

# TRUST REPORTING SYSTEMS - AN INTERNATIONAL COMPARISON

This Policy Briefing examines the issue of how to best ensure that national authorities have adequate access to key information on trusts. The issue is pressing. First, several major nations, including the US, are reviewing how they can improve their systems in the wake of critical appraisals from the Financial Action Task Force (FATF), the body responsible for coordinating the development of anti-money laundering (AML) measures. Second, ensuring tax authorities have adequate access to information on trusts is an important issue as a growing number of international tax information exchange agreements (TIEAs) are signed under the aegis of the Organisation for Economic Co-operation and Development's (OECD's) Global Forum programme. We have therefore surveyed the findings on access to information on trusts of a representative sample of ten FATF peer reviews of jurisdictions where trusts are common.

## Our main findings are:

- The most widely used model for gathering information on trusts is via competent and well-regulated advisors who are required to pass that information on to the authorities. Generally this approach is highly effective.
- In the trusts context the important elements of a strong reporting regime are clear requirements on professional standards and competence with as few as possible gaps in regulatory supervision. The 'Statement of Best Practice for Trust and Company Service Providers' published by the Offshore Group of Banking Supervisors provides a good template here.
- There appears to be a significant disconnect between the risk-based approach used by most jurisdictions and the principles actually being applied in published peer reviews. More explicit consideration of cost benefit issues in the peer review process would strengthen the consistency of application of AML regulations in different jurisdictions.
- Concerns about preserving legitimate confidentiality are implicitly acknowledged by peer review teams as being an important issue in some key jurisdictions, but none of the reviews surveyed consider performance in this area.
- There is no case for developing new (and probably costly) approaches to collect the information needed on trusts for tax purposes – current AML systems are generally 'fit for purpose' in gathering the information needed under TIEAs.

## Summary Results and Conclusions

- Of the jurisdictions surveyed, only Cayman was judged 'compliant' on FATF Recommendation 34, the key recommendation relevant for trusts. Seven jurisdictions were judged largely or partially compliant and two (US and New Zealand) were judged non-compliant. This spread of results is similar to, or rather better than, similar surveys have found for other key FATF recommendations.
- In the trusts sector the standard model used internationally to fulfil AML obligations is a 'regulated advisor' approach (sometimes called the 'obligation on service providers' approach), giving competent authorities broad-ranging investigatory powers, but also regulating trust service providers and requiring them to collect key information.
- South Africa is unique in our survey in adopting a register approach (sometimes called 'up front disclosure'), requiring trusts to register with the authorities and provide key information as part of the registration process.
- Looking at the regulated advisor and register approaches, there is no evidence that, correctly applied, one is more effective than the other in providing key information to investigators. As FATF itself has noted, 'it matters less who maintains the required information... provided that the information on beneficial ownership exists, that it is complete and up-to-date and that it is available to competent authorities'.
- The US and New Zealand, take a third approach, labelled by FATF as 'primary reliance on investigative mechanisms', which grants strong investigatory powers to competent authorities, but with little or no regulatory requirement on trust service providers to collect key information. Both countries using this approach were found to be non-compliant.
- The main variation between jurisdictions using the standard 'regulated advisor' approach is in terms of where the regulatory boundaries are drawn and how consistently regulatory standards are applied. 'Trust service providers' vary widely from jurisdiction to jurisdiction, in some instances being specialist trust companies, in others a range of lawyers, accountants and other professionals. In all cases, the important elements of a strong AML regime are clear requirements on professional standards and competence with as few as possible gaps in regulatory supervision. The 'Statement of Best Practice for Trust and Company Service Providers'<sup>1</sup> published by the Offshore Group of Banking Supervisors provides a good template here.
- It would help strengthen the consistency of application of AML regulations if FATF explicitly considered cost/benefit issues as part of the peer review process. There is no explicit discussion of cost/benefit issues in any of the peer reviews in our survey. As a result jurisdictions are often criticised for deficient procedures in spite of clear evidence that, overall, their systems capture the great bulk of the required information. We note that researchers looking at other areas of the FATF review process have similarly argued that FATF ought to take cost/benefit issues in to consideration more explicitly.
- Another striking omission from all the peer reviews surveyed is the lack of any discussion of how well differing systems fulfil FATF's long-standing commitment to respecting individuals' legitimate expectations of confidentiality. This is an important issue for many trust service providers with respect to, for example, the register approach adopted in South Africa. Concerns about preserving confidentiality are also implicitly acknowledged by the FATF peer review teams as being an important issue in securing general acceptance of stronger AML measures in some key jurisdictions. It would help build confidence in AML measures if FATF explicitly considered confidentiality issues in its peer review process.

