

Offshore company beneficial ownership registers and trusts: Key questions for CSPs

Service area / [Trusts and Private Wealth](#)

Location / [Group](#)

Date / [January 2019](#)

British Crown Dependencies (CDs) and Overseas Territories (OTs) do not presently have registers of trusts. However, they have introduced beneficial ownership registers for companies and certain other entities (**BO Registers**) in response to international initiatives to combat money laundering and terrorist financing. The information contained on the BO Registers and filed on the relevant government's central database is only available to designated competent authorities and is not presently available for public inspection.

Questions remain as to whether the information on the registers will become publicly available and, if so, on what conditions and to what extent.

Last year, the UK Government sought to impose the requirement for public beneficial ownership registers upon OTs (but not the CDs, for constitutional reasons) but has deferred the deadline for compliance from 31 December 2020 until 31 December 2023. Under the Fifth EU Anti-Money Laundering Directive (**AMLD**) EU members are also under a deadline to introduce public registers of trusts, although for trusts public access to beneficial ownership information may be subject to a "legitimate interest test". It is understood that CDs will implement public beneficial ownership registers when they become a global standard.

In this context, this article seeks to:

- outline the most relevant recent history;
- consider the question: Who are the beneficial owners of a company when a trustee of a trust directly or indirectly owns the company; and

- outline at a high level differences between the approaches of each of the UK, OTs and CDs as they relate to the above question.

The Exchange Notes Agreements

During April 2016, the UK introduced registers of persons with significant control in respect of companies and certain other entities (**PSC Register**). The information on the PSC Register is generally publicly available but a "person with significant control" (**PSC**) may have his or her details suppressed if able to show that he or she is at risk of intimidation or violence from being connected to the entity on the PSC Register.

Following the Fourth EU AMLD, and around the same time of the introduction of the PSC Register, the UK Government entered into separate exchange notes agreements with the CDs and OTs (**Exchange Notes**). In each of the Exchange Notes the UK Government and the relevant CD or OT Government mutually agreed among other things to by 30 June 2017:

- establish and maintain BO Registers in respect of companies and certain other legal entities established in their jurisdictions and that the beneficial ownership information be held on a secure central register maintained by the government; and
- grant the other government's designated law enforcement agencies an automatic right for the provision of unrestricted and timely (within 1 hour if urgent, at all times of day and on weekends and public holidays if required) beneficial ownership information for the purposes of law enforcement in connection with the prevention and detection of money laundering and terrorist financing.

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Company beneficial owner registers and trusts

Companies are often directly or indirectly owned by trustees of trusts. In those circumstances, a company that is in scope and not exempted from the requirements may be required to establish and maintain a BO Register and include in it the minimum required information and have that information filed on its government's central data base of beneficial ownership information. In order to identify the persons who will appear in the BO Register, the company (and its corporate service providers, **CSPs**) must apply the relevant definition of "beneficial owner" or, in the UK, the definition of "persons with significant control".

Who is a "beneficial owner"?

The general law concept of beneficial ownership focuses on a person's legally enforceable entitlement to benefit from property and not on control otherwise than through ownership. At its most simplest, a trust exists when the person with legal title to the property is not the beneficial owner, or the only beneficial owner of the property.

Internationally, more complex trusts (e.g. with different and wide classes of beneficiaries and power holders) are considered particularly vulnerable for misuse to facilitate money laundering and terrorist financing because the persons who may ultimately benefit from, or control the application of, the trust property may not always be readily identifiable.

Consequently, the Financial Action Task Force (**FATF**) and EU AMLDs' concept of "beneficial ownership" differs materially from general law concepts of beneficial ownership. FATF and the EU's Fourth AMLD definitions of "beneficial owner" operate to, if construed in their broadest possible terms, include a range of persons as beneficial owners- many who may not be able to benefit, or exercise control of, entities at all or in any meaningful way. The UK has, for its PSC Register, opted for the more accurate expression "persons with significant control"- perhaps recognising that the expression "beneficial owner" as used by FATF and in the EU AMLDs, may be a misnomer.

The FATF and the Fourth AMLD each apply a tiered approach to determine a company's beneficial owners by, in summary, providing that the beneficial owners are the:

- natural persons who directly or indirectly have, or exercise, control over the company through ownership interests;
- to the extent there are doubts about, or an inability to identify, persons in the above category, the natural persons who control the company "through other means"; or
- if no natural person is identified under either of the above categories, the natural persons who exercise control through positions held within the company.

Taking into account the second tier outlined above, determining whether a person controls a company by means other than through a direct or indirect ownership interest involves a factual assessment. The FATF Guide to Transparency and Beneficial Ownership acknowledges that trust's terms vary and encourages financial institutions to apply a risk-based approach when performing client due diligence- which involves considering the trust's terms and the factual context regarding who is exercising control or enjoying the trust property.

Given the above, the law and guidance in respect of BO Registers ought not be unduly prescriptive when specifying who "ultimately effectively controls" (or put another way ultimately "calls the shots of") a company for the purposes of the BO Registers. To the extent it is considered that specific definitions are necessary, perhaps they should err toward having a narrow scope. To do otherwise may require the costly and disproportionate exercise of identifying, and including on BO Registers, wide categories of persons who may ordinarily have little control or prospect of benefitting from the structure- such persons may ordinarily pose a low money laundering or terrorist financing risk.

