

Full Draft Amendment Text of R.25 and INR.25

Note on formatting:

The current text of the Recommendation and Interpretive Note are shown in normal black text. All proposed amendments are coloured in red, with additions underlined and ~~deletions struck-out~~. Open Ownership's proposed amendments are marked in blue, with additions underlined and ~~deletions struck-out~~.

Recommendation 25. Transparency and beneficial ownership of legal arrangements

Countries should ~~assess the risks of take measures to prevent~~ the misuse of legal arrangements for money laundering or terrorist financing and take measures to prevent their misuse. In particular, countries should ensure that there is adequate, accurate and ~~up-to-date timely~~ up-to-date information on express trusts and other similar legal arrangements, including information on ~~the settlor(s), trustee(s) and beneficiary(ies)~~ all parties to a trust and all any other natural person(s) exercising ultimate effective control over a trust, or benefiting from a trust, that can be obtained or accessed ~~in a timely fashion efficiently and in a timely manner~~ by competent authorities. Countries should consider ~~measures to facilitate~~ access to beneficial ownership and control information by financial institutions and DNFBPs undertaking the requirements set out in Recommendations 10 and 22.

Interpretive Note to Recommendation 25 (Transparency and Beneficial Ownership of Legal Arrangements)

1. Countries should require trustees of any express trust ~~governed under their law, and persons holding an equivalent position in a similar legal arrangement, that are residents in their country or that administer any express trusts or similar legal arrangements in their country (whether governed under their law or foreign law) and every express trust governed under their law~~, to obtain and hold adequate, accurate and ~~current up-to-date~~ up-to-date beneficial ownership information¹ regarding the trust or other similar legal arrangements. This should include information on the identity of: (i) the settlor(s); (ii) the trustee(s) and any other administrator(s) of the trust; (iii) the protector(s) (if any); (iv) ~~the each direct or indirect beneficiaryies or and, where applicable, the class(es) of beneficiaries² or objects of a power;~~ any other natural person(s) exercising ultimate effective control over the trust or benefiting from the trust (including through a legal person or arrangement, or through a nominee arrangement).

Similar legal arrangements cover any arrangement which has a structure or functions similar to trusts. This includes allowing for the separation between the beneficial owner

¹ Beneficial ownership information for legal arrangements is the information referred to in the interpretive note to Recommendation 10, paragraph 5(b)(ii).

² Where there are no ascertainable beneficiaries at the time of setting up the trust, the trustee should obtain and hold information on the class of beneficiaries and its characteristics, or object of a power. Following a risk based approach, countries may decide that it is not necessary to identify the individual beneficiaries of certain charitable or statutory permitted non-charitable trusts.

Commented [OO1]: It is critical to explicitly include nominee arrangements. If any party to a trust is a legal person, the provisions in the following paragraph (“Where the parties to the trusts or other similar legal arrangements are legal persons or arrangements, countries should require trustees and persons holding an equivalent position in a similar legal arrangement to also obtain and hold adequate, accurate, and up-to-date basic and beneficial ownership information of the legal persons or arrangements.”) will only cover the beneficial ownership of the legal person, and not the beneficial ownership of the trust (i.e. information about their nominator).

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. One party may have more than one role in the arrangement. For a similar legal arrangement, this should include persons holding equivalent positions. Where the parties to the trusts or other similar legal arrangements are legal persons or arrangements, countries should require trustees and persons holding an equivalent position in a similar legal arrangement to also obtain and hold adequate, accurate, and up-to-date basic and beneficial ownership information of the legal persons or arrangements. Countries should also require trustees and persons holding an equivalent position in a similar legal arrangement that are residents in their country or of trusts administered in their country of any trust governed under their law to hold basic information on other regulated agents of, and service providers to, the trust and similar legal arrangements, including investment advisors or managers, accountants, and tax advisors.

1*. Countries with express trusts and other similar legal arrangements governed under their law should have mechanisms that:

- (a) identify the different types, forms and basic features of express trusts and/or other similar legal arrangements.
- (b) identify and describe the processes for: (i) the setting up of those legal arrangements; and (ii) the obtaining of basic³ and beneficial ownership information;
- (c) make the above information referred to in (a) and (b) publicly available.

1**. Countries should assess the money laundering and terrorist financing risks associated with different types of trusts and other similar legal arrangements:

- (a) governed under their law;
- (b) which are administered in their country or for which the trustee or equivalent resides in their country; and
- (c) types of foreign legal arrangements that have sufficient links⁴ with their country
- (d) which have relevant assets, including real estate, bank accounts and vehicles, in the country; and
- (e) which have a party to the trust or service provider in their country

and take appropriate steps to manage and mitigate the risks that they identify⁵.

