

## TRANSPERENCY AND BENEFICIAL OWNERSHIP



### Definition of Beneficial Ownership

The Financial Action Task Force (FATF) defines beneficial ownership in two (2) contexts:

1. In the context of legal persons—a beneficial owner refers to the person who ultimately owns the legal entity (including, but not limited to, a company), as well as the person who makes relevant decisions within the legal entity. This notion focuses on identifying the natural person who takes advantage of assets held by the legal entity and on whose behalf transactions are conducted.
2. In the context of legal arrangements—a beneficial owner refers to the natural person who ultimately owns or controls the legal arrangement and who exercises control over the legal arrangement.



### What is a Legal Person and a Legal Arrangement?

- \* A *legal person* refers to any entity other than natural persons that can establish a permanent customer relationship with a financial institution or otherwise own property. This can include companies, bodies corporate, foundations, partnerships, or associations and other relevantly similar entities.
- \* The FATF defines a *legal arrangement* as an express trust or other similar arrangement. Note that an *express trust* refers to a trust clearly created by the settlor, usually in the form of a document e.g. a written deed of trust.

### Beneficial Ownership Information

To determine who the beneficial owners of a company are, basic information about the company, which includes information about the legal ownership and control structure of the company, should be collected. This would include information about the status and powers of the company, its shareholders and its directors. For trusts, adequate information on the settlor, trustee and beneficiaries should be obtained.

### Interpretation of FATF Recommendations 24 & 25

The Financial Action Task Force has established standards on transparency, so as to deter and prevent the misuse of corporate vehicles. There are two (2) FATF Recommendations which speak to Transparency and Beneficial Ownership: Recommendation 24 'Transparency and beneficial ownership of legal persons' and Recommendation 25 'Transparency and beneficial ownership of legal arrangements'.

The FATF Recommendations require countries to ensure that adequate, accurate and timely information on the beneficial ownership and control of legal persons and legal arrangements are available and can be accessed by the competent authorities in a timely fashion. To the extent that such information is made available, it would help financial institutions (FIs) and designated non-financial businesses and professions (DNFBPs) to implement the customer due diligence (CDD) requirements on corporate vehicles which include identifying the beneficial owner, identifying and managing ML/TF risks, and implementing AML/CFT controls based on those risks.

### Topics Discussed:

- ⇒ Definition of Beneficial Ownership
- ⇒ What is a Legal Person and a Legal Arrangement?
- ⇒ Beneficial Ownership Information
- ⇒ Interpretation of FATF Recommendations 24 & 25
- ⇒ The Misuse of Legal Persons
- ⇒ Structures to Conceal Beneficial Ownership
- ⇒ Challenges in Identifying Beneficial Ownership
- ⇒ Criteria for Identifying the Beneficial Owners of an Entity
- ⇒ Measures to Prevent the Misuse of Corporate Vehicles

## The Misuse of Legal Persons

Corporate vehicles such as companies, partnerships, trusts and other legal persons are used to conduct and facilitate business activities, but they are sometimes misused for money laundering (ML) and terrorist financing (TF). This is because corporate vehicles are an attractive way to disguise and convert the proceeds of crime before introducing these proceeds into the financial system. The lack of adequate, accurate and timely beneficial ownership information facilitates ML/TF by disguising:

- \* the identity of known or suspected criminals;
- \* the true nature of a transaction conducted by a corporate vehicle;
- \* the true purpose of an account or property held by a corporate vehicle; and/or
- \* the source or use of funds or property associated with a corporate vehicle.



## Structures to Conceal Beneficial Ownership

The beneficial ownership information can be obscured through the use of:

1. Shell companies— shell companies can be established with various forms of ownership structure, especially in cases where there is foreign ownership which is spread across jurisdictions which adds to its complexity.
2. Complex ownership and control structures involving many layers of shares registered in the name of other legal persons.
3. Bearer shares and bearer share warrants— Bearer shares are equity security owned by whoever holds the physical share certificate. These shares present an additional risk to regulated businesses. Without adequate safeguards in place it is impossible for the regulated business to know with certainty that the true identity of the beneficial owner has been disclosed to them.
4. Unrestricted use of legal persons as directors.
5. Formal nominee shareholders and directors where the identity of the nominator is undisclosed.
6. Trusts and other legal arrangements which enable a separation of legal ownership and beneficial ownership of assets.
7. The use of intermediaries in forming legal persons, including professional intermediaries.



## Challenges in Identifying Beneficial Ownership

The obstacles listed above make it difficult to identify the beneficial owners of legal entities and legal arrangements. However, the challenge is exacerbated when different aspects of a corporate vehicle implicate numerous countries. Criminals often create, administer, control, own, and financially operate corporate vehicles from different countries, thereby preventing competent authorities in any one jurisdiction from obtaining all relevant information about a corporate vehicle.

## Criteria For Identifying the Beneficial Owners of an Entity

Beneficial Ownership of a legal entity is identified through three (3) main criteria—

1. The first criterion: the beneficial owner of the entity is the natural person who may control the legal person through ownership interests, either through holding a certain percentage of the ownership interests (threshold approach) or through exercising de facto control over the entity, whether alone or together with other shareholders (majority interest approach).
2. The second criterion: the beneficial owner is identified as the natural person(s) who controls the legal entity through other means. The natural person may control the entity by financing it or by having family relationships with other persons in control.
3. The third criterion: this is a residual criterion used when there is no natural person identified according to the other two (2) criteria. This criterion gives relevance to the natural persons exercising control of the entity through holding positions within the legal entity. The identified natural person is responsible for strategic decisions that fundamentally affect the business practices or exercise control over daily affairs through holding a senior management position.



## Measures to Prevent the Misuse of Corporate Vehicles

Regulated entities should take the following measures to accurately identify the beneficial owners of a legal person or legal arrangement and to prevent the misuse of their businesses:

- \* Assess the risks associated with legal persons and legal arrangements.
- \* Reasonable measures should be taken to obtain and hold up-to-date information on a company's beneficial ownership.
- \* Ongoing due diligence should be performed on the beneficial owners, shareholders and directors of a company.
- \* Regulated entities should ensure that all companies they conduct business with are registered companies. A certificate of incorporation should be requested to solidify this, along with documentation to evidence that the company is in good standing and still in existence.
- \* Service Providers should maintain company files for a minimum of five years, even after the company has ceased conducting business with the Service Provider or vice versa.
- \* Regulated entities should cooperate with competent authorities by providing accurate and timely information on the beneficial ownership of a legal person or legal arrangement.

### References:

- *The FATF Guidance on Transparency and Beneficial Ownership (2014)*
- *The FATF Recommendations (2012)*
- *Financial Services (Implementation of Industry Standards) Regulation (FSR), No. 51 of 2011.*