<sup>1</sup>'Trust and Company Service Providers – Statement of Best Practice', Offshore Group of Banking Supervisors, September 2002

- A frequent practical issue identified by FATF peer review teams is that while the necessary information on trusts is available to one enforcement agency, legislation to protect privacy and data protection requirements impose limits on the circumstances in which information can be shared with other agencies. This reinforces the case for ensuring FATF methodologies explicitly address public concerns about confidentiality, the integrity of systems and data security.
- The approaches developed at a national level to collecting AML information, combined with the strong investigatory powers most jurisdictions grant to tax authorities, appear to be generally 'fit for purpose' in terms of securing the information on trusts that jurisdictions need to fulfil their obligations under TIEAs. It would simply add to costs, with no clear benefit, to require jurisdictions to develop entirely new approaches to gather information for tax information exchange purposes.

**The Society of Trust and Estate Practitioners (STEP) is the worldwide professional body for practitioners in the fields of trusts and estates, executorship and related issues. STEP members help families secure their financial future and protect the interests of vulnerable relatives. With over 15,500 members around the world, STEP promotes the highest professional standards through education and training leading to widely respected professional qualifications.**

## Trust Reporting – An International Comparison

There is an important debate developing on how to ensure that national authorities have timely access to the key information they might need on a trust. In part, the debate has been sparked by the fact that a limited number of major jurisdictions, not least the US, have been judged to have inadequate procedures in place to give them the information they need under long-standing international agreements to combat money laundering and terrorist financing. In addition, however, national authorities now also have to ensure that they have adequate systems in place to gain access to information they might need under the rapidly growing number of international agreements to combat tax evasion. Some have suggested that the data collection systems that are appropriate to gather information for AML purposes might not be appropriate to gather information for tax purposes.

The OECD sponsored FATF was established in 1989 and spearheads 'the effort to adopt and implement measures designed to counter the use of the financial system by criminals'. It has 36 members comprising most of the world's major economies, with many other smaller economies having 'Associate' status through various regional bodies.

FATF has published '40 Key Recommendations' designed to provide a 'complete set of counter-measures against money laundering covering the criminal justice system and law enforcement, the financial system and its regulation, and international cooperation'.<sup>2</sup> These were last reviewed in 2004 and they have been joined by '9 Special Recommendations'<sup>3</sup> setting out 'the basic framework to detect, prevent and suppress the financing of terrorism and terrorist acts'. Members of the international community are expected to ensure that they comply with all '40+9' recommendations. Failure to do so potentially opens up the threat of sanctions.

In terms of trusts, categorised by the OECD as 'legal arrangements', the key recommendation is Recommendation 34, 'Transparency of legal persons and arrangements':

*'Countries should take measures to prevent the unlawful use of legal arrangements by money launderers. In particular, countries should ensure that there is adequate, accurate and timely information on express trusts<sup>4</sup>, including information on the settlor, trustee and beneficiaries that can be obtained or accessed in a timely fashion by competent authorities. Countries could consider measures to facilitate access to beneficial ownership and control information to financial institutions undertaking the requirements set out in Recommendation 5.'*<sup>5</sup>

Of course, differing jurisdictions have different legal systems, financial systems and institutions. Generally, therefore, FATF has taken a non-prescriptive approach and not dictated exactly how national jurisdictions collect information. Instead, the focus is on an assessment of how effective each jurisdiction's systems are. As FATF has noted, its role is to 'set minimum standards for action for countries to implement the detail according to their particular circumstances and constitutional frameworks'.<sup>6</sup>

## STEP's Survey

A crucial part of the FATF process is a peer review mechanism to audit the robustness of the regulations and legislation each jurisdiction has in place and assess how easy it is in practice to access the required information. Post-peer review assessments have now been published for most of the world's major economies (with the striking exception of France). Similar assessments have also been published for many smaller nations, typically after reviews by bodies such as the International Monetary Fund (IMF) or the regional FATFs.

