



**Asia-Pacific
Economic Cooperation**

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Overview of the Beneficial Ownership Concept

Submitted by: Asia/Pacific Group on Money Laundering



**Capacity Building Workshop on Exposing the
Unseen Hands: Tackling Concealment of
Beneficial Ownership
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Session 1:

Overview of the Beneficial Ownership Concept

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Beneficial owner[ship] International instruments

- ▶ The term ‘beneficial owner[ship]’ appears in instruments in the following organisations:
 - OECD (2001)
 - Wolfsberg Group (2000 Guidance, revised 2002)
 - Basel Committee (2001)
 - UNCAC (2002)
 - FATF (2003, revised 2012)

OECD - 2001

- *Misuse of Corporate Vehicles* 2001: ‘beneficial ownership’ and ‘control’ were explained, but not defined:

‘In this Report, “*beneficial ownership*” refers to ultimate beneficial ownership or interest by a natural person. In some situations, uncovering the beneficial owner may involve piercing through various intermediary entities and/or individuals until the true owner who is a natural person is found. With respect to corporations, ownership is held by shareholders or members. In partnerships, interests are held by general and limited partners. In trusts and foundations, beneficial ownership refers to beneficiaries, which may also include the settlor or founder

In this Report, “*control*” means effective control by an individual or a group of individuals over a corporate vehicle. ... The relevant inquiry will be who exercises effective control (rather than legal control) over the corporate vehicle’

Basel and Wolfsberg 2001; 2002

- ▶ Neither Wolfsberg nor Basel define ‘beneficial owner’
- ▶ Basel (2001): focused on customer identification by banks:
 - ‘A bank should understand the structure of the company, determine the source of funds, and identify the *beneficial owners* and those who have *control* over the funds’
- ▶ Wolfsberg (2002) also focused on CDD:
 - ‘*beneficial ownership* must be established for all accounts’ but did not define the meaning of the term (Wolfsberg, *Global Anti-Money-Laundering Guidelines for Private Banking* (2002), paragraph 1.2.2)

UNCAC - 2002

- ▶ UNCAC Article 14(1)(a): “countries” should implement an AML regime that: ‘emphasize[s] requirements for customer and, where appropriate, beneficial owner identification, record-keeping and the reporting of suspicious transactions’
- ▶ UNCAC does not define ‘beneficial owner’
- ▶ *Travaux préparatoires* (2002): UN struggling with terminology, using ‘identity’, ‘true beneficiary’ and others before settling on ‘beneficial owner’
(United Nations, *Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Corruption*)

FATF 2003

- ▶ FATF first defined 'beneficial owner' in 2003:

Beneficial owner refers to the natural person(s) who ultimately owns or controls a customer and/or the person on whose behalf a transaction is being conducted. It also incorporates those persons who exercise ultimate effective control over a legal person or arrangement

- ▶ Then it was revised in 2012 

FATF 2012 definition

Beneficial owner refers to the natural person(s) who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise ultimate effective control over a legal person or arrangement

Footnote:

Reference to “ultimately owns or controls” and “ultimate effective control” refer to situations in which ownership/control is exercised through a chain of ownership or by means of control other than direct control

Origin of term

- ▶ Prior to 2003, FATF used a variety of other terms
 - From 1996-2003 the term ‘true identity’ was used
 - Interpretive note used ‘principal owner,’ beneficiaries,’ and ‘actual control’
- ▶ Where did these come from?
 - Trust law?
 - OECD Model Double Tax Convention?

FATF 2012 definition

Beneficial owner refers to the natural person(s) who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise ultimate effective control over a legal person or arrangement

Footnote:

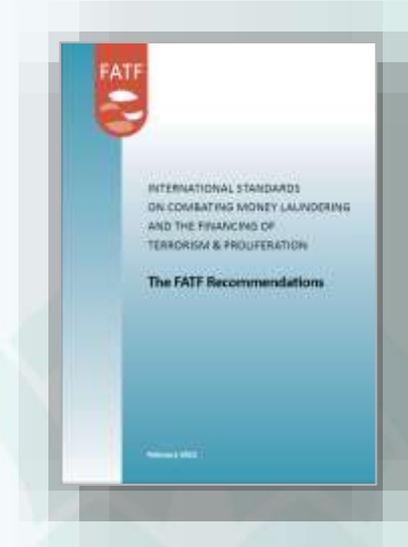
Reference to “ultimately owns or controls” and “ultimate effective control” refer to situations in which ownership/control is exercised through a chain of ownership or by means of control other than direct control

