

COMMENTS AND RESPONSES OF ACTEC
TO QUESTIONS POSED BY FATF
ON DRAFT AMENDMENTS TO RECOMMENDATION 25
TO BE CONSIDERED AT THE FEBRUARY 2024 FATF PLENARY
DECEMBER 8, 2023

[Sent via email to FATF.Publicconsultation@fatf-gafi.org.]

The American College of Trust and Estate Counsel ("ACTEC") is pleased to submit the following comments and responses to questions posed by FATF regarding its updated Risk-Based Guidance to Recommendation 25 on Beneficial Ownership and Transparency of Legal Arrangements.

ACTEC is a professional organization of approximately 2,400 lawyers from throughout the United States. ACTEC also has approximately 80 International Fellows from many jurisdictions outside the United States. Fellows of ACTEC are elected to membership by their peers on the basis of professional reputation and ability in the fields of trusts and estates and on the basis of having made substantial contributions to those fields through lecturing, writing, teaching, and bar activities. Fellows of ACTEC have extensive experience in advising clients on matters pertaining to the planning for, creation and administration of all types of private trusts. For many of our Fellows, this includes advising corporate and individual trustees of the rights, duties and obligations that arise from the role of trustee. Some Fellows work within institutions that provide trustee services and as such have a unique perspective on the role of corporate trustees. Fellows also provide advice regarding federal taxes, with a focus on estate, gift, and generation-skipping transfer tax planning, fiduciary income 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.

ACTEC commends the FATF for seeking comments from stakeholders, including designated non-financial businesses and professions (DNFBPs) to better meet its stated objective of preventing the misuse of legal arrangements for money laundering or terrorist financing. Countries should assess the risks of, and take measures to prevent, such misuse of legal arrangements. In particular, countries should ensure that there is adequate, accurate and up-to-date information on express trusts and other similar legal arrangements including information on the settlor(s), trustee(s) and beneficiary(ies), that can be obtained or accessed efficiently and in a timely manner by competent authorities. Countries should consider facilitating access to beneficial ownership and control information by financial institutions and DNFBPs undertaking the requirements set out in Recommendations 10 and 22.

In particular, the FATF seeks comments on the following questions with respect to the updated Risk-Based Guidance to Recommendation 25:

1. Are there any other purposes of express trusts beyond what have been set out in the Guidance?
2. Are there other potential scenarios concerning beneficiaries that should be included in this Guidance?
3. What other activities may be included in the definition of trust administration, if any?
4. Are there other additional mechanisms available to ensure access to beneficial ownership information in the context of trusts?
5. What are the suggested approaches to identify, assess, and mitigate the ML/TF risks linked with different types of legal arrangements (trusts governed under domestic

law, foreign trusts administered in the country, and foreign trusts having sufficient links with the country)? What trends can be identified?

6. Under which circumstances would a non-professional trustee be chosen? Which types of trusts are typically administered by such non-professional trustees?
7. How can countries achieve the obligations on non-professional trustees more effectively?

ACTEC has chosen to limit its responses and comments with respect to questions 1 to 4, 6 and 7. ACTEC believes these questions are most closely related to the purposes and mission of ACTEC and the situations in which ACTEC Fellows are most frequently involved with their clients.

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Question 1: Are there any other purposes of express trusts beyond what have been set out in the Guidance?

The FATF Guidance on the purposes of express trusts as presented, including Annex A, is comprehensive and provides a useful overview of the breadth of purposes of express trusts. The categories "asset management", "tax planning and optimization", and "estate planning and probate" are broad and encompass various types of focused purpose trusts, such as trusts to vote company stock, special needs trusts for disabled beneficiaries, blind trusts for settlors in the public sector.

The Guidance makes the important distinction between non-charitable trusts with identifiable beneficiaries and charitable trusts for a particular charitable purpose which may not have identifiable beneficiaries but are commonly enforced by the attorney general or similar officer of a state.

We do not believe there are purposes for which trusts are formed that are not covered by the Guidance.

Question 2: Are there other potential scenarios concerning beneficiaries that should be included in this Guidance?

The FATF Guidance on the potential scenarios concerning beneficiaries provides a useful overview of the wide range of beneficiary circumstances present in express trusts. One scenario that could be added is a beneficiary for whom a "designated representative" is or may be appointed.

Applicable statutes in some jurisdictions provide for a designated representative to receive accountings and information regarding the trust's assets and the trustee's actions in lieu of the beneficiary herself. This is common when the beneficiary is of a level of maturity or sophistication that, in the view of the settlor of the trust, is insufficient for the beneficiary to make constructive use of the knowledge of their interest in the trust.