STEP has therefore conducted a survey of the post-assessment reviews published for a representative group of ten jurisdictions where trusts are frequently found, with a particular focus on reported performance with respect to Recommendation 34 – i.e. the effectiveness with which information is gathered on trusts. Pages 10 and 11 provide a summary of the peer review findings in each case.

<sup>2</sup> [www.fatf-gafi.org/document/28/0,3343,en\\_32250379\\_32236920\\_33658140\\_1\\_1\\_1\\_1,00.html](http://www.fatf-gafi.org/document/28/0,3343,en_32250379_32236920_33658140_1_1_1_1,00.html)

<sup>3</sup> [www.fatf-gafi.org/document/9/0,3343,en\\_32250379\\_32236920\\_34032073\\_1\\_1\\_1\\_1,00.html](http://www.fatf-gafi.org/document/9/0,3343,en_32250379_32236920_34032073_1_1_1_1,00.html)

<sup>4</sup> An express trust is simply a trust where the settlor voluntarily and intentionally creates a trust over their assets, to take effect either immediately or on their death. It requires the signing of a trust instrument which will either be a will or a trust deed. Almost all trusts dealt with by professional trust advisors are express trusts.

<sup>5</sup> Recommendation 5 places an obligation on financial institutions and nonfinancial businesses and professions to prevent money laundering and terrorist financing by undertaking customer due diligence procedures and record-keeping.

<sup>6</sup> FATF 40 Recommendations, FATF/OECD, October 2003.

The jurisdictions covered in our survey are:

- Canada
- Cayman
- Ireland
- Isle of Man
- Jersey
- New Zealand
- Singapore
- South Africa
- United Kingdom
- United States of America

These ten jurisdictions are typically so-called common-law jurisdictions (or at least have elements of the common-law tradition). Australia is perhaps the major omission in terms of countries with widespread use of trusts, but the last peer review report on Australia was published in 2005 and there have been major subsequent changes in Australian procedures. Our survey nevertheless covers a representative mix of both onshore (i.e. where most of the trusts are established by domestic settlors) and offshore (i.e. where most of the trusts are established by settlors living elsewhere) jurisdictions.

Just one jurisdiction (Cayman) was judged to be 'compliant' with OECD Recommendation 34. Seven jurisdictions were found to be 'largely compliant' or 'partially compliant' and two, the US and New Zealand, were judged 'non-compliant'. The fact that the majority of the jurisdictions in our survey focused on Recommendation 34 were found to be 'largely' or 'partially' compliant rather than simply 'compliant' should not perhaps come as surprise. Other surveys of the results of FATF peer reviews for other key recommendations have found similar results with relatively few or in some cases no jurisdiction being found compliant.<sup>7</sup>

## Trusts – the basics

Trusts are, in principle, a very simple concept. A trust is a private legal arrangement where the ownership of someone's assets (which might include property, shares or cash) is transferred to someone else (usually, in practice, not just one person, but a small group of people or a trust company) to look after and use to benefit a third person (or group of people).

The person giving the assets is usually known as the 'settlor' in the UK or a 'grantor' in the US (but can also sometimes be called the 'trustor' or the 'creator'). The people asked to look after the assets are called the 'trustees' and the person who benefits from the trust is called the 'beneficiary' or 'beneficial owner'. The details of the arrangement are usually laid out in a 'trust deed' and the assets placed in the trust are the 'trust fund'.

One common misconception is that the assets in the trust fund are legally owned by the trust. In fact, a trust, unlike a company, cannot own assets. Instead the trustees are the legal owners of the assets, but the trustees must at all times put the interest of the beneficiaries above their own. Thus, the settlor of a trust can be a trustee, but they must still act in the interests of the beneficiary, not themselves. There is another common misconception that trusts can only function in states where it is possible to separate the legal ownership and beneficial ownership in the trust fund. In fact, while many jurisdictions operate trusts using this mechanism, others, such as South Africa, Italy and Scotland do not.