2. All countries should take measures to ensure that require trustees or persons holding equivalent positions in similar legal arrangements to disclose their status to financial institutions and DNFBPs when interacting with them in their function, as a trustee, including when forming a business relationship (such as opening bank accounts,

³ In relation to a legal arrangement, basic information means the identifier-identifying information of the legal arrangement, including trust (e.g. the name, the unique identifier such as a Legal Entity Identifier (LEI), tax identification number or equivalent, where this exists), the trust deed (or equivalent), the country under whose law the trust is governed, the country of residence of the trustee/equivalent or of the place-country from where the legal arrangement is administered, and any agents or service providers to the trust.

⁴ Countries may determine what is considered a sufficient link on the basis of risk. Examples of sufficiency tests may include, but are not limited to, when the trust/similar legal arrangement or a trustee or a person holding an equivalent position in a similar legal arrangement has significant and ongoing business relations with financial institutions or DNFBPs, has significant real estate/other local investment, or is has a tax resident implication (e.g. by virtue of the beneficiary being resident in the country), in the country.

⁵ This could be done through national and/or supranational measures. These could include requiring beneficial ownership information on some types of foreign legal arrangements to be held as set out under paragraph 3.

Commented [OO2]: Current footnote 3 should be moved up here to clarify what constitutes basic information when it is first mentioned.

purchasing real estate, or acquiring assets) or carrying out an occasional transactions above the threshold. Professional trustees should be regulated and supervised under anti-money laundering regulations, which countries could be achieved through licensing trustees. Trustees or persons holding equivalent positions in similar legal arrangements should cooperate to the fullest extent possible with, and not be prevented by law or enforceable means from providing, competent authorities with any necessary information relating to the trust or other similar legal arrangements⁶. Countries should also ensure that trustees or persons holding equivalent positions in similar legal arrangements should not be prevented by law or enforceable means from, or from providing financial institutions and DNFBPs, upon request, with information on the beneficial ownership and the assets of the trust or legal arrangement to be held or managed under the terms of the business relationship.

3. In order to ensure that adequate, accurate and up-to-date information on the basic and beneficial ownership of the trusts or other similar legal arrangements, trustees and trust assets, is accessible efficiently and in a timely manner by competent authorities, other than trustees or persons holding an equivalent position in a similar legal arrangement, on the basis of risk, context and materiality, countries should ensure a public authority or body collects and holds information on the beneficial ownership of trusts or similar arrangements in a central registry. Countries should use one or more consider using any of the following complementary. Countries are encouraged to ensure that other relevant authorities, persons and entities hold information on all trusts with which they have a relationship. Potential sources of information as necessary on trusts, trustees, and trust assets are:

(a) Registries (e.g. a central registry of trusts or trust assets), or asset registries for land, property, vehicles, shares or other assets

(a) A public authority or body holding information on the beneficial ownership of trusts or other similar arrangements (e.g. in a central registry of trusts; or in asset registries for land, property, vehicles, shares or other assets that hold information on the beneficial ownership of trusts and other similar legal arrangements which own such assets). Information need not be held by a single body only.⁷

(b) Other competent authorities that hold or obtain information on trusts/similar legal arrangements and trustees/their equivalents (e.g. tax authorities which collect information on assets and income relating to trusts and other similar legal arrangements).

(c) Other agents and/or service providers including trust and company service providers, to the trust, including investment advisors or managers, accountants, or lawyers, or financial institutions, or trust and company service providers.

3* Countries should have mechanisms that ensure that information on trusts and other similar legal arrangements, including information provided in accordance with

⁶ Domestic competent authorities or the relevant competent authorities of another country pursuant to an appropriate international cooperation request.

⁷ A body could record beneficial ownership information alongside other information (e.g. tax information), or the source of information could take the form of multiple registries (e.g. for provinces or districts, for sectors, or for specific types of legal arrangements), or of a private body entrusted with this task by the public authority.

paragraphs 2 and 3, is adequate, accurate and up-to-date⁸. In the context of legal arrangements:

Adequate information is information that is sufficient to unambiguously identify the natural persons who are the beneficial owner(s), and their role in the trust⁹, information that is sufficient to identify the individual providing the information (if different) and contact information for both.

Accurate information is information, which has been verified to confirm its accuracy by verifying the identity and status of the beneficial owner using reliable documents, data or information. The extent of verification measures may vary according to the specific level of risk may warrant more extensive verification.