The role of designated representative is most often filled by an individual who the settlor of the trust or other appointing party believes will have the best interests of the beneficiary in mind. This individual may be a relative of the beneficiary or other trusted individual.

Question 3: What other activities may be included in the definition of trust administration, if any?

The Guidance refers to many aspects of trust administration but does not separately define the term itself. The Guidance does highlight the important distinguishing feature of a trust as a relationship between a settlor, trustee and beneficiaries with respect to property, with the trustee as the legal owner having fiduciary

duties to the beneficiaries with beneficial interests. This relationship and the role of the trustee in the relationship determine the meaning of the term "trust administration" – all actions incident to holding title to property for the benefit of another. The meaning is expansive and a comprehensive list of all constituent elements of administration is elusive.

Question 4:

Are there other additional mechanisms available to ensure access to beneficial ownership information in the context of trusts?

In the US, there are many laws and regulations governing the operation of trusts at both the federal and state level. This includes duties owed by the trustee to the trust beneficiaries, including but not limited to the duty to account to beneficiaries and the duty of loyalty to the beneficiaries, which can be enforced through court actions.

Trustees are also required to provide information to various governmental authorities which would provide the identity of trust beneficiaries and trustees. The various reporting requirements were set out in the August 1, 2022, Comments and Responses of ACTEC to Questions Posed by FATF on Draft Amendments to Recommendation 25 (which can be found at https://www.actec.org/assets/1/6/2022-8-1_Comments_on_the_Draft_Amendments_to_Recommendation_25.pdf?hssc=1). These reporting requirements continue to be sufficient to provide sufficient information to the applicable authorities to identify beneficial ownership information.

FATF should also view the current requirements applicable to trustee reporting as sufficient to disclose beneficial owners, based on the following protections:

1. Trusts are monitored by trustees, many of which are commercial banks and trust companies (often referred to as "corporate trustees") and are already fully subject to AML/CDD regulation.
2. Additional AML/CDD and FATF obligations arise at the level of retitling assets into the name of a trust upon the creation and funding of the trust.
3. Further reporting by individual and corporate trustees occurs at the level of taxing the trust and/or beneficiaries receiving distributions from trusts.
4. Hedge fund and private equity interests, which are commonly owned in trusts, are also highly regulated industries that require issuers to conduct AML/CDD guided by FATF principles.
5. Other types of trust assets include real estate, art and antiquities, all of which are under increasing international AML regulation, also guided by FATF principles and local regulation. For example, in 2016 the US, through its Financial Crimes Enforcement Network ("FinCEN") began issuing Geographic Targeting Orders ("GTOs") requiring title insurance companies to collect and report information about the persons involved in certain residential real estate transactions deemed to present AML risks.
6. Under the recently enacted US Corporate Transparency Act ("CTA"), a corporation, limited liability company, limited partnership or other similar entity is required to report the beneficial owners thereof to FinCEN. Beneficial owners include individuals who directly or indirectly own or control not less than 25% of the ownership interests of the entity and persons who exercise substantial authority over the entity. If a trust owns an interest in such an entity, the company should be required by the CTA to report the above beneficial owner information with respect to the trust. This would include the individual trustees and other fiduciaries who oversee the trust as well as certain individuals employed by a corporate trustee of the trust.

In addition, it would include a beneficiary who has a right to all of the trust income or who can withdraw substantially all of the trust assets.

7. Beneficiary information is reported to competent authorities when beneficiaries receive distributions from trusts both under tax compliance laws and pursuant to FATCA/CRS reporting. For example, trustees of US domestic trusts must identify the beneficiaries to whom they distribute trust assets on the annual federal tax return that the trustee is required to file with the Internal Revenue Service (Form 1041). Trustees of a foreign grantor trust with an owner who is a US citizen or resident also must annually file IRS Form 3520-A, "Annual Information Return of Foreign Trust with a U.S. Owner." In addition, US citizens and residents who receive distributions from a foreign trust, or who contribute assets to such a trust, must report such activity annually on IRS Form 3520, as discussed in greater detail in December 6, 2022, Comments and Responses of ACTEC to Questions Posed by FATF on Draft Amendments to Recommendation 25 (which can be found at the following link: https://www.actec.org/assets/1/6/2022-12-06_ACTEC_Comments_to_Rec_25_Proposed_Changes.pdf?hssc=1).