Trusts can take effect during the lifetime of the settlor or shortly after their death. There is also a wide range of different types of trust depending, for example, on how the benefits of the trust are to be distributed. The basic principle that a trust contains assets owned by someone for the benefit of someone else nevertheless remains true in all forms of trust.

<sup>7</sup> For example, a survey of how jurisdictions were judged to have performed relative to Recommendation 5 (focused on customer due diligence procedures) found that no jurisdiction had been found 'compliant', three had been judged 'largely compliant', 21 'partially compliant' and five 'non-compliant'. See *Anti-Money Laundering Magazine*, May 2010.

## Survey Findings in Detail

### 1. Gathering information on trusts – three broad approaches

The standard model that has evolved internationally to fulfil obligations under Recommendation 34 is a 'regulated advisor' approach. This model, sometimes referred to by FATF as 'obligation on service providers'<sup>8</sup>, gives prime responsibility for obtaining, verifying and retaining records on settlors, trustees and beneficiaries to trust advisors and administrators (i.e. service providers). A key requirement of successful implementation of such an approach is that there are strong regulatory or other powers to ensure compliance. The competent authorities must also have adequate investigatory powers to obtain any information they may need promptly from service providers. This is the basic model followed in seven of the ten jurisdictions surveyed.

A few jurisdictions rely on granting investigatory powers to competent authorities but with little or no regulatory oversight or requirement on trust service providers to collect key information. This approach generally produced unsatisfactory results. Both the US and New Zealand rely on this approach (termed by FATF as 'primary reliance on investigative mechanism'<sup>9</sup>) and both were found by the OECD to be non-compliant. We understand that there is currently an active review underway in both jurisdictions to consider how best to improve the collection of key information by trust service providers (typically lawyers in this context).

South Africa is unique among those jurisdictions in our survey in adopting a register approach. Trusts are required to register with the authorities and provide key information as part of the registration process (termed 'up-front disclosure' by FATF<sup>10</sup>). South Africa was found to be partially compliant, with reservations expressed about the reliability of the data collected via the register.

### 2. Which approach is best?

When considering the regulated advisor and register approaches there is no evidence that, correctly applied, one approach is more effective than the other in providing key information to investigators. Cayman was

found to be compliant by its peer review. Several other jurisdictions using the regulated advisor approach were found to be 'largely compliant', as was South Africa using a register approach. As FATF has noted in a wider context, 'it matters less who maintains the required information... provided that the information on beneficial ownership exists, that it is complete and up-to-date and that it is available to competent authorities'<sup>11</sup>.

The key problem identified in the FATF peer reviews of those jurisdictions relying on the investigatory approach was that without adequate regulation of trust service providers there were doubts that complete and up-to-date information was available to the competent authorities.

### 3. Ensuring effective regulation

The key issue in ensuring the effectiveness of the regulatory approach is correctly defining the boundaries of those who are to be regulated and required to collect and retain key information. Moreover, the precise definition of those falling within the regulatory boundary is one of the key points of variability across those jurisdictions employing the regulatory approach. In reality, however, this variability often simply reflects the sharp differences in 'trust service providers' from one jurisdiction to another. In many offshore jurisdictions it is the norm for trust companies to be the main service providers and play the lead role in gathering information on trusts. In many onshore jurisdictions the equivalent role is usually played by lawyers, notaries and other professionals. Banks meanwhile can also play a key role in some jurisdictions. The important point, as the Offshore Group of Banking Supervisors (an organisation instigated by the Basel group of banking supervisors) has argued, is that whatever the institutional arrangements surrounding trust services, arrangements should be in place to ensure that the sector is effectively regulated<sup>12</sup>.

