



December 7, 2023

Mr. Raja Kumar
President
The Financial Action Task Force
2, rue André Pascal
75775 Paris Cedex 16 FRANCE

Submitted via email to FATF.Publicconsultation@fatf-gafi.org

Re: Comments of the FACT Coalition on the draft Amendments to FATF Guidance on Beneficial Ownership (R.25)

Dear Mr Kumar:

This letter responds to a request for comments on the draft amendments to FATF guidance on beneficial ownership under Recommendation 25 (**Draft Guidance**), and follows a comment by the FACT Coalition on the Revision to Recommendation 25 on August 1, 2022 (**2022 Comment**).¹

This letter was drafted by the FACT Coalition, a non-partisan alliance of more than 100 state, national, and international organizations promoting policies to build a fair and transparent global tax system that limits abusive tax avoidance and to curb the harmful impacts of corrupt financial practices.² This comment was prepared in consultation with colleagues at the Tax Justice Network (**TJN**), Open Ownership and Transparency International, and the FACT Coalition endorses their written comments, along with their verbal comments made at the Recommendation 25 Guidance Webinar on November 26, 2023.

In this comment, we wish to affirm the value of registration of beneficial ownership information in all legal constructs, affirm the importance of beneficial ownership information extending to the widest practicable range of beneficiaries, and caution against the use of language employed by trust and estate agents in the Draft Guidance.

Value of Registration of Beneficial Ownership Information

Unlike Recommendation 24 relating to legal persons, Recommendation 25 regrettably did not implement a central registry or alternative mechanism approach for trusts. Criminal enterprises, kleptocrats, corrupt

¹ See FACT's comment, "FACT Sends Comments to Curb the Misuse of Trusts and Other Legal Arrangements - FATF Recommendation 25," August 1, 2022, <https://thefactcoalition.org/fact-sends-comments-to-fatf-in-public-consultation-on-recommendation-25/>.

² To learn more about the FACT Coalition and its members, see <https://thefactcoalition.org/about-us/>.

officials, illicit financiers and tax cheats abuse the anonymity of trusts in much the same way that they abuse the anonymity of companies. As the FACT Coalition submitted in testimony before Alaska’s legislature in the wake of the Pandora Papers scandal, “trusts [are] one of the most significant gaps in the U.S. anti-money laundering regulatory regime.”³ The limited coverage of trusts remains a concerning loophole in the U.S. despite passing of the Corporate Transparency Act on January 1, 2021. Just as we argue for the closing of that loophole in the U.S., we argue for the closing of that loophole at the international standard setting level.

While we understand that the Guidance cannot change the Recommendation itself, we commend the FATF highlighting the registry approach in the Draft Guidance at section 5.2. While the Draft Guidance suggests that the registry approach “may also be considered in relation to trusts”, we urge the FATF to use stronger language to encourage countries to implement registration in fighting illicit financial flows and to expand on the ways that registries can help, and already are helping, countries in that fight. We therefore suggest that the final Guidance (**Guidance**):

- Note that without a registration system, it will be difficult for countries to enforce the requirement of Recommendation 25 that countries ensure they have “adequate, accurate and up-to-date information”;
- Highlight the benefits of the registry approach that are evidenced in the FATF’s own mutual evaluation reviews regarding Recommendation 25, as we noted in our 2022 Comment;⁴
- Outline clearly that the registry approach is an accepted approach in numerous jurisdictions. As noted by TJN, more than 120 jurisdictions already require registration, with 65 requiring beneficial ownership information registration, and some jurisdictions help close loopholes by putting the obligation on all parties to the trust to report information.⁵ The registry approach is widely used to ensure that information is, as is required under Recommendation 25, “adequate, accurate and current”;
- Recommend that countries tie the validity of trusts to registration;
- Recommend that foreign trusts be required to register when the trust has an interest in an entity or asset in the jurisdiction;
- Provide additional guidance on how countries can manage legal entities and legal arrangements within the same corporate structures, given that the FATF Recommendations treat them differently. Having more consistent guidance between the two types of legal constructs would help to streamline corporate compliance and prevent arbitrage and abuse of loopholes between legal constructs.

Guidance on Beneficiaries

Affirming our 2022 Comment, and echoing the submission of TJN, we urge the FATF to emphasize the value of a broader approach to beneficiary information in its Guidance. For instance, we suggest that the Guidance:

³ “FACT Urges Critical Transparency Measures for Trusts in Testimony Before Alaska’s Legislature,” April 19, 2022, <https://thefactcoalition.org/fact-urges-critical-transparency-measures-for-trusts-in-testimony-before-alaskas-legislature/>.

⁴ FACT’s comment, “FACT Sends Comments to Curb the Misuse of Trusts and Other Legal Arrangements - FATF Recommendation 25,” August 1, 2022, <https://thefactcoalition.org/fact-sends-comments-to-fatf-in-public-consultation-on-recommendation-25/>.

⁵ Andres Knobel and Florencia Lorenzo, Trust Registration around the World: The case for registration under FATF Recommendation 25,” July 2022, <https://taxijustice.net/wp-content/uploads/2022/07/Trusts-FATF-R-25-1.pdf>.

- Recommend identification of all classes of beneficiaries. This should include indirect and discretionary beneficiaries (including all candidates for future discretionary trust distributions, not only as and when distributions are received). Indirect beneficiaries receive trust benefits through third parties and can receive benefits on the same scale as direct beneficiaries, but this extra step can make the trust more susceptible to abuse because beneficiaries are more difficult to identify. Likewise, only identifying beneficiaries once they have received a discretionary trust distribution fosters the types of complexity that can be abused for illicit financial flows;
- Emphasize the value of not applying beneficial ownership thresholds for legal persons where they are a party to a trust, and the risks of not taking this approach. While beneficial ownership rules for trusts do not apply thresholds for individuals, adding a legal person as a party to a trust can de facto apply the thresholds that normally exist for legal persons into the trust context.⁶

Care in Language Used in the Guidance

Finally, we urge the FATF to be mindful of the language utilized in the Guidance. We note, as our colleagues at TJN do, that language employed in the Draft Guidance such as ‘estate planning’, ‘tax optimisation’, and ‘asset protection’ are often euphemisms used by private practitioners and other enablers to describe practices that stray into the gray area between tax avoidance and tax evasion. A key benefit of the registration approach is to bring information to central authorities to better help them clearly delineate between legitimate and illegitimate tax practices.

We are also concerned with the description of trusts as “not a type of legal entity or corporate vehicle but a relationship between the principal parties to such arrangement” (p. 2). While this may be true in a strict legal sense, it is unhelpful in the context of a document providing guidance on preventing financial abuse of trusts. As noted above, trusts are susceptible to abuse in many of the same ways as legal entities. Trusts are not simply a ‘relationship’ in the same way that a contract for services is, and describing it as such gives credence to the arguments of enablers that trusts are inherently unfit to be regulated like companies because of their nature. When it comes to preventing financial abuse, that is simply not the case. While trusts and companies do have different legal characteristics, many of the same transparency initiatives, like registration of beneficial ownership information, equally help to stem illicit financial flows in both companies and trusts.

Thank you for the opportunity to comment. If you have questions, you may contact Erica Hanichak (ehanichak@thefactcoalition.org).

Signed,

Ian Gary
Executive Director

Erica Hanichak
Government Affairs Director

⁶ Andres Knobel, “Complex Ownership Structures: Addressing the Risks for Beneficial Ownership Transparency,” February 2022, <https://taxjustice.net/wp-content/uploads/2022/02/Complex-ownership-chains-Reduced-Andres-Knobel-MB-AK.pdf>.