



*In Response*

## **Corporate vehicles – Beneficial Ownership and Control Information Review of the FATF Forty Recommendations Position paper**

1. In the context of the review process, the Financial Action Task Force on Money Laundering (FATF) lays out difficulties in identifying the persons that are the ultimate beneficial owners and controllers of corporate vehicles (companies, trusts, foundations etc.). The issue of bearer shares and of trusts are considered in detail. For both, certain minimum standards of transparency are seen required and different options are suggested.
2. ***In summary, we feel that the main focus has to be the obligation of each financial intermediary to identify its customer and the beneficial owner of any funds deposited and keep respective records. In doing so, objectives pursued by the FATF are fulfilled directly. Restricting the use of corporate vehicles would only restrict legitimate use thereof without ensuring more transparency.***
3. Banks and other financial intermediaries are obliged to combat money laundering and financing of terrorism. Because of reputational risks they have a direct interest in being successful in these efforts. In order to combat money laundering and financing of terrorism banks need to identify unusual behaviour of customers and unusual transactions. This can be accomplished if the bank knows the customer, his business and economic background well.
4. “Know-your-customer” is of importance not only to combat crime but also for sound and proper running of the banking business. While it is obvious that a bank needs to know its debtors it is also clear that the bank needs information on its creditors and depositors.<sup>1</sup> The degree of knowledge has to follow the risks involved. This does not exclude some basic standards that should apply to all business.
5. The first step in every “know-your-customer”-policy is the verification of the contracting partner’s identity by an official document or an extract of an official register; copies of the identification documents have to be kept on record. Except for identification of contractual partners at distance, the verification of contracting partner’s does not pose significant problems.
6. The second step is to know the people in the economic background behind contractual partners. In cases of doubt as to whether the contracting partner is himself the beneficial owner, the bank should collect information on the beneficial owner. Where higher reputational risks are involved it may be appropriate to require a confirmed copy of an identification document of the beneficial owner. Every personal investment vehicle or trust is a case of doubt by definition and financial intermediaries should be required to collect information on the beneficial owners behind such a vehicle. “Behind” does not necessarily mean a legal function of beneficial ownership as it may be that legally the relevant person is not entitled in any form; what is of interest is who is economically standing behind such a vehicle.

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1. <sup>1</sup> Basel Committee of Bank Supervisors, „Customer Due-Diligence for Banks“, 2001

7. Beneficial owners can be physical persons or legal entities provided they are conducting a commercial or manufacturing business or any other form of commercial operation (with the exception of financial intermediaries, as it is their business to hold other people's assets). An investment vehicle can never be a beneficial owner. Under a risk based approach it may under special circumstances be advisable to collect information about the dominating shareholders of a legal entity running a business operation.
8. In a grantor trust the bank should verify the identity of the trustee and collect information about the grantor or settlor. In a simple trust - next to the verification of the identity of the trustee - the beneficiaries should be known. And if in a complex or discretionary trust no beneficial owner may be determined, it may be necessary to collect information on all people involved, on the actual settlor, on the persons authorized to give instructions, on people likely to become beneficiaries and on people in functions of control or otherwise involved in the trust.
9. We conclude that in trusts money laundering risks can be kept under control if the banks identify beneficial owners as described. The same applies to personal investment companies, Liechtenstein structures and other forms of individualised property. Privacy legislations of a jurisdiction do not deny the bank the possibility to only open accounts for such a vehicle, if the information about people in the background are disclosed to the reasonable satisfaction of the bank.

### ***Combating the financing of terrorism***

10. Combating the financing of terrorism requires the same "know-your-customer" policies as the combating of money laundering. As amounts involved are generally much smaller and do not need to stem out of crime, the task is even more difficult. Financial intermediaries depend on reliable information on terrorists from their national law enforcement authorities. As in combating money laundering it is crucial that financial institutions organise themselves in a way to be able to respond in decent time to the question of law enforcement whether somebody is an accountholder, beneficial owner and holder of a power of attorney connected to the bank.