A working party of the Offshore Group of Banking Supervisors (on which FATF, IMF and OECD were represented) has published a 'Statement of Best Practice'<sup>13</sup> for trust and company service providers, highlighting the need, for example, to ensure that trust service providers have 'relevant and appropriate levels of

<sup>8</sup> 'Options for Obtaining Beneficial Ownership and Control Information', Steering Group on Corporate Governance, OECD/FATF, September 2002

<sup>9</sup> Ibid

<sup>10</sup> Ibid

<sup>11</sup> 'The Misuse of Corporate Vehicles, Including Trust and Company Service Providers', FATF, October 2006, pg 17

<sup>12</sup> 'Securing effective exchange of information and supervision in respect of trust and company service providers', Offshore Group of Banking Supervisors, December 2004

<sup>13</sup> 'Trust and Company Service Providers – Statement of Best Practice', Offshore Group of Banking Supervisors, September 2002

competence/capability' and are fit and proper persons. Very similar criteria were put forward by the OECD Steering Group on Corporate Governance<sup>14</sup>, including ensuring that 'staff were properly qualified, for example in terms of suitable experience, exams, licenses and training from well regarded outside sources' and ensuring that service providers are fit and proper. The great majority of trusts in those jurisdictions in our survey relying on the regulatory approach to information capture have trust service providers who generally meet such criteria.

Where there are gaps, they are usually of little practical consequence and it is clear that most of those jurisdictions judged 'largely' or 'partially' compliant by FATF had regulatory boundaries, which in practice captured the great majority of trusts, but failed to regulate certain groups playing only a minor, if any, role in the trust business. Jersey, for example, was judged 'largely compliant' rather than 'compliant' but at the same time it was recognised 'the vast majority of trust arrangements' were in practice covered by Jersey's processes. Similarly the UK, judged to be 'partially compliant', was found to have poor monitoring of 'providers of trust services who are not lawyers or accountants that are members of professional bodies'. STEP has itself flagged this loophole<sup>15</sup> to the UK authorities, although the number of express trusts created in the UK without using a member of one of the main professional bodies as a service provider is likely to be minimal.

In practice, the exclusion of certain groups from regulation usually reflects the adoption of a 'risk-based' approach, with explicit or implicit assessments that the costs of regulating some groups will heavily outweigh any likely benefits. We will return to this issue in greater detail below.

#### 4. Ensuring an effective register

The key issue (from an anti-money laundering point of view) in ensuring the effectiveness of the register approach is rigorously auditing the information provided to the register and ensuring it is up to date. While South Africa was judged 'partially compliant' under the peer review process, it was noted that there was no means of

checking if the information supplied to the register was accurate or up to date.

It seems likely that the costs of ensuring a comprehensive regular audit of registered information would be significant. It is also worth noting that in spite of the glaring lack of any checking procedures around the information supplied to the trust register, the FATF peer review highlights that the South African authorities have seen few if any cases of malpractice connected with trusts. This adds further weight to the view that the costs of any audit process will probably outweigh the benefits.

Another issue that a public trust register on the South African model inevitably raises is how to protect individuals' legitimate expectations of confidentiality in their financial affairs. This has been a significant issue whenever the possibility of using a trust register model has been considered in other jurisdictions and reports suggest that this is, for example, a live debate currently in New Zealand.<sup>16</sup> We look at the issues raised here in greater detail below.

#### 5. Ensuring the cost effectiveness of procedures

It is clear that one of the main issues determining where jurisdictions draw regulatory boundaries or limit requirements to audit information is the likely cost relative to the benefits. Most governments, practitioners and professional bodies (including STEP) support a risk-based approach to regulation, where the risk posed for various activities is balanced against the cost incurred in regulation. Such an approach has been endorsed both by the Offshore Group of Banking Supervisors<sup>17</sup> and by FATF<sup>18</sup> as being beneficial in allowing a more focused use of resources.

In that context it is very surprising that there is no explicit discussion in any of the FATF peer review reports surveyed of the cost/benefit issues surrounding AML procedures or the effectiveness or otherwise of the risk based approach employed by each jurisdiction. For example, most practitioners would argue that express trusts formed on the death of an individual (testamentary or will trusts) are very low risk, particularly if they include few overseas assets. Such trusts are very common in several major jurisdictions,

<sup>15</sup> 'Response to HMT Review of Money Laundering Regulations', December 2009 [www.step.org/resources/policy\\_and\\_technical/uk\\_policy/2009/response\\_to\\_hmt\\_review.aspx](http://www.step.org/resources/policy_and_technical/uk_policy/2009/response_to_hmt_review.aspx)