Up-to-date information is information which is as current and up-to-date as possible, and is updated within a reasonable short and defined period following any change, and an annual confirmation that information held is still correct.

4. ~~Countries should ensure that~~ Competent authorities, and in particular law enforcement authorities, ~~and FIUs and DNFBS,~~ should have rapid and efficient access to basic and beneficial ownership information of legal arrangements, and all the powers necessary to obtain timely access to the information held by trustees, persons holding equivalent positions in similar legal arrangements, and other parties, in particular information held by financial institutions and DNFBS on: (a) the basic and beneficial ownership of the legal arrangement; (b) ~~the residence of the trustees and their equivalents;~~ and (c) any assets held or managed by the legal arrangement, or by the financial institutions or DNFBS, in relation to any trustees or their equivalents with which they have a business relationship, or for which they undertake an occasional transaction.

5. Professional trustees and persons holding equivalent positions in similar legal arrangements should be required to maintain the information referred to in paragraph 1 for at least five years after their involvement with the trust or similar legal arrangement ceases. Countries are encouraged to require non-professional trustees and the other authorities, persons and entities mentioned in paragraph 3 above to maintain the information for at least five years.

6. Countries should require that any information held pursuant to paragraph 1 above should be kept accurate and be as current and up-to-date as possible, and the information should be updated within a reasonable period following any change. This can be achieved by requiring the registration of information as a prerequisite for legal validity. For example, requiring the registration of the legal arrangement for it to be legally valid, and for beneficial ownership information of beneficiaries to be registered before being able to benefit from the legal arrangement.

7. Countries should ~~consider establish~~ measures to facilitate rapid and efficient access to any basic and beneficial ownership trust information of legal arrangements on trusts that is held by the other authorities, persons and entities referred to in paragraph 3, by financial institutions and DNFBS undertaking the requirements set out in Recommendations 10 and 22.

⁸ For beneficiary(ies) of trusts/similar legal arrangement that are designated by characteristics or by class, trustees/equivalent are not expected to obtain adequate and accurate information until the person becomes entitled as beneficiary at the time of the payout or when the beneficiary intends to exercise vested rights.

⁹ Settlor(s), trustee(s), protector(s) (if any), beneficiary(ies) or class of beneficiaries, and any other person exercising ultimate effective control over the trusts. For a similar legal arrangement, this should include persons holding equivalent positions. Where the trustee and any other party to the legal arrangement is a legal person, the beneficial owner of that legal person should be identified. To help disambiguate between individuals, countries should consider using clear unique identifiers, such as national identity numbers.

Commented [OO3]: This information is included in basic information on trusts as defined in footnote 3.

8. Countries should facilitate access to additional data users that contribute to achieving AML/CFT aims, including civil society and investigative journalists. Countries should consider doing so by making the information available to the general public, in conformance with domestic privacy and data protection legislation.

89. In the context of the Recommendation, countries are not required to give legal recognition to trusts. Countries need not include the requirements of paragraphs 1, 2, 5, and 6 and 11 in legislation, provided that appropriate obligations to such effect exist for trustees (e.g. through common law or case law), provided that this ensures equivalent clarity and awareness of the responsibilities and requirements of all parties covered in R25, and that compliance is verifiable and sanctions enforceable.

[Other Legal Arrangements

~~9. —As regards other types of legal arrangement with a similar structure or function, countries should take similar measures to those required for trusts, with a view to achieving similar levels of transparency. At a minimum, countries should ensure that information similar to that specified above in respect of trust should be recorded and kept accurate and current, and that such information is accessible in a timely way by competent authorities.]~~