### ***Bearer shares***

11. The FATF is concerned about the privacy of ownership of bearer shares and about the possibilities bearer shares offer to drugs, arms and other illegal activities. They ask for comments on a series of possible countermeasures. However, the impression given, that "privacy of ownership" is merely an abuse, is erroneous. It is a wide spread opinion, that privacy is a human right, be it on individual topics such as health status or ownership. Just the misuse of privacy should be prevented. We would have wished that the chapter on bearer shares (4.2.) was held in the same moderate tone as the chapter on trusts (4.3.). In our view chapter 4.2. seems to almost contain a presumption that the use of bearer shares is for the purpose of misuse. As in the chapter on trusts (4.3. paragraph 213) it should clearly be stated, that in many jurisdictions the use of bearer shares is not improper. Whether bearer shares can be misused for money laundering purposes in fact depends more on other factors in a jurisdiction such as, how the „know your customer“-rules are applied and enforced, what powers are conferred on the law enforcement agencies and how they are exercised. As in the case of trusts (4.3.paragraph 213) it should therefore also in relation to bearer shares clearly be stated, that options need to be considered with sufficient flexibility depending on the circumstances in individual jurisdictions.
12. Most valuable is the remark No 199 in article 4.2. (page 62) and the differentiation made between bearer bonds and bearer shares. It is true, that bearer shares in certain jurisdiction might lead to exercise of anonymous control of a company and this fact should be stressed and dealt with. All other risks such as money laundering, fraud, theft, concealing assets etc. are inherent to all bearer instruments such as bearer shares or bearer bonds. Among the instruments posing such risks cash in the form of banknotes have to be mentioned as well and as far as the risks which should be eliminated are concerned, the same recommendations have to be imposed on the issuers of banknotes as well. Failing this, the recommendations should concentrate on the specific risks of bearer shares, which is the anonymous control of a company. Such control is exercised when a shareholder cast his vote and such vote taking should be prevented from being anonymous. The beneficial owner casting his vote has to be known to the company, thereby making this information available to any legally entitled investigation body or authority. No

anonymous control could be exercised any more and corporate vehicles could not be used any longer for illegitimate purposes. When a vote is taken in a given corporation, all proxies should only be valid, if the beneficial owners are properly identified and known to the company.

13. The examples given in No 204 (4.2.4.) are not at all typical for legitimate uses of bearer shares:
  - Companies can be quickly formed in various jurisdiction, with or without bearer share.
  - For international trade usually consignment papers are widely used, facilitating financing by far better than with bearer shares.
  - When using intermediaries it is irrelevant whether bearer or registered shares are used, since the intermediary covers the beneficial owner in any case. Any person who wants to prevent himself from being misused as intermediary has to be careful and to identify the person or company, for which he acts. It is his responsibility and duty to consider, whether bearer shares are used correctly or serve as cover only.
14. Neither can a company do business without entering into a relationship with a financial intermediary nor can a shareholder do much with shares without them being deposited in a bank. In the complexities of the modern economy every player is constantly in a close relationship with financial intermediaries. For a financial institution verifying the identity of its customers and establishing the identity of beneficial owners it would be a highly suspicious event if a company would declare that because of bearer shares there was no knowledge of beneficial ownership.
15. In case of a publicly traded company the dematerialization of shares has been developed to a degree that an individual share on paper has become a rare and conspicuous event. It is to be understood that dematerialization means that the shareholders are known by name and address at any time. Bearer shares of listed companies are mostly kept in deposits with banks and may only be traded through the banks. Thus, according to the „know your customer“-rules such banks need to know who the beneficial owners of the shares are. This is a further reason, why bearer shares of listed companies should not fall under the scope of application of any option being considered. Investment vehicles like personal investment companies are unthinkable without a banking relationship. The first task of the bank before opening an account is to establish beneficial ownership of the domiciliary company. Bearer shares are in no way an impediment to that task.
16. The case of a non-publicly traded company like a small or medium enterprise without a visible entrepreneur or group of investors would be a conspicuous and suspicious event and the bank would have to investigate about the dominating interests.

- 17. In countries where banks identify customers and are establishing the identity of beneficial owners, companies with bearer shares pose no other law enforcement problem than companies with nominative shares. The crucial importance of the establishment of beneficial owners of domiciliary companies has to be emphasized. Judicial authorities have access to this information. The other options presented by the FATF consultation paper are bureaucratic and would not further the efforts of combating crime.**
- 18. Among the recommendations given in No. 209, lit. a and b would literally wipe out bearer shares, even used legitimately. In lit. c the recommendations in (ii) and (iii) seem to be reasonable and acceptable. In addition it could become a requirement for exercising voting powers at shareholders meetings - and thereby controlling the decisions of a company - that the beneficial owner of shares, for whom the vote is exercised, are identified (this should be the case for registered shares as well).**

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