<sup>16</sup> [www.stepjournal.org/news/news/new\\_zealand\\_prepares\\_trust\\_law.aspx](http://www.stepjournal.org/news/news/new_zealand_prepares_trust_law.aspx)

<sup>17</sup> 'Trust and Company Service Providers – Statement of Best Practice', Offshore Group of Banking Supervisors, September 2002

<sup>18</sup> 'Risk Based Approach Guidance for Trust and Company Service Providers', FATF June 2008

but not distinguished in any of the peer reviews studied. Similarly the UK was criticised in its peer review appraisal for an approach that specifically allows trust service providers to evaluate the amount of data they need to hold in the light of a risk assessment, although it was acknowledged that law enforcement and financial investigators both considered the arrangements adequate to probe the suspected criminal use of trust.

There appears to be a significant 'disconnect' between the risk-based approach used by most jurisdictions and recognised by authoritative international bodies (including FATF itself) and the principles actually being applied in the published peer reviews. Other studies have reached similar conclusions. Sharman and Mistry, for example, in a Commonwealth Secretariat paper argued that, based on the peer reviews published, FATF's approach appeared 'to be based on the presumption that the overriding benefit of such regulations is so obvious... that almost any level of cost incurred by anyone anywhere in applying them is acceptable and should not be questioned'.<sup>19</sup> They went on to note the growing body of evidence that in fact the cost of AML regulation is very high and the benefits relatively modest.

Given the great weight many jurisdictions, both large and small, place on ensuring that regulatory burdens pass clear cost/benefit tests and are proportionate to the risks, it appears to be a major deficiency that there is little evidence of these principles being applied in the FATF peer review methodology. It would certainly help strengthen the international consistency of the application of AML regulations if FATF put greater weight on cost/benefit issues in its recommendations.

## 6. Ensuring legitimate confidentiality

The OECD/FATF has long acknowledged that 'individuals and corporate vehicles'<sup>20</sup> have legitimate expectations of confidentiality<sup>21</sup>. This issue, however, is not discussed in the trust context in any of the peer reviews mentioned. This omission is particularly striking in the case of South Africa, where the public have access to all files held on the trust register. This situation has prompted acute concerns in some quarters that the South African system denies families the right to confidentiality in their personal financial affairs, but the peer review report

does not appear to have considered the issue at all.

It seems clear that the failure to address concerns about preserving legitimate confidentiality is damaging in as much as it is at least one of the factors making it harder to ensure consistent compliance internationally with Recommendation 34. In the case of the US in particular, the FATF peer review notes that the failure to require trustees or others to collect key information on trusts reflects the strong view that 'in the US a trust is essentially a contractual agreement between two private persons'<sup>22</sup>. Indeed in practice trusts in the US and elsewhere are normally agreements drawn up within families, not simply 'private persons', making the concern for proper confidentiality all the more understandable.

A more explicit recognition in the OECD peer review process of the social and political context of trusts in differing jurisdictions would help address the political sensitivity in many cases of regulating or gathering information on what are regarded as private family arrangements. In particular, if FATF attached greater weight to its commitment to legitimate confidentiality in its published peer review methodology, it might well prove easier to gain wide support in key jurisdictions for its recommendations.

## 7. Ensuring effective access to information by competent authorities

One of the major issues flagged in several of the peer reviews surveyed is that while the key information is available for trusts, it is not available to the full range of competent authorities. This is particularly true of some onshore jurisdictions where trusts are subject to tax, since invariably in such cases the domestic tax authorities have robust systems in place to ensure compliance. There may, however, be legal constraints on who the domestic tax authorities can share such information with.

Thus in the US, where over 3 million trusts filed tax returns and collectively paid USD4.6 billion of taxes in 2008,<sup>23</sup> the FATF peer review concludes both that investigatory powers are 'generally sound and widely used' and that 'the IRS has access to beneficial owner

<sup>19</sup> Considering the Consequences: The Development Implications of Initiatives on Taxation, Anti-money Laundering and Combating the Financing of Terrorism', Commonwealth Secretariat, J C Sharman & Percy S Mistry, 2008

<sup>20</sup> The OECD has historically often, and erroneously, included trusts in lists of 'corporate entities', see for example, 'Options for Obtaining Beneficial Ownership and Control Information', OECD, 2002, page 3, para 1.