International Cooperation

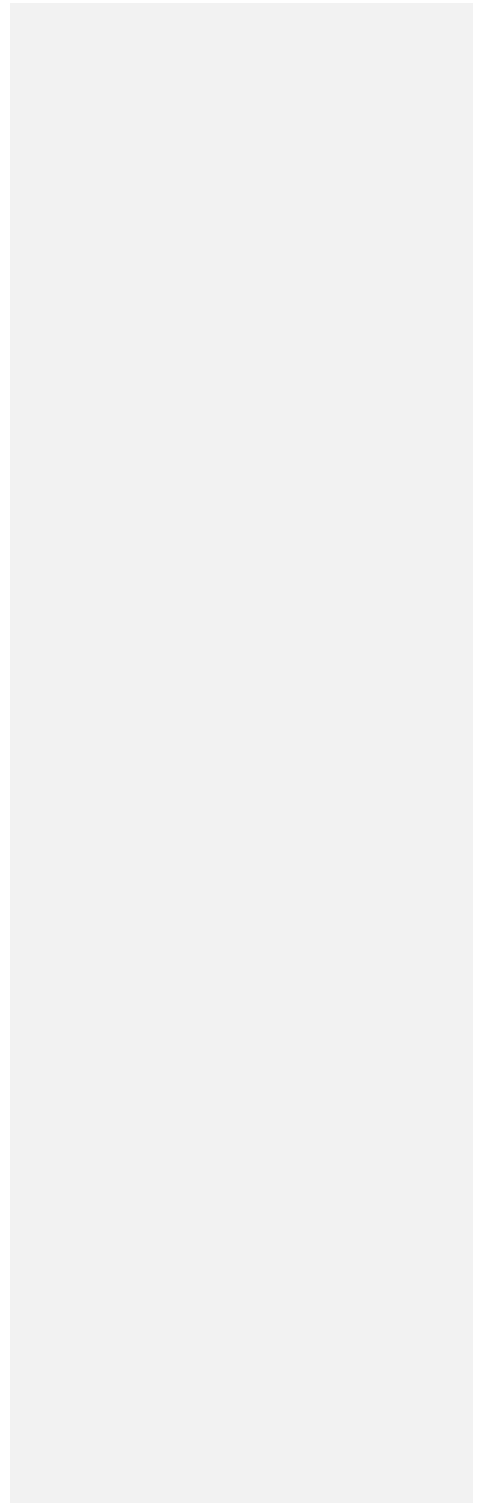
10. Countries should rapidly, constructively and effectively provide international cooperation in relation to information, including beneficial ownership information, on trusts and other legal arrangements on the basis set out in Recommendations 37 and 40. This should include (a) facilitating access by foreign competent authorities to any information held by registries or other domestic authorities; (b) exchanging domestically available information on the trusts or other legal arrangement; and (c) using their competent authorities' powers, in accordance with domestic law, in order to obtain beneficial ownership information on behalf of foreign counterparts. Consistent with Recommendations 37 and 40, countries should not place unduly restrictive conditions on the exchange of information or assistance e.g., refuse a request on the grounds that it involves a fiscal, including tax, matters, bank secrecy, etc. In order to facilitate rapid, constructive and effective international cooperation, where possible, countries should designate and make publicly known the agency(ies) responsible for responding to all international requests for BO information, consistent with countries' approach to access to beneficial ownership information. To this end, countries should consider keeping information held or obtained for the purpose of identifying beneficial ownership in a readily accessible manner. The use of unique identifiers for trusts and legal arrangements such as the Legal Entity Identifier (LEI) enables the sharing of information by making it easier to combine structured information held by different competent authorities. Public access to beneficial ownership information facilitates the exchange of information across borders.

Liability and Sanctions

11. Countries should ensure that there are clear responsibilities to comply with the requirements in this Interpretative Note; and that trustees or persons holding equivalent positions in similar legal arrangements are either legally liable for any failure to perform the duties relevant to meeting the obligations in paragraphs 1, 2, 5 and 6 and (where applicable) 5; or that there are effective, proportionate and dissuasive sanctions, whether criminal, civil or administrative, for failing to comply.¹⁰ Countries should be able to establish with certainty whether the requirements are being complied with, to

¹⁰ This does not affect the requirements for effective, proportionate, and dissuasive sanctions for failure to comply with requirements elsewhere in the Recommendations.

| [ensure that sanctions are enforceable](#). Countries should ensure that there are effective, proportionate and dissuasive sanctions, whether criminal, civil or administrative, for failing to grant to competent authorities timely access to information regarding the trust referred to in paragraphs 1 and 5.