Key terms in definition

- ▶ While the FATF defines ‘beneficial owner’ it uses complex undefined terms in the definition:
 - *Ultimately owns:* *legal or equitable ownership?*
 - *Control:* *legal control or economic control?*
 - *Effective control:* *how does this differ from ‘control’*
 - *Ultimate effective control:* *how does this differ from ‘effective control’?*
 - *Is being conducted :* *in the context of a current transaction?*
 - *On who’s behalf:* *what type of relationship? agency?*

Principal FATF requirements relevant to beneficial ownership

- ▶ Glossary definitions:
 - ▶ *'legal person'*
 - ▶ *'legal arrangement'*
 - ▶ *'express trust'*
 - ▶ *'trustee'/ 'trust'*
 - ▶ *'beneficiary/beneficiaries'*
 - ▶ *'settlor'*
- ▶ R. 24 – Legal persons
- ▶ R. 25 – Legal arrangements
- ▶ R. 10 – Customer due diligence
- ▶ R. 12 – PEPs
- ▶ IO. 2 – International cooperation
- ▶ IO. 5 – Legal persons/arrangements



Legal persons

- ▶ FATF defines *legal persons* as “entities other than natural persons that can establish a permanent customer relationship with a financial institution or otherwise own property”
 - ▶ So the definition includes companies, limited partnerships, foundations, companies limited by guarantee, companies without share, capital statutory corporations...
- ▶ FATF does not define ‘*natural persons*’ or ‘*persons*’
 - ▶ What are these?
- ▶ How can you determine who or what is the beneficial owner of a legal person?

Legal arrangements

- ▶ FATF defines *legal arrangements* as structures similar to what is defined as a trust in the Hague Convention of Trust Recognition and includes civil law arrangements ‘*similar*’ to trusts
 - ▶ However, civil law arrangements are not similar to trusts
 - ▶ There is no concept of equity in civil law countries – why is this important?
 - ▶ Because civil law ‘trust’ assets are not subject to equitable proprietary claims
 - ▶ Equitable proprietary claims may affect who the beneficial owner is
- ▶ In many assessments, it is assumed that *legal arrangements* encompasses trusts only and that civil law structures are not included

Beneficial ownership and trusts

FATF Recommendation 25

“Countries” should take measures to prevent the misuse of legal arrangements for money laundering or terrorist financing. In particular, countries should ensure that there is adequate, accurate and timely information on express trusts, including information on the settlor, trustee and beneficiaries, that can be obtained or accessed in a timely fashion by competent authorities. Countries should consider measures to facilitate access to beneficial ownership and control information by financial institutions and DNFBPs undertaking the requirements set out in Recommendations 10 and 22

Interpretive Note to Recommendation 25

“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

Recommendation 25

- ▶ Trustees must hold:
 - ▶ adequate, accurate, and current beneficial ownership information regarding the trust including:
 - identity of the settlor, trustee(s), protector (if any), beneficiaries, or class of beneficiaries and any other natural person exercising ultimate effective control over the trust
 - also basic information on other regulated agents of, and service providers to, the trust, including investment advisors or managers, accountants, and tax advisors
 - ▶ What ‘natural person’ could be missing from this list that is not included in the definition of ‘beneficial owner’?
 - ▶ And, what really is missing from the list?

Consider this statement:

“Beneficial ownership refers to the natural person or persons who invest in, control, or otherwise reap gains from an asset, such as a bank account, real estate property, company, or trust.”

- ▶ *Beneficial Ownership Transparency in Corporate Formation, Shell Companies, Real estate and Financial Transactions*, Congressional Research Service, 2019 p. 1 cites the FATF 2014 Guidance

Questions?