

Revisions to Recommendation 25

Response to White Paper for Public Consultation

Open Ownership (OO) provides technical assistance to countries implementing beneficial ownership (BO) transparency reforms, to help generate accurate data on BO that complies with international standards and meets the needs of data users across government, obliged entities and the wider private sector, and civil society.

Since 2017, OO has worked with [over 40 countries](#) to advance implementation of beneficial ownership reforms, as well as supporting the creation of over 15 new central and sectoral registers. OO has developed the world's leading [data standard](#) for BO information, co-founded the international [Beneficial Ownership Leadership Group](#), and built the world's first [transnational public beneficial ownership register](#).

OO is pleased to contribute to the public consultation on revisions to the FATF Recommendation 25. The question of legal arrangements such as trusts and their status is a major obstacle to fighting financial crime, and intersects with transparency in the BO of legal entities where legal arrangements appear in their ownership structures. In order to address this blindspot, OO recommends following a similar approach to legal arrangements that it requires for legal entities as part of Recommendation 24. In summary:

- Lessons from Recommendation 24 provide a robust blueprint for providing competent authorities and other BO data users with adequate, accurate, up-to-date and timely BO information.
- For countries to properly assess risks with respect to trusts and other legal arrangements, and in order to ensure there is *timely* access to information without tip-off risk and to facilitate proactive investigations, there should be a requirement to register trusts and other legal arrangements that have a sufficient link with a country in a central registry.
- Giving registration a constitutive effect (i.e. making legal validity of a trust contingent on registration) would address the otherwise insurmountable compliance challenges inherent to the registration of trusts and other legal arrangements and ensure information is *up-to-date*.
- There should be a clear obligation on the trustee(s) to hold adequate, up-to-date, and accurate information, and to disclose this information to a central register.
- It should be clear what information should be held about who by providing clear guidance on who the beneficial owners of trusts and legal arrangements are.

This submission is also on behalf of and endorsed by [OpenCorporates](#), the largest open database of companies in the world that is relied upon by millions of users and hundreds of enterprises to power critical business processes, including KYC, analytics & investigations and data management – as well as as journalists and other social good causes.

For further information or to discuss these responses in further detail, please contact tymon@openownership.org.

I. Scope of Legal Arrangements, risk assessment and foreign trusts

1. In this context, are the following concepts sufficiently clear? If not, how could they be improved?

- a “governed under their law”*
- b “administered in the jurisdiction”*
- c “trustee residing in the jurisdiction”*
- d “similar legal arrangements” (as compared with express trust).*

OO welcomes FATF’s consideration to revise the definition of legal arrangements by referring to Article 2 of the Hague Convention on the law applicable to trusts and their recognition so that jurisdictions can use this as a basis of whether legal arrangements have a similar structure or perform a similar function to an express trust. However, Article 2 does not specify that there can be more than one settlor, and that all parties to the trust can also be legal entities.

We believe a clarification of all the concepts would be beneficial. For example, it is not fully clear what the difference is between “administered in the jurisdiction” and “trustee residing in the jurisdiction”. It suggests that “administers” refers to cases where a trustee is not administering the trust, for instance in the case of nominee trustees, although this is not clear.

The FATF proposal to define a “sufficient link” to trigger a requirement to capture BO information about legal arrangements is a step forward. OO would propose to expand this to jurisdictions where trust assets (e.g. real estate) are located, where trusts establish a business relationship (e.g. opening or maintaining a bank account) or have any other tax implication, and where beneficiaries are located.

The term “similar legal arrangements” is also insufficiently clear. This could specify that it should cover any arrangement that allows for the separation between the beneficial owner and the legal owner of assets, generally involving a mechanism where assets are entrusted by one or more parties to one or more other parties that manages the asset for one or more third parties, as done by the European Commission. It should also make clear that one party may have more than one role in the arrangement.

2. What could be the pros and cons associated with the new suggested risk assessment? What could be the potential “sufficient links” for foreign-created legal arrangements (e.g. residence of trustee, location of asset etc.) for the purpose of risk assessment?

The definition of “sufficient link” is too narrow in scope. Sufficient link should cover:

- The trust being formed under the laws of the jurisdiction
- Any party to the trust being resident in the jurisdiction, including nominees or anybody else who administrates the trust
- Any trust asset(s) (e.g. bank account(s)) being located in the jurisdiction
- Any service providers to the trust being based in the jurisdiction

It will be difficult for many countries to conduct risk assessments as in many jurisdictions there is no requirement for trusts to be registered. Therefore many countries have no overview of the size and scope of trusts with a sufficient link in their jurisdiction, and as such it will be difficult to conduct a useful assessment. All trusts pose a money laundering risk. Therefore, OO recommends that requirements apply to all trusts that have a sufficient link with the country, following an expanded definition of sufficient link. As in the approach in Recommendation 24, other aspects of the disclosure system (e.g. enhanced verification) can be based on risk.