<sup>21</sup> 'The Misuse of Corporate Vehicles, Including Trust and Company Service Providers', FATF, October 2006, pg 17

<sup>22</sup> 'Summary of the third mutual evaluation report on anti-money laundering and combating the financing of terrorism – Unites States of America', FATF-GAFI, June 2006

<sup>23</sup> See [www.irs.gov/taxstats/indtaxstats/article/0,,id=96425,00.html](http://www.irs.gov/taxstats/indtaxstats/article/0,,id=96425,00.html)

information'. The problem identified is instead that, without an order from the courts, the IRS can only share this information with law enforcement agencies 'in the course on an on-going investigation that has criminal tax implications'.<sup>24</sup>

Similarly, in Canada the FATF peer review found that while the CRA had key information on trusts from tax returns, there were strict limitations resulting from confidentiality provisions within the Income Tax Act on the circumstances in which the CRA could share this information with other enforcement agencies.

Examples such as these highlight that the practical problems in many jurisdictions often relate less to ensuring that the required information is provided by trust service providers, and more to ensuring that the data can be accessed and shared effectively by the various authorities and enforcement agencies in ways that preserve public confidence in the integrity of the system and data security. This reinforces the case for ensuring that FATF methodology pays more explicit attention to issues such as ensuring legitimate rights to confidentiality.

## 8. Ensuring adequate information is available for tax information exchange purposes

It is clear from our survey that most jurisdictions where trusts are common have invested heavily in developing systems to collect key information on trusts for anti-money laundering purposes. The focus of the international community has, however, broadened from fighting money laundering to also fighting tax evasion. Much of the work here is being done by another OECD body, the Global Forum on Transparency and Exchange of Information for Tax Purposes, using processes very similar to FATF with internationally agreed standards, encapsulated in this case in TIEAs, with effectiveness overseen via a peer review process.

The first wave of Global Forum peer reviews has recently been published and it is natural to ask if the same systems developed for gathering information to fight money laundering are also fit for purpose in terms of fighting tax evasion. The key requirement (listed under 'Availability of Information – Essential Elements') in the case of trusts within the Global Forum peer review

process is that:

*'Jurisdictions should take all reasonable measures to ensure that information is available to their competent authorities that identifies the settlor, trustee beneficiaries of express trusts (i) created under the laws of that jurisdiction, (ii) administered in that jurisdiction, or (iii) in respect of which a trustee is resident in that jurisdiction.'*<sup>25</sup>

This is essentially the same information as jurisdictions are required to ensure is available under FATF Recommendation 34 (see earlier) and the close relationship with the FATF process is recognised by the Global Forum, which notes:

*'It is important to recognise that efforts to improve on transparency and effective exchange of information for tax purposes take place in a broader context. This is particularly the case with regard to the work of FATF relating to issues of domestic institutional measures to provide information, mutual legal assistance, and transparency with regard to information about ownership and the identity of owners and other stakeholders. These are key components of the foreseeably relevant information that jurisdictions must be able to provide under the Global Forum standards. FATF concepts may provide useful guidance and be taken into consideration to interpret and apply the standards where appropriate.'*<sup>26</sup>

Generally, it seems clear that the same systems developed to collect key information on trusts for money laundering purposes will be capable of providing the required information for tax information and exchange purposes. It would clearly be costly and unnecessary to require the development of entirely new systems to capture essentially the same information on trusts for tax purposes as is already captured for AML purposes.

<sup>24</sup> 'Summary of the third mutual evaluation report on anti-money laundering and combating the financing of terrorism – United States of America', FATF-GAFI, June 2006

<sup>25</sup> 'Terms of reference to monitor and review progress towards transparency and exchange of information for tax purposes', OECD – Global Forum on Transparency and Exchange of Information for Tax Purposes, 2010.