GLOSSARY

Beneficial owner	<p><u>In the context of legal persons, beneficial owner</u> refers to the natural person(s) who ultimately¹ owns or controls a customer² and/or the natural person on whose behalf a transaction is being conducted. It also includes those natural persons who exercise ultimate effective control over a legal person <u>of arrangement</u>. Only a natural person can be an ultimate beneficial owner, and more than one natural person can be the ultimate beneficial owner of a given legal person <u>of arrangement</u>³.</p> <p>¹ - Reference to "ultimately owns or controls" and "ultimate effective control" refer to situations in which ownership/control is exercised through a chain of ownership or by means of control other than direct control.</p> <p>² - This definition should also apply to beneficial owner of a beneficiary under a life or other investment linked insurance policy.</p> <p>³ - The ultimate beneficial owner is always one or more natural persons. As set out in R.10, in the context of CDD it may not be possible to verify the identity of such persons through reasonable measures, and, to the extent that there is doubt about whether a person with a controlling ownership interest in a legal person is the ultimate beneficial owner, or where no natural person exerts control through ownership interests, the identity should be determined of the natural persons (if any) exercising control of the legal person <u>of arrangement</u> through other means. Where no natural person is identified in that role, the natural person who holds the position of senior managing official should be identified and recorded as holding this position. This provision of R.10 does not amend or supersede the definition of who the <i>beneficial owner</i> is, but only sets out how CDD should be conducted in situations where the beneficial owner cannot be identified.</p> <p><u>In the context of legal arrangements, beneficial owner includes: (i) the settlor(s); (ii) the trustee(s) and any other administrator(s) of the trust; (iii) the protector(s) (if any); (iv) each direct or indirect beneficiary, or where applicable, the class of beneficiaries or objects of a power; and (v) any other natural person(s) exercising ultimate effective control over the arrangement or benefiting from the trust (including through a legal person or arrangement, or through a nominee arrangement)</u>.⁴ <u>In the case of a legal arrangement similar to an express trust, beneficial owner refers to the natural person(s) holding an equivalent position to those referred above. When the trustee and any other party to the legal arrangement is a legal person, the beneficial owner of that legal person should be identified.</u></p> <p>⁴ - Reference to "ultimate effective control" over trusts or similar legal arrangements includes situations in which ownership/control is exercised through a chain of ownership/control.</p>
Beneficiaries	Please refer to the IN to Recommendation 8.
Beneficiary	<p>The meaning of the term <i>beneficiary</i> in the FATF Recommendations depends on the context:</p> <ul style="list-style-type: none"> In trust law, a beneficiary is the person or persons who are <u>or may become</u> entitled to the benefit of any trust arrangement. A beneficiary can be a natural <u>person</u> or a legal person or arrangement. All trusts (other than charitable or statutory permitted non-charitable trusts) are required to have ascertainable beneficiaries. While trusts must always have some ultimately ascertainable beneficiary, trusts may have no defined existing beneficiaries <u>when they are set up</u> but only <u>a class of beneficiaries</u> or objects of a power until some person becomes entitled as beneficiary to income or capital on the expiry of a defined period, known as the accumulation period, <u>or following exercise of trustee discretion in the case of a discretionary trust</u>. The <u>accumulation</u> <u>is</u> period is normally coextensive with the trust perpetuity period which is usually referred to in the trust deed as the trust period. <p>[...]</p>
Express trust	<i>Express trust</i> refers to a trust clearly created by the settlor, usually in the form of a document e.g. a written deed of trust. They are to be contrasted with trusts which come into being through the operation of the law and which do not result from the clear intent or decision of a settlor to create a trust or similar legal arrangements (e.g. constructive trust).
Legal arrangements	<p><i>Legal arrangements</i> refers to express trusts and other <u>similar</u> legal arrangements. Examples of other similar arrangements: (for AML/CFT purposes) <u>may</u> include <u>but are not limited to</u> fiducie, <u>certain types of Treuhand</u> <u>and</u>, fideicomiso, <u>and Waqf</u>^{1,2}.</p> <p>¹ - <u>Similarity is assessed having regard to Article 2 of the Hague Convention on the law applicable to trusts and their recognition on the basis of whether legal arrangements have a similar structure or perform a similar function to an express trust.</u></p> <p>² - <u>Except in countries where Waqf are legal persons under Recommendation 24.</u></p>
Settlor	<i>Settlors</i> are natural or legal persons who transfer ownership of their assets to trustees by means of a trust deed or similar arrangement.

<u>Similar legal arrangement</u>	<u>Similar legal arrangements cover any arrangement which has a structure or functions similar to trusts. This includes allowing 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. One party may have more than one role in the arrangement.</u>
Trustee	<p>The terms <i>trust</i> and <i>trustee</i> should be understood as described and consistent with Article 2 of the Hague Convention on the law applicable to trust and their recognition¹.</p> <p>Trustees may be professional (e.g. depending on the jurisdiction, a lawyer or trust company) if they are paid to act as a trustee in the course of their business, or a non-professional <u>who is not in the business of being a trustee</u> (e.g. a person acting <u>without reward</u> on behalf of a family).</p> <p>¹ – Article 2 of the Hague Convention reads as follows: <i>For the purposes of this Convention, the term "trust" refers to the legal relationships created – inter vivos or on death – by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.</i></p> <p><i>A trust has the following characteristics –</i></p> <ul style="list-style-type: none"> <i>a) the assets constitute a separate fund and are not a part of the trustee's own estate;</i> <i>b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee;</i> <i>c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law.</i> <p><i>The reservation by the settlor of certain rights and powers, and the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust.</i></p>