3. Are there any other considerations with respect to scope of legal arrangements or risks posed by legal arrangements that FATF should factor into its review of R.25?

FATF should consider how revisions to Recommendation 25 will impact Recommendation 10. For example, there is already a definition of the beneficial owners of trusts in Recommendation 10 (see below). FATF should also pay particular attention to how its requirements will be met in non-trust law countries, as knowledge about trusts and other legal arrangements are likely to be lower. FATF should support non-trust law countries with specific and detailed guidance and consider providing dedicated training, as many jurisdictions have not yet had any cause to develop knowledge in and dedicate resources to this area. Consideration should also be given to how Recommendation 25 relates to Recommendation 24, as systems to address both may be developed simultaneously.

II. Obligations of trustees under R.25

4. What are the pros and cons of expanding the extent of information which trustees should hold to include the objects of power in the context of discretionary trusts? Is the concept of “objects of power” sufficiently clear and reasonable? Are there any other terms that you would recommend FATF use instead of “objects of power”?

It is essential that trustees hold information on all beneficiaries and classes of beneficiaries, as otherwise discretionary trusts would constitute a substantial loophole in the visibility of the BO of trusts by competent authorities. The concept of “objects of power” is unclear. The term “discretionary beneficiaries” may be clearer. In any case, it should be accompanied by sufficient guidance and a clear explanation, supported by examples.

5. Do you agree with the proposed nexus of such obligations based on residence of trustees or location where the trusts are administered? Compared to the current obligation incumbent on countries that have trusts governed under their law, do you see pros and cons from such a change, (e.g., would there be a difference in terms of efforts to collect the information in cases where a trust may have trustees that are resident in more than one jurisdiction, and where a trust may be administered in a country in which a trustee is not resident)?

Obligations should extend to all jurisdictions to which the trust has a “sufficient link” as outlined in the answer to question 2. Making the legal validity of the trust in each jurisdiction is contingent upon trustees meeting their obligations would provide an incentive for trustees to do so, and would address challenges in information collection in cases where a trust may have trustees that are resident in more than one jurisdiction, and where a trust may be administered in a country in which a trustee is not resident.

6. Do you see challenges in respect of record-keeping obligations for non-professional trustees noting that all other obligations under R.25 apply to such trustees?

All trustees, whether professional or non-professional, have fiduciary duties. As part of these duties, it is reasonable to expect they hold up-to-date and adequate information on all parties to the trust as well as the trust assets and activities. Alternatively, trustees could be regulated and licensed, making all trustees professional by default.

III. Definition of Beneficial Owners

7. Would you support the insertion of a standalone definition for beneficial owner in the context of legal arrangements (distinct from that for legal persons)? Or would it risk creating confusion with the definition of beneficial owners applicable to legal persons? What relevance should control have in the definition of beneficial ownership of legal arrangement to address AML/CFT risk?

Fundamentally, the definition of a beneficial owner and that of a legal arrangement and legal entity do not differ. For both, it is the natural person(s) who have ultimate ownership or control, and/or on whose behalf a transaction is being conducted. What this means in practice, and the specific roles that this applies to with respect to a legal entity and legal arrangement are different. Therefore, OO would welcome more details and guidance specifying which roles in a legal arrangement are beneficial owners. FATF already has a definition for trusts as part of Recommendation 10. However, this definition does not allow for multiple settlors or classes of beneficiaries. Therefore, OO recommends specifying that all parties to a trust should be considered beneficial owners of a trust or other legal arrangement:

- settlor(s)
- protector(s)
- trustee(s)
- administrator(s) of the trust (where different from the trustee)
- (discretionary) beneficiary/ies and class(es) of beneficiaries
- any other natural person exercising ultimate effective control over the trust (including through a chain of control/ownership or through a nominee arrangement)

Furthermore, FATF should provide guidance on what minimum standards should apply and what information should be collected if any of the above is a legal entity.

8. Does limiting the information regarding beneficiaries to only those who have the power to revoke the arrangement or who otherwise have the right to demand or direct (that is, without the consent of the trustee) distribution of assets seem reasonable?

The information should cover all those listed in the answer to question 7, including all (discretionary) beneficiary/ies and class(es) of beneficiary/ies, irrespective of their specific powers.

