTEC noted in the course of our discussions in Milan, the choice of governing law for express trusts is an entirely private matter for the settlor and trustees of the trust on its creation. Settlors and trustees may choose to select a governing law without the requirement for an enduring relationship between that law of the trust and the location of the trustee, the jurisdiction of trust property or indeed underlying beneficiaries.

As a matter therefore of pure construction, we understand the objectives of paragraph 1 of the Interpretive Note is to seek to ensure that those countries that have a domestic trust law should be required to obligate trustees to obtain and hold suitable beneficial ownership information. As Mr Osborne noted in our discussions, the jurisdiction which may be chosen as a governing law would have no way of determining that trusts exist under their governing law unless this were to come to their attention in another context such as a tax return or ownership of property etc. Our concern therefore is that the reference to governing law unduly restricts the ambit of paragraph 1 and that there is no prospect of it being enforceable because the jurisdiction of the governing law will not interact with trustees on that basis.

Having considered the matter carefully, we suggest below an alternative formulation of wording which we believe would better achieve the objective of the drafting:

"Countries whose law permits the creation of express trusts should require trustees of any express trust to obtain and hold adequate, accurate, and current beneficial ownership information regarding the trust. This should include information on the identity of the settlor, the trustee(s), the protector (if any), the beneficiaries or class of beneficiaries, and any other natural person exercising ultimate effective control over the trust. Such countries should also require trustees of any express trust to hold basic information on other regulated agents of, and service providers to, the trust, including investment advisors or managers, accountants, and tax advisors."

The rationale here is that the domestic rules of trust jurisdictions will require trustees to hold information about the beneficiaries. By removing the reference to governing law, it is more apparent that if a trustee finds himself in a different trust jurisdiction from that of the trust's governing law, he is still required to hold suitable information.

Yours sincerely

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