Key questions

There are differences between the approaches of the UK and each of the OTs and CDs in respect of how the concept of beneficial ownership (or persons with significant control) is applied for the purposes of the BO Registers (such reference shall include the PSC Register). In circumstances where a trustee of a trust directly or indirectly owns a company, key questions that companies and their CSPs ought to consider under the laws of the applicable jurisdiction are:

- Is the company within the scope of the requirements?
- Is the company exempt from the requirements? e.g. depending on the jurisdiction, exemptions may exist for licensed entities, public companies, overseas companies, certain investment funds and "subsidiaries" of such companies
- If an exemption is available, does the company need to file any information with the regulator (e.g. as in Cayman Islands)
- Is the trustee and/or the trust an intermediate entity (often referred to as a "relevant legal entity" or "RLE") in the company's structure? e.g. if it were a natural person, would the trustee or trust satisfy the definition of "beneficial owner" in respect of the company?
- What is the definition of "beneficial owner" for the purpose of the jurisdiction's BO Register? Does the definition or requirements prescribe who is a beneficial owner of a company where a trustee of a trust directly or indirectly owns or controls the company through an ownership interest? The approach in the UK, Jersey and Guernsey appears to differ with that of the Isle of Man and the OTs in this regard to varying degrees.

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- Does the jurisdiction, as in Isle of Man, provide for a wide definition of “beneficial owner” and a narrower definition of “registerable beneficial owner”- the latter being directly relevant for the purposes of identifying who is included in the central register?
- If the definition of “beneficial owner” or “person with significant control” does expressly consider trusts, what classes of persons, if any, are expressly identified as being deemed to ultimately control the trust and the underlying company?
 - Is the settlor required to be included in the BO Register even if the settlor: is not a beneficiary; is expressly excluded from benefitting from the trust; and does not hold any powers under the trust’s terms? Note UK, Isle of Man and Guernsey guidance appears to explicitly provide that such settlors need not be included in their BO Registers- this outcome might be reached under the laws in respect of BO Registers in Bermuda and Cayman Islands as well.
 - Are there any particular powers that if held by a person, would mean that person is required to be included on the BO Register? If so, what are those powers (e.g. powers to appoint or remove trustees, amend the trust, distribute trust property, revoke the trust, make investments)? Does it make any difference if the powers are to direct, veto or are only exercisable on the occurrence of a condition? In particular, note the UK, Jersey and Guernsey explicitly set out powers that they appear to consider evidence a person having control over the trust and, by extension, its underlying company.
 - Do the provisions require inclusion on the BO Register of directors or individuals who are beneficial owners of a corporate trustee? Is the position different if the trustee is licensed in the jurisdiction, an overseas trustee or a private trust company?
 - Are fixed interest beneficiaries considered “beneficial owners”? Is the proportion of the trust fund in which the beneficiary has a fixed interest relevant? It appears to be relevant in the Isle of Man (i.e. for the purposes of determining registerable beneficial owners) and, it is submitted, most of the major OTs. However, Jersey and Guernsey appear to require fixed interest beneficiaries to be included as beneficial owners in their central registers irrespective of the size of the fixed interests.
 - What is the position in respect of discretionary beneficiaries? Does someone who has a mere hope of benefitting (a.k.a. a discretionary beneficiary) exercise “ultimate effective control”? Does the conclusion change in a year that a discretionary beneficiary receives a distribution? Jersey’s FAQ and the Isle of Man’s guidance explicitly indicate that persons ought not be included in the BO register only by reason of being discretionary beneficiaries. It is submitted that this conclusion is sensible and correct and is available in other jurisdictions also.
- In the absence of express provisions in the applicable beneficial ownership laws dealing with trusts (e.g. Bermuda, Isle of Man and to a lesser extent Cayman and BVI), what is the analysis to determine who is a trust’s and underlying company’s “beneficial owner”?
- Does guidance issued in respect of the beneficial ownership requirements have the force of law or not? If not, what weight should be given to the guidance? What should be the approach if guidance is inconsistent with the legislation? The UK guidance in respect of “persons with significant control” forms part of UK law. The guidance issued by governments in most of the CDs and OTs does not.
- How should provisions in the legislation, policy or guidance applicable in respect of BO Registers be construed, particularly if they are unclear, ambiguous or do not cover all scenarios? To what extent is the overriding purpose of the law or guidance and the context relevant?
- Should advice be obtained by companies and CSPs in respect of their obligations under the law applicable to BO Registers? Who should the advice be obtained from? Are the advice and instructions likely to be subject to legal advice privilege?

Conclusions

Notwithstanding honourable objectives, the FATF and the EU AMLDs may adopt an inherently complex, extensive and counter-intuitive approach to “beneficial ownership” that is often applied or misapplied to reach inaccurate conclusions regarding who “ultimately effectively controls” a trust and its underlying companies. A wide definition may be appropriate in the context of customer due diligence but not in the case of BO Registers. Perhaps as a consequence, the UK, each of the OTs and the CDs have reached different conclusions as to the interpretation of the FATF and AMLD definitions and how they ought to be applied for the purposes of the BO Registers.

Family offices, CSPs and their respective advisors might do well to avoid making broad assumptions of what constitutes a “beneficial owner” (or “person with significant control”) for the purposes of the BO Registers and avoid making assumptions that the definitions are identical in each jurisdiction. Families who have established, or are looking to establish, trust structures ought to be comforted to some extent that, while there are different analysis, “all and sundry” may not be required to be included in a company’s BO Register. Additionally, the UK Government appears to have acknowledged that it may be appropriate for beneficial ownership information in respect of trusts to remain private. If registers of beneficial ownership information are made public in the CDs and OTs, the conditions upon which the public may access the information (e.g. the content of any such “legitimate interest tests”) will be fundamentally important.

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