9. Do you have any specific suggestions for a different standalone definition?

See answer to question 7.

IV. Obstacles to transparency

10. What features of legal arrangements do you see being used for obscuring ownership? Are these linked to their involvement in the creation of broader complex structures or inherent to legal arrangements?

There is no registration requirement for trusts in many countries, to have legal validity or otherwise, as is the case with legal entities. In cases where there is a requirement to register information, there is little or no way to check what compliance rates are, to verify information given or to know whether information is up to date, or if the conditions of a trust change. As stated in the June 2022 [Cullen](#)

[Commission of Enquiry into Money Laundering in British Columbia report](#), with respect to trusts which need to be reported where they hold property:

The [...] Study suggests there is an under-reporting of [...] trusts for several reasons, including a lack of understanding of the meaning of a [trust] and difficulties in identifying [...] trusts, as they can exist with no formal agreement or documentation of any kind.

Unlike legal entities, trusts can be formed, exist and be legally valid without the knowledge and awareness of competent authorities. The conditions of the trust are often opaque and have many varying complicated control structures due to the flexibility afforded to them by the law. For example, a settlor might still be retaining control over a trustee (or the trust) through a letter of wishes, by appointing a protector, or by giving power of attorney to a close associate to either veto or remove the trustee. These issues are inherent to legal arrangements. Because trusts can own assets such as company shares and bank accounts, this is an unacceptable blind spot for competent authorities. To illustrate, a World Bank study across 30 years found that nearly 70% of more than 200 large-scale corruption cases relied on anonymously owned companies, [including the use of trusts](#) to disguise ownership. This not only obscures the ownership of assets, which in many cases are not legally by any natural person involved in the trust, but directly undermines all of FATF's efforts towards better visibility of the ownership of legal entities under Recommendation 24.

11. What are the legitimate uses of flee/flight clauses? What are the challenges associated with these clauses?

The main obstacle to transparency is detailed in question 10. Efforts to address that, for example by centrally registering trusts in order to have legal validity in all jurisdictions to which is has a “sufficient link” as outlined in the answer to question 2, would also address problems around flee/flight clauses, and this would require deregistration if a trust were to be moved to be governed by the laws of a different jurisdiction.

12. What are the key obstacles to transparency of trusts and other legal arrangements?

See answer to question 10.

V. Approach in collecting beneficial ownership information

13. Can such an approach ensure that competent authorities have timely access to beneficial ownership information in the context of legal arrangements?

Countries implementing the registry approach as part of the multi-pronged approach for the beneficial ownership of legal entities under Recommendation 24 have [demonstrated the best results in FATF mutual evaluation reviews](#) in terms of making adequate, accurate and up-to-date information available to competent authorities. A similar approach should be taken for Recommendation 25.

14. Have you seen any issues/challenges with including information collected by other agents or service providers including trust and company service providers, investment advisors or managers, accountants, or lawyers as a mechanism?

Besides the potential conflict of interest for agents and service providers in providing accurate and up-to-date information about trusts to authorities, [experience with Recommendation 24](#) shows that relying solely on the provision of information by these intermediaries provides unnecessary barriers

to timely access, risks tipping off the subjects of investigation, limits proactive investigations and bulk analysis by competent authorities, and provides challenges with ensuring compliance.

15. Do you think that a multi-pronged approach should be followed for accessing beneficial ownership information of legal arrangements, consistent with Recommendation 24? Or would the features of legal arrangements make a single-pronged approach preferable instead? What are the pros and cons, including in relation to administrative burden, from these approaches?

OO would be in favour of a multi-pronged approach for legal arrangements, consistent with Recommendation 24. [Lessons from Recommendation 24](#) show that in order to make it most effective, a central registry approach should be required. In order to incentivise compliance, registration should have constitutive effect. This means that a trust would not be legally valid in a country where it has not been centrally registered. This approach has already been taken by some countries, such as [South Africa](#), where trusts must be registered in order to be valid. Certain domestic trusts must be registered with the Master of the High Court, who subsequently issues letters of authority to the nominated trustee(s). No trustee may act as such without the written authority of the Master, thereby giving it legal validity upon registration. To further encourage compliance, Recommendation 25 could require new (classes of) beneficiaries to not be able to benefit from the trust property if their information has not been updated with the central register.

16. Are there any other mechanisms that FATF should consider as a reliable source of beneficial ownership information for competent authorities?