<sup>26</sup> Ibid

<b>Country</b> <b>Date of last review</b> <b>FATF Rating</b>	<b>Broad approach</b>	<b>Key findings</b>	<b>Additional Comments</b>
<b>Canada</b> Feb 2008 'Partially Compliant'	Investigative powers using trustee tax filings and information from trustees and trust companies.	'While the investigative powers are generally sound and widely used, there is minimal information ... concerning the beneficial owners of trusts and fiducie in Quebec.'	'Agencies that receive information on legal arrangements have significant limitations on their ability to disclose information.'
<b>Cayman</b> Nov 2007 'Compliant'	Investigative approach using information obtained from regulated trust service providers.	'Information on trusts maintained by licensed trust service providers can be readily accessed by ... the regulatory and law enforcement authorities.'	'Provision of trust services is a regulated activity ... subject to CDD, record keeping and other requirements ... Specific guidance is also provided for trust service providers ... regarding the required due diligence on settlors, settled assets and beneficiaries.'
<b>Ireland</b> Feb 2006 'Partially compliant'	Investigative approach, application to High Court necessary to obtain identity of trustees.	'Investigative authorities should be given greater powers to obtain information.'	'Often it will be difficult to identify trustees and beneficial owners ... if the beneficial ownership or control structure is complicated.'
<b>Isle of Man</b> Sep 2009 'Largely compliant'	Investigative approach with licensing of most trust service providers.	'The authorities should seek to put in place measures to ensure (adequate information) is available for legal arrangements administered by a trustee who is not covered by the licensing requirements.'	'The most notable exempted regulated activity is acting, by way of business, as a trustee for less than ten legal arrangements.'
<b>Jersey</b> Aug 2009 'Largely compliant'	Investigative approach with 'a wide range of powers to access any information and documentation held by registered Trust Company Businesses.'	'While the vast majority of trust arrangements are covered, the authorities should further seek to put in place measures (covering those that are not).'	'The vast majority of trustees and all professional trustees are covered' by the registration requirements.
<b>New Zealand</b> Nov 2009 'Non compliant'	Investigative approach, but no legal obligation on settlor, trustee, beneficiaries or trust service provider to collect or keep key information.	'New Zealand should develop requirements to ensure that information ... is readily available ... such measures could include, for example, requiring trustees to maintain full information on the trust's beneficial ownership and control.'	'It is not known how many express trusts exist in New Zealand, but they are extremely common' ... and 'are regularly used as family estate planning vehicles.'

<b>Country</b> <b>Date of last review</b> <b>FATF Rating</b>	<b>Broad approach</b>	<b>Key findings</b>	<b>Additional Comments</b>
<b>Singapore</b> Feb 2008 'Partially Compliant'	Investigative approach using information obtained from regulated businesses.	'While competent authorities have power to access information on beneficial ownership in trusts ... only trusts administered by trustee companies and trust company service providers are obliged to maintain such information.'	'Most complex trust arrangements in Singapore are established by using a Trust Company or a lawyer'
<b>South Africa</b> March 2009 'Partially Compliant'	Investigative approach supplemented by a national trust registration system.	'Trust register is a valuable source of information ... however steps should be taken to ensure that the information held in the Registry is accurate.'	'No CDD is conducted on the founder of a trust.' 'The Registry does not regulate trusts: it is an office of record ... an auditor's statement, for instance, is not reviewed for suspicious or anomalous activity.' 'To date, the Masters (of the High Court, in charge of the registry) have never had a suspicion of criminal activity' with respect to trusts.
<b>UK</b> Nov 2009 'Partially compliant'	Investigative approach using information obtained from regulated businesses and information held by tax authorities.	'While the investigative powers are generally sound ... there is no standardisation of beneficial ownership data held ... (which varies with) the firm's own assessment of risk ... providers of trust services who are not lawyers or accountants that are members of professional bodies are not monitored.'	'Current and prospective investigatory powers are generally considered by law enforcement and financial investigators to be adequate to probe the suspected criminal use of trusts.'
<b>United States</b> July 2006 'Non compliant'	Investigative approach, but information is only available from tax authorities in cases with criminal tax implications.	'While the investigatory powers are generally sound and widely used, there is minimal information concerning the beneficial owners of trusts.'	'The IRS retains oversight of income generated by trust through federal tax laws. Virtually all US state jurisdictions recognizing trust have purposely chosen not to regulate trusts ... because in the US a trust is essentially a contractual agreement between two private persons.'

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First Published in Great Britain in 2010

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