8. The trust laws of the 35 US states that have adopted the Uniform Trust Code ("UTC"), which can be found at [Uniform-Trust-Code-5c12a36374cd4.pdf](#), as well as similar trust laws in states that have not specifically adopted the UTC provisions, codify seminal trustee duties going back through the history of common law trusts, including the following:

- a. The duty to administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries;
- b. The duty of loyalty to administer the trust solely in the interests of the beneficiaries;
- c. The duty to act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests; and
- d. The duty to administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust.

It would be impossible for a trustee to carry out her legal obligations under these principles without providing the information to the current relevant authorities required under Recommendation 25.

Question 6: Under which circumstances would a non-professional trustee be chosen? Which types of trusts are typically administered by such non-professional trustees?

There are many circumstances under which a non-professional trustee would be chosen to administer a trust governed by the law of one of the US states, and there are many common types of trusts that are typically administered by non-professional trustees. Indeed, a non-professional trustee would be more likely to be appointed than a professional trustee in many situations.

Consider each of the following common situations that would fit within the "Estate planning and probate" category in [Annex A](#) of FATF's updated Risk-Based Guidance to Recommendation 25:

- A revocable or "living" trust. Individuals often create and fund a trust during life to hold assets for the primary (or sole) benefit of the person who creates the trust, commonly referred to as the "settlor". Those trusts are often referred to as "revocable" or "living" trusts and are also designed to facilitate the transfer of control in case of the settlor's incapacity, to handle at death the transfer of those assets (outside of probate) to her intended beneficiaries, and/or to provide some level of privacy. In most situations, the settlor will be the sole trustee, at least while she is living and competent. If she has trusted family members or friends, it is highly likely that she will appoint one or more of those individuals as successor trustees, and it is unlikely that any of those individual

trustees would be professional trustees. A professional trustee might be appointed to serve as a successor, but such an appointment would more often be contingent upon the individuals not being able or willing to serve.

- A testamentary trust. Trusts are often created at the death of an individual, including by operation of a Last Will and Testament. Like the revocable trust example above, many people choose to appoint a trusted family member or friend to serve as trustee rather than a professional trustee.
- A "gift" trust. Settlor create trusts while they are alive to benefit family members (or others), and not the settlor. There are many reasons for creating such a trust (including as articulated in Annex A) and depending on the family situation and the type of assets that are contributed to such a trust, it is again highly likely that a spouse, other family member or friend may be appointed as at least the initial trustee.
- Fees. Settlor sometimes choose to appoint a non-professional trustee because an individual (especially a family member or friend) might not charge a fee for serving as trustee – although non-professional trustees are very often both entitled to, and do receive, payment. This is particularly the case if the individual designated as trustee is a potential beneficiary of the trust. In contrast, a professional trustee will charge for serving.

We think that the above question might be better considered in the inverse manner – "*Under which circumstances would a non-professional trustee NOT be chosen? Which types of trusts are NOT typically administered by such non-professional trustees?*"

A non-professional trustee may not be chosen in the above estate planning and probate scenarios for a variety of reasons. The settlor may not have family or friends who she trusts, or believes are competent, to serve in the role. The settlor may believe that her trusted family or friends would be burdened with serving, due to concerns about the time required to serve, the complexity of the assets, and/or because the settlor does not want those individuals to be put in a challenging (or conflicting) position with respect to the beneficiaries. In those (and other) cases, a settlor may choose to appoint an independent professional trustee to serve as the only trustee, or as a co-trustee.

Question 7:

How can countries achieve the obligations on non-professional trustees more effectively?

As discussed above, nonprofessional trustees are subject to the same fiduciary duties and reporting requirements as professional and corporate trustee under the UTC and other state trust legislation. Quite often nonprofessional trustees (as well as professional and corporate trustees) retain legal counsel to advise them as to their duties and obligations to the beneficiaries as well as with respect to governmental authorities at the state and federal levels.

Mechanisms are to a great extent already imbedded in federal and state law to combat and prevent the misuse of trust arrangements for money laundering or terrorist financing, as highlighted in the responses to the previous questions asked by FATF. An effective way for countries to achieve a high level of compliance by non-professional trustees with these mechanisms would be a mandatory education regime for such trustees or demonstration that the trustee has a certain level of professional education (e.g., as an attorney, accountant, financial planner, etc.). Many professional organizations, such as ACTEC, could help to provide such education services.

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Thank you again for this opportunity to respond to FATF's questions regarding its updated Risk-Based Guidance to Recommendation 25.

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