Emulating Recommendation 24, competent authorities should rely on information held by trustees, who should be legally required to hold up-to-date and accurate information on the trust and its parties; information from a central register, where all relevant trusts should be registered to have legal validity; supplementary sources of information such as asset registries, information collected by other competent authorities, and information collected by other agents or service providers including trust and company service providers, investment advisors or managers, accountants, or lawyers. A failure to meet obligations should be met with proportionate and dissuasive sanctions.

Relevant trusts should be all trusts that have a sufficient link with the country as detailed in the answer to questions in Section I.

VI. Adequate, accurate and up-to-date information

17. Do you see any concerns with the suggested requirements?

OO welcomes the suggested requirements, but has concerns that unless trusts are centrally registered and their legal validity be contingent on registration, there will be significant challenges in ensuring the information is adequate, accurate and up-to-date.

18. In addition to trustees, who could play a role in the verification of BO information in the context of legal arrangements?

Financial institutions (FIs) and designated non-financial businesses and professions (DNFBPs) should play a complementary role in verifying the BO of legal arrangements, as they are already required to establish the BO of legal arrangements as part of Recommendation 10. The definition of the BO of legal arrangements should be clarified (see answer to question 7) and harmonised with the definition in

Recommendation 10. Registry authorities should have the primary responsibility for verification, as they already have access to relevant and reliable documents, data and information.

19. Can the notion of “independently sourced/obtained documents, data or information” in the definition of accurate information pose any issues for the private sector and, if so, how?

The private sector already verifies information using independently sourced/obtained documents, data or information for both legal entities and arrangements (for example, identities). Where this is not available, it seems unfeasible for the private sector to source or obtain this type of information. A central register of trusts, including information on the conditions to the trust (for example as specified in a trust deed) available to competent authorities, FIs and DNFBPs, would become a useful resource, and a reference dataset that information can be checked against.

VII. General questions

20. What are the potential issues/challenges for the private sector regarding implementation of the R.25 requirements?

The lack of a central repository of information about trusts, the lack of a requirement to register information in such a repository (e.g. by making legal validity contingent on registration), and the lack of the verification of that information poses a challenge to the private sector.

21. Do you see any challenges in obtaining information regarding beneficial ownership information of legal arrangements when the trustee (or equivalent) resides in another jurisdiction or when the legal arrangement is administered abroad?

This scenario poses significant challenges, as evidenced by [recent mutual evaluation reports](#). Therefore it is critical that trusts should be centrally registered in each jurisdiction to which it has a “sufficient link” (as detailed in responses to questions in Section I) and its information available to competent authorities. Making a trust’s legal validity in a jurisdiction contingent on its registration would address otherwise insurmountable challenges to compliance.

22. Are there any suggestions to improve R.25 and its Interpretive Note to better meet its stated objective to prevent the misuse of legal arrangements for money laundering or terrorist financing?

FATF has acknowledged that publicly available BO registers play a major part in increasing transparency and can help combat money laundering and financing of terrorism in its [current](#) and proposed guidance of Recommendation 24. This has been echoed by the EU for legal arrangements, which states the following in its [fifth AML Directive](#):

[...] public access to beneficial ownership information would contribute to combating the misuse of trusts and similar legal arrangements, similar to the way public access can contribute to the prevention of the misuse of corporate and other legal entities for the purposes of money laundering and terrorist financing.

Public access to beneficial ownership information allows greater scrutiny of information by civil society, including by the press or civil society organisations, and contributes to preserving trust in the integrity of business transactions and of the financial system. It can contribute to combating the misuse of corporate and other legal entities and legal arrangements for the purposes of money laundering or terrorist financing, both by helping investigations and through

reputational effects, given that anyone who could enter into transactions is aware of the identity of the beneficial owners. It also facilitates the timely and efficient availability of information for financial institutions as well as authorities, including authorities of third countries, involved in combating such offences. The access to that information would also help investigations on money laundering, associated predicate offences and terrorist financing.

FATF should consider a requirement to make the information publicly available, or at the very minimum, access for other data users who play a role in fighting financial crime, such as all non-AML-regulated businesses who engage with trusts, investigative journalists and civil society. [Denmark](#) has made all information relating to trusts available to the public, thereby also providing direct and timely access for FIs, DNFBPs, and overseas competent authorities.

23. What are the areas in particular where the private sector would benefit from guidance regarding implementation of R.25 requirements, including suggested revisions described above?

It should be fully clear what the obligations are for different parties to a trust and legal arrangement. This should include the types of information private sector actors can therefore reasonably expect certain parties to hold, and clarifying what obligations FIs and DNFBPs have with respect to trusts and legal arrangements under Recommendation 10 by harmonising guidance on what constitutes a beneficial owner for trusts and legal arrangements across the